

Strengthening the fight against crime: Is DNA- Database the answer?

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LLM by

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Chapter 1: Introduction

1. Introduction

In October 2010 the Criminal Law (Forensic Procedure) Act came into operation. The Act amends the Criminal Procedure Act in regards to the taking, retention and creation of fingerprint-databases. It also provides for comparative searches with other databases. When the Bill was considered DNA was included, however DNA was excluded from the final Act. It was argued that DNA should be dealt with in a separate bill. The question arises what the value if any, a DNA database will lend to the investigative capacity of the South African Police Service. Furthermore one has to consider the constitutional implication of such a piece of legislation on the rights of an accused, which is afforded and guaranteed to him or her by the Bill of Rights.

2. Value of DNA Evidence

The value of “real evidence” in securing a conviction is well documented in sources on South African Law of Evidence. “Real evidence” is the term used to cover the production of material objects for inspection by court, and include fingerprints and DNA profiles. According to *Schwikkard et al.* real evidence such as a fingerprint found on a scene of a crime is often of strong probative value in linking the accused with the commission of the crime¹. With regards to DNA profiling, *Schwikkard et al.* explains that “*the chance of error is very remote and properly conducted test is said to be proof of identity beyond any doubt*”².

Our Courts have defined DNA as follows: *S v Orrie* 2004 (1) SACR 162 (C) at paragraph 18: “*DNA (the abbreviation for Deoxyribonucleic Acid) is a relatively new type of testing which may be performed on a wide range of bodily samples, including blood, with a view to proving guilt, establishing innocence or proving relationships. The test, a complex one, is based upon the scientific thesis that all individuals, save for identical twins, possess a unique genetic code held in the 46 chromosomes which are made up of complex chemical which is DNA*”. In *S v Maqhina* 2001(1) SACR 241 (T) at page 247, the Court described the scientific process as follows: “*DNA is a complex chemical found in the cells throughout the human body. It carries genetic information which determines the physical characteristics of a person. This information is carried in coded form, and contains the genetic information which codes amongst others, for different cells, tissues and organs. DNA is constant for an individual and does not change during a person’s lifetime. Each person’s DNA is the same in all of their cells, so the DNA recovered from blood cells will be the same as that found in other tissues and body fluids, such as semen and hair roots. Each*

¹ Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009. Page 257.

² Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009. Page 259.

person's DNA is unique, except for identical twins and therefore indicates differences between individuals".

There is a need to strengthen the investigative powers and capacity of the South African Police Service. The aim of this paper is to identify legislative and other means to strengthen the forensic intelligence DNA gathering capacity of the SAPS as a powerful tool to solve crime and the identification of potential suspects.

3. Current Legislation

South Africa does not have any specific legislation regulating the taking of DNA samples and the establishment of a DNA database. The taking of blood samples and the ascertainment of bodily features in criminal cases is broadly regulated by the Criminal Procedure Act 51 of 1977. There is no legislation in South Africa which specifically provide for the establishment of a DNA database, the collection of samples taken from accused persons and convicted persons, and ability to compare these samples against which collected at a crime in a effort to establish the identity of a perpetrator.

The ascertainment of bodily features of the accused is regulated by Chapter 3 of the Criminal Procedure Act, which grant powers, under section 37, in respect of the taking of fingerprints, palm-prints, foot-prints, the drawing of blood samples, attendance at a identity parade and the taking of photographs.

In terms of section 37(1)(c), a police official may not take a blood sample from an accused, but a police official may take such steps as he may deem necessary in order to ascertain whether the body or any person referred to in paragraph (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance. Blood samples may be taken, in terms of section 37(2), on own authority by a medical officer of a prison or a district surgeon or if a police official requests it, another registered medical practitioner attached to any hospital who on reasonable grounds is of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant in later criminal proceedings, may in terms of subsection (2)(b) take a blood sample from such a person. In terms of subsection (3), a court before which criminal proceedings are pending may in any case in which a police official is not empowered under subsection (1) to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such steps, including the taking of a blood sample, be taken. Although not as clearly worded as in reference to the destruction of all prints under section 37, the wording as it appeared in subsection (5), has been interpreted as requiring destruction of the result of the bodily examination in all cases where the accused was found not guilty.

It is clear that the Criminal Procedure Act does not specifically provide for the taking of bodily samples for the purpose of DNA analysis. As it stands the Criminal Procedure Act only provides for the taking of a blood sample for DNA testing with regards to a specific case. Current legislation does not support the gathering of DNA profiles for the purpose creating a DNA database, or to locate DNA matches between different cases, or to cross reference a new DNA profile with existing DNA profiles of suspects or convicted offenders on a DNA database.

4. Proposed legislation

The aim is to strengthen the South African Police Service investigative intelligence by creating an investigating tool the South African Police Service can use to identify suspects, and possibly solve past, present and future cases. Therefore we need legislation that allows the taking of DNA profiles of the convicted persons and permit the SAPS to retain these DNA profiles in a DNA database. It is submitted that the DNA database should consist out of three parts. The first would be convicted offenders DNA profiles, secondly, DNA profiles collected at a scene of a crime and thirdly DNA profiles of persons that voluntarily consents that their DNA profile be retained and stored on the DNA database. If a DNA-database existed, it will be a powerful investigative tool for the SAPS and will bring forth the following advantages:

- Crime scene profiles can be matched to other crime scenes;
- Identification of suspects;
- Plea bargains will increase;
- Could also prove innocence;
- Cycle time of cases can be shortened;
- Conviction rate will increase.

The proposed legislation should allow a Court to order that an accused after being convicted of a violent or sexual offence, that his DNA profile be retained and up loaded in the DNA database. In principle it forms part of the offender's sentence such as a violent offender being declared unfit to possess a firearm, or a sexual offender's name being registered in the sexual offences register.

In 2009 the Criminal Law (Forensic Procedure) Bill was published for consideration and public feedback. The Bill wanted to expand the investigation capacity of the South African Police Service by creating an investigating tool in the form of databases. This would be legislation specifically regulating the ascertainment of bodily features. The Bill was created to provide the police service with the power to

take fingerprints and DNA samples of certain categories of persons and to retain these samples and store them on a database. The Bill would provide for comparative searches to be done against these databases. Therefore when fingerprints or DNA samples are obtained from a crime scene it could be compared to the existing profiles in the database. In 2010 the Criminal (Forensic Procedure) Act 6 of 2010 was published in the *Government Gazette*. However the in the Act DNA was excluded. It was argued that DNA should be dealt with in a separate bill.

5. Conclusion

The Constitution of South Africa Act 108 of 1996 is the supreme law of our country and any law or conduct inconsistent with the Constitution is invalid. The Bill of Rights is entrenched in the Constitution in Chapter 2. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state. The rights in the Bill of Rights are subjected to the limitations contained or referred to in section 36, or elsewhere in the Bill. However the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Therefore any proposed legislation must pass the scrutiny of the constitution, as the constitution applies to all law and all organs of the state.

The question arises, if the proposed legislation creating DNA databases will infringes on the rights of a person guaranteed in the Bill of Rights. This paper will aim to identify if the advantages of such legislation, and if this piece of legislation will infringe on these constitutional rights, if any, and if so may these rights be limited by the limitation clause. Furthermore international trends regarding the taking, retention and creation of DNA databases will also discussed.

Chapter 2: Ascertainment of Bodily Features of Accused.

1. Introduction

The ascertainment of an accused bodily feature is broadly governed by the Criminal Procedure Act.³ Section 37 of the Criminal Procedure Act creates the means by which the bodily features may be ascertained and creates an acceptable manner of collecting “real evidence”⁴. Section 37 ensures the collection is done in accordance with civilised standards of decency and in an orderly fashion.⁵ The effect of section 37 is that acts that would constitute criminal liability are sanctioned by chapter 3 of the Criminal Procedure Act.

Section 37 makes serious inroads upon the bodily integrity of the accused. But these inroads should be seen in the light of the fact that the ascertainment of the bodily features and ‘prints’ of an accused often forms an essential component of the investigation of crime and are in many respects a prerequisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial.⁶ In *S v Orrie & another* 2004 (1) SACR 162 (C) at [15] where Bozalek J noted that the taking of blood samples ‘has long been... a vital tool in the administration of criminal justice system’. It is therefore clear that the ascertainment of an accused bodily features infringes his constitutional rights⁷. Therefore section 37 must be read and applied subject to certain constitutional rights. These constitutional rights are the right to dignity⁸, the right not to be treated in a cruel, inhuman or degrading way⁹, and the right to bodily and psychological integrity¹⁰. However these constitutional rights are subject to the limitation clause set out in Section 36 of the Constitution. Therefore constitutional rights¹¹ may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable.

³ Act 51 of 1977.

⁴ In *S v M* 2002 (2) SACR 411 (SCA) at [31] Heher JA held: “Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box).

⁵ See proviso to s 37(1)(c), example: A male police officer may not examine the body of a female accused.

⁶ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 3-1.

⁷ Chapter 2: *Bill of Rights* of Act 108 of 1996.

⁸ Section 10 of the Constitution.

⁹ Section 12 (1)(e) of the Constitution.

¹⁰ Section 12 (2) of the Constitution.

¹¹ Set out in Chapter 2: *Bill of Rights*.

The accused furthermore, has the guaranteed constitutional right not to be compelled to make any confession or admission that could be used in evidence against him¹², and not be compelled to give self-incriminating evidence¹³. It must be considered if taking of the accused bodily features amounts to self-incriminating evidence, or compelling the accused to make an admission that could be used against him at trial. At Common Law the privilege of an accused against self-incrimination is embodied in the maxim ‘*nemo tenetur se ipsum accusare*’. The Common Law ambit of the privilege of against self-incrimination is confined to communications, whereas section 37 deals with the ascertainment of an accused’s bodily or physical feature or conditions which are not as a result of a communication emanating from the accused.¹⁴ *Wigmore*¹⁵ explains that an inspection or ascertainment of bodily features does not violate the privilege against self-incrimination

‘...because it does not call on the accused as a witness--- ie, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action--- as when he is required to take off his shoes or roll up his sleeve--- is immaterial, unless all bodily action were synonymous with testimonial utterance... not compulsion alone is the component of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself... Unless some attempt is made to secure a communication--- written, oral or otherwise---... the demand upon him is not a testimonial one.’¹⁶

In *S v Binta*¹⁷ Akerman J stated as follows:

‘The common law principle “*nemo tenetur ipsum accusare (prodere)*” does not apply to the ascertainment of bodily features or the taking of blood samples in general, and in particular not to such acts as are performed in terms of s 37 (1) or (2) of the Criminal Procedure Act. A distinction is drawn between being obliged to make a statement against interest and furnishing “real” evidence.’

It has been held that the common-law distinction has not been affected by constitutional provisions. In *S v Huma & another*¹⁸ and *S v Maphumalo*¹⁹ in the latter case Combrick J held that:

¹² Section 35(1)(c) of the Constitution.

¹³ Section 35 (3)(j) of the Constitution.

¹⁴ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 3-6..

¹⁵ *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) at para 2265.

¹⁶ This approach was approved in *Nkosi v Barlow* 1984 (3) SA 148 (T) and *S v Duma* 1984 (2) SA 591 (C) 595 G-H and 596B.

¹⁷ 1993 (2) SACR 553 (C) at 562 d-e.

‘the taking of the accuseds’ fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in s 37 (1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their right as contained in s 25 (20)(c), or 25 (3)(d) of the Constitution. Nor does it appear to be a violation of the accuseds’ rights as contained in s10 of the Constitution, which reads: “Every person shall have the right to respect for and protection of his or her dignity.”²⁰

Even though this judgement was decided in terms of the interim Constitution, it is submitted in terms of the present Constitution the position is exactly the same.²¹

2. Section 37 of the Criminal Procedure Act

In criminal cases the ascertainment of bodily features was broadly regulated by section 37 of the Criminal Procedure Act. Chapter 3 of the Criminal Procedure Act regulated and granted powers in respect of taking fingerprints, palm-prints, foot-prints, the drawing of blood samples, attendance at an identity parade and the taking of photographs.²²

Section 37 read as follows:

(1) Any police official may-

- (a) take the fingerprints, palm-prints, foot-prints or may cause any such prints to be taken-
 - (i) of any person arrested upon any charge;
 - (ii) of any such person released on bail or on warning under section 72;
 - (iii) of any such person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40 (1)²³;

¹⁸ (2) 1995 (2) SACR 411 (W).

¹⁹ 1996 (2) SACR 84 (N).

²⁰ Para 90c-d.

²¹ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 3-6.

²² Joubert (ed) *Criminal Procedure Handbook* 8 ed (2007) page 133.

²³ Section 40 (1)(n), (o) and (p) reads as follows: “(1) A peace officer may without warrant arrest any person-

(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;

- (iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or
 - (v) of any person convicted by a court or deemed under section 57 (6)²⁴ to have been convicted in respect of any offence which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph;
- (b) make a person referred to in paragraph (a) (i) or (ii) available or cause such person to be made available for identification in such condition, position or apparel as the police may determine;
- (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristics or distinguishing feature or shows any condition or appearance; Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official is not a female.
- (d) take a photograph or may cause a photograph to be taken of a person referred to in paragraph (a)(i) or (ii).
- (2)(a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.
- (b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any latter criminal proceedings, such medical practitioner may take a blood sample of such person or cause such blood to be taken.

(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;”

²⁴ Section 57 (6) of the CPA reads as follows: “(6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate’s court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question”.

- (3) Any court before which criminal proceedings are pending may-
- (a) in any case in which a police official is not empowered under subsection (1) to take fingerprints, palm-prints or foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance.
 - (b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary on order to ascertain the state of health of any accused at such proceedings.
- (4) Any court which has convicted any person of any offence or which has concluded which preparatory examination against any person on any charge, or any magistrate, may order that the fingerprints, palm-prints or foot-prints, or a photograph, of the person concerned be taken.
- (5) Fingerprints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.

Section 37 (1)(a) confers upon a police official the powers to take an accused's fingerprints, palm-prints or foot-prints irrespective of whether the trial has commenced or not.²⁵ Prints taken must form part of a person referred to in section 37 (1)(a)(i)-(v).²⁶ The prints taken from the accused is real evidence and the accused cannot invoke the maxim '*nemo tenetur ipsum accusare*' as a valid excuse for refusing to have his prints taken.²⁷ In *S v Huma & another* (2) 1995 (2) SACR 411(W) it was held that the taking of fingerprints in terms of ss37 and 225 does not constitute an impairment of the accused's right to dignity in terms of ss10 and 11 of the Constitution Act 200 of 1993 and is also not an infringement of the right to remain silent in terms of ss25(3)(c) and 25(3)(d) of the Constitution.²⁸ In *Msoni v Attorney-General of Natal* 1996 (8) BCLR 1109 (W) 1120B it was also stated:

'...an accused submits to fingerprinting under compulsion, he does not thereby proffer testimonial evidence against himself. All he is being required to do is to make available

²⁵ *Nkosi v Barlow* 1984 (3) SA 148 (T).

²⁶ Joubert (ed) *Criminal Procedure Handbook* 9 ed (2009) 131.

²⁷ *Nkosi v Barlow* 1984 (3) SA 148 (T) at 154D.

²⁸ Currie & De waal *The Bill of Rights Handbook* 5 ed (2005) 764-7.

specimens of a bodily feature... In this entire process there is no communicative act by the accused, either orally or in writing. In other words, the mere giving of fingerprint specimens does not in itself amount to the accused making himself a compellable witness against himself.'

Therefore, in terms of section 37, any police official may take finger-, palm or foot-prints of the persons listed in paragraphs (i) to (v) of subsection (1)(a), before the conviction of the persons in question. Such prints may be taken before or during the trial of an accused. Police officials may also take prints, or cause prints to be taken, of a person who is convicted by a court or who is in terms of section 57(6) deemed to have been convicted of an offence the Minister has by notice in the Government Gazette declared an offence for the purposes of subsection (1)(a)(v).

Section 37(3) also gives the court before whom the criminal proceedings are pending the power to have prints taken when a police official does not have such power. Such orders can also be given before the criminal proceedings have commenced and do not necessarily have to be given by the same judicial officer as the one who will be presiding over the matter. Subsection (4) states that any court that has convicted any person of an offence or concluded a preparatory examination on any charge, or any magistrate, even if that magistrate did not preside in the trial, can order that the finger-, palm- or foot-prints of the accused be taken. These discretionary powers given to the court during the trial and upon conviction, subsection (5) will apply, and the prints will be destroyed if the accused is found not guilty.

It is submitted regarding the powers of police officials in relation to the taking of a blood sample under section 37:²⁹

- (1) A police official may not take a blood sample from an accused, but a police official may take such steps as he may deem necessary in order to ascertain whether the body or any person referred to in paragraph (a)(i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance.³⁰
- (2) Blood samples may be taken, on own authority by a medical officer of a prison or a district surgeon or if a police official requests it, another registered medical practitioner attached to any hospital who on reasonable grounds is of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant in later criminal proceedings, may in terms of subsection (2)(b) take a blood sample from such a person.³¹

²⁹ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 8.

³⁰ Section 37(1)(c) of the Criminal Procedure Act.

³¹ Section 37(2) of the Criminal Procedure Act.

- (3) A court before which criminal proceedings are pending may in any case in which a police official is not empowered under subsection (1) to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such steps, including the taking of a blood sample, be taken.³²
- (4) Although not as clearly worded as in reference to the destruction of all prints under section 37, the wording as it appeared in subsection (5), has been interpreted as requiring destruction of the result of the bodily examination in all cases where the accused was found not guilty.³³

In *S v Binta*,³⁴ with regards to taking of a blood sample Ackerman J held:

'I have already referred to the provisions of s 37(2)(a) of the Criminal Procedure Act empowering a district surgeon or (in the appropriate circumstances any other registered medical practitioner) to take a blood sample from another person. This power is formulated in terms that the district surgeon or medical practitioner "may take such steps, including the taking of a blood sample". Similarly the power to take finger-print or foot-prints in terms of section 37 is couched in the form that any police official "may" take such prints or cause them to be taken. In my view these provisions confer rights on the persons in question to act in the manner provided. These provisions can hardly be construed to apply only to those cases where the other person voluntarily consents to the particular acts being performed. Such a construction would render the relevant provisions redundant, because at common law the consent of such person would make lawful what would otherwise be an assault. In my view the provisions also apply where the other person refuses to submit to the particular act and would entitle the police in question to ensure that the steps mentioned in s 37(1)(a) or s 37(2) are taken against the wishes of the other person and to use such force as reasonable necessary to achieve this end. This conclusion is strengthened by the provision of s 37 (1)(c) (which clearly applies to blood samples because of proviso) which enacts inter alia, that any police official "may take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in para (a)(i) or (ii) has any...characteristic... or shows any condition...".'

³⁵

3. Section 225 of the Criminal Procedure Act

Section 37 should be read together with section 212 (6) and (8)³⁶, and section 225³⁷ of the Criminal Procedure Act.

³² Section 37(3) of the Criminal Procedure Act.

³³ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 8.

³⁴ 1993 (2) SACR 553 (C) at 561j- 562d.

³⁵ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 37, 2007) 3-27.

³⁶ Proof of fingerprints and the dispatch thereof, by means of affidavit.

Section 225 of the Criminal Procedure Act reads as follows:

- (1) Whenever it is relevant at criminal proceedings to ascertain whether any finger-print, palm-print or foot-print of an accused at such proceedings corresponds to any other finger-print, palm-print or foot-print, or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the finger-print, palm-print or foot-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.
- (2) Such evidence shall not be inadmissible by reason only thereof that the finger-print, palm-print or foot-print in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of section 37, or that it was taken or ascertained against the wish or the will of the accused concerned.

Subsection (1) of section 225 of the Criminal Procedure Act provides for the admissibility of evidence which relate to finger-print, palm-print or foot-prints of the accused whenever such prints corresponds with any other prints that are relevant at such proceedings. It also provides for the admissibility of evidence of evidence of bodily marks, characteristics, distinguishing features or the condition or physical appearance of the accused whenever such condition or physical appearance, characteristic, bodily mark or distinguishing feature are relevant to such proceedings.³⁸ In terms of subsection (2), evidence concerning bodily features is admissible even if the presence of those features was determined against the will of the accused or procured contrary to the provisions of section 37.³⁹

3.1. Section 225(2) of the Criminal Procedure Act

At common law an accused may not be compelled to give self-incriminating evidence, either before or during the trial. In *R v Camane & others*⁴⁰ Innes CJ cited with approval the view of *Wigmore*⁴¹ that 'testimonial compulsion' forms the basis of the common law maxim. Thus an accused can be compelled to furnish what *Wigmore* calls 'autopic evidence'.⁴² Therefore the taking of a blood sample against

³⁷ Admissibility of prints or bodily features as proof.

³⁸ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 24-94.

³⁹ *S v Maphumalo* 1996 (2) SACR 84 (N).

⁴⁰ 1925 AD 570 at 575.

⁴¹ See footnote 15.

⁴² Evidence where the accused remains passive and is required to show his complexion, marks or features.

the will of the accused does not fall within the common law rule against self-incrimination.⁴³ Section 225(2) provides that evidence referred to in subsection (1) shall not be inadmissible purely on the ground that procurement of evidence was contrary to the provisions of section 37 or against the will of the accused. One should consider the question whether taking of fingerprints or ascertaining of any bodily feature against the will of the accused is constitutionally sound. In *S v Huma & another* (2) 1995 (2) SACR 411 (W) it was found that such course of action would do violence to two of the accused's fundamental rights under the interim Constitution: his right to dignity contained in ss 10 and 11⁴⁴ and his right to remain silent and not to be a compellable witness against himself contained in s 25(3)(c) and (d)⁴⁵. Claasen J held with regards to dignity, that the taking of fingerprints did not constitute inhuman or degrading treatment,⁴⁶ but that, even if it did, it constituted a reasonable and necessary limitation of the right since it was necessary to enable the administration of justice to run its proper course. As far as self-incrimination was concerned, he concluded that s 25(3)(d) of the Constitution was 'merely a codification of the common law principle against self-incrimination and [did] not take the principle any further'^{47, 48}.

With regards to section 212 of the Criminal Procedure Act, it should be noted that this section deals with proof of certain facts by affidavit or certificate. The manner in which the finding, withdrawal, dispatching and analysis of DNA can be proved is provided for in section 212 (4)(a), (6) and (8).

4. Conclusion

It is clear that the Criminal Procedure Act does not specifically provide for the taking of bodily samples for the purpose of DNA analysis. As it stands the Criminal Procedure Act only provides for the taking of a blood sample for DNA testing with regards to a specific case. Current legislation does not support the gathering of DNA profiles for the purpose creating a DNA database, or to locate DNA matches between different cases, or to cross reference a new DNA profile with existing DNA profiles of suspects or convicted offenders on a DNA database.

⁴³ *Ex parte Minister of Justice: In re R v Matemba* 1941 AD 71.

⁴⁴ Now section 10 and section 12 of the final Constitution.

⁴⁵ Now section 35(3)(h) and (j) of the final Constitution.

⁴⁶ At 416b-h.

⁴⁷ At 419d-e.

⁴⁸ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 24-98A.

Chapter 3: Constitution of South Africa

1. Introduction

The Constitution of South Africa⁴⁹ is the supreme law of our country and any law or conduct inconsistent with the Constitution is invalid. The Bill of Rights is entrenched in the Constitution in Chapter 2. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state. The rights in the Bill of Rights are subjected to the limitations contained or referred to in section 36, or elsewhere in the Bill. However the state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁵⁰

As all legislation must comply with the requirements set out in the Constitution, and therefore the Criminal Procedure Act needs to adhere to this constitutional scrutiny. We need to consider the constitutional impact on section 37, and the possible rights infringement caused by the general application of section 37 and section 225. The Bill of Rights are embodied in chapter two of the Constitution, and it sets out fundamental rights that are guaranteed to all citizens of the republic including accused persons. The following rights contained in the Bill of Rights will be considered:

Section 10: Human Dignity- reads as follows:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 12: Freedom and Security of the person- reads as follows:

(1) Everyone has the right to freedom and security of the person, which includes-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and

⁴⁹ Act 108 of 1996.

⁵⁰ See sections 1, 2, 7 and 8 of the Constitution.

(c) not to be subjected to medical or scientific experiments without their informed consent.

Section 14: Privacy- reads as follows:

Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property or home searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

Section 35: Arrested, detained and accused persons-reads as follows:

(1) Everyone who is arrested for allegedly committing an offence has the right-

- (a) to remain silent;
- (b) to be informed promptly-
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person.

(3) Every accused person has a right to a fair trial, which include the right-

- (h) to be presumed innocent, to remain silent, and not to testify during proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The rights that are contained in the Bill of Rights are guaranteed rights to all citizens including accused persons, however the rights in the Bill of Rights are subject to the limitations contained in the limitation clause embodied in section 36 of the Constitution.⁵¹

⁵¹ Section 7(3) of the Constitution.

Section 36: Limitations of rights- reads as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) of in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

2. Unconstitutionally obtained Evidence

Section 225(2) provides that evidence referred to in subsection (1) shall not be inadmissible purely on the ground that procurement of evidence was contrary to the provisions of section 37 or against the will of the accused. What would the case be if the evidence was obtained improperly, or was procured contrary to the Constitution? Before the enactment of the Constitution it was no concern of our courts the manner in which the evidence was obtained, provided that the evidence was relevant to the proceedings.⁵² Therefore the only requirement for admissibility was relevance and there was no principle in law to exclude evidence that was obtained in an improper way.⁵³ However in a criminal case a judge always has the discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused.⁵⁴

Section 35(5) of the Constitution states that evidence obtained in a manner that violates any of the rights contained in the Bill of Rights must be excluded if the admission of such evidence would render the trial unfair or be detrimental to the administration of justice. Therefore the underlining principle is that unconstitutionally obtained evidence is inadmissible despite its relevance and regardless of the fact that it would otherwise have been admissible.⁵⁵ Section 35(5) will only be applicable where the evidence obtained was obtained by infringement of a right in the Bill of

⁵² *R v Kuruma Son of Kaniu* [1955] AC 197.

⁵³ *R v Mabuya* 1927 CPD 181.

⁵⁴ *R v Kuruma Son of Kaniu* [1955] AC 197 at 204.

⁵⁵ Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009. Page 183.

Rights.⁵⁶ Therefore evidence obtained in an illegal or improper way would fall within the common law discretion of the courts. Section 35(5) is flexible enough to permit a discretion on the court which has to be exercised on the basis of the facts of the case⁵⁷ and factors and considerations such as the nature and the extent of the constitutional infringement,⁵⁸ the presence or absence of prejudice to the accused,⁵⁹ the balance between due process and crime control,⁶⁰ the interest of society,⁶¹ and, furthermore, it must be taken into account whether the admission of evidence would deprive the accused from his right to a fair trial entrenched in the Constitution.⁶² Therefore section 35(5) still makes it possible to render unconstitutionally obtained evidence admissible, but only if the evidence will not render the trial unfair or be detrimental to the administration of justice. With regards to an accused right to a fair trial and the interpretation of this right, the Court in *S v Thilo*⁶³ held:

“[A]n accused’s right to a fair trial under s 35(3) of the Constitution is a comprehensive right and ‘embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force’. Elements of this comprehensive right are specified in paras (a) to (o) of sub-s (3). The words ‘which include the right’ preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a

⁵⁶ Currie & De Waal *The Bill of Rights Handbook* 658

⁵⁷ *S v Ngcobo* 1998 (10) BCLR 1248 (N).

⁵⁸ *S v Sesame* 2000 (2) SACR 225 (O).

⁵⁹ *S v Soci* 1998 (2) SACR 275 (E) at 293j-294b Erasmus J held as follows: “[P]rejudice to the accused... becomes relevant under the requirement in [s 35(5)] that the evidence must be excluded ‘if the admission of that evidence would render the trial unfair’... The question of prejudice is... inseparable from the question of fairness, in that a trial cannot be completely fair where the accused is in any way prejudiced; but, on the other hand, the trial can hardly be unfair where there is no prejudice. I find therefore that the presence or absence of prejudice is relevant to the question of a fair trial.”

⁶⁰ *S v Cloete* 1999 (2) SACR 137 (C) 146c. In this case Davis J, after having excluded impugned evidence, commented as follows (at 150h-i): “ This is a difficult case. It is particularly problematic because the burden of the crime wave and the need for crime control weighs very heavily. It is wrong to conclude that an attempt to preserve the Constitution is necessary a nod in the direction of criminals. The Constitution is not the cause of crime in this country. The court’s task is to uphold the Constitution in such a manner that gives it its proper effect which I consider is to attempt to achieve some balance between the models of crime control and due process.”

⁶¹ *S v Soci* 1998 (2) SACR 275 (E) at 397f-g.

⁶² Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009. Page 228.

⁶³ 2000 (2) SACR 443 (CC) at [9] and [11].

comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those detailed in sub-s (3)... It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possible other) interests in the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.”

3. Section 36 – Limitation of Rights

As stated above constitutional rights may be limited by section 36. Only rights contained in the Bill of Rights are subject to limitation.⁶⁴ Section 36 contains specific criteria for the limitation of rights contained in the Bill of Rights. By restricting a right in the Bill of rights, we in fact infringe upon that right. However this infringement will not be unconstitutional as this infringement is accepted as it is justified in an open society based on human dignity, equality and freedom.⁶⁵ Therefore a restriction that can be justified in accordance with the criteria set out in section 36 will be constitutionally valid. This however doesn't mean that the rights contained in the Bill of Rights can be limited for any reason. Only under exceptional circumstances can a right be limited by section 36, and only if the restriction is justifiable.⁶⁶ The restriction placed on the right needs to serve an important purpose.⁶⁷ If the purpose can be achieved without limiting the right, the right may not be restricted. Therefore, the purpose is important

⁶⁴ *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 35, where it was held that judicial independence was not subject to limitation.

⁶⁵ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 164.

⁶⁶ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 164.

⁶⁷ Meyerson *D Rights Limited* (1997) 36-43.

to calculate if the restriction is justifiable. A restriction is justifiable if the restriction would achieve the purpose it is designed to achieve, and there is no other the 'realistically available' way to achieve this purpose without the right being restricted.⁶⁸

Section 36 is general limitation clause, as it applies to all the rights contained in the Bill of Rights. The Court will follow a two-stage approach to identify the infringement of rights and evaluation of the justifications for the infringement. The court will first have to determine if a right contained in the Bill of rights have been infringed, and secondly, whether such an infringement is justifiable as a permissible limitation to the infringed right.⁶⁹ Therefore if a right has been infringed by law or conduct, it must be shown that the infringement is permissible according to the criteria for a legitimate limitation in terms of section 36.

3.1 Criteria Justifying the Limitation of Rights

(i) *Authorized by law*

A Right in the Bill of Rights may only be limited by 'law of general application'. Therefore the limitation of the right must be authorized by law, and must be law of general application.⁷⁰ The 'Law of General Application' is derived from the principal that the government gains power from the law, as government must have lawful authority for its actions. All forms of legislation and common law will qualify as 'law' if created and implemented by a lawful government.⁷¹ It should be noted that the courts have the power to develop limitations by virtue of their power to develop the common law.⁷²

(ii) *General Application*

The second component relating to the 'law of general application', relates to the character of the law that authorises a particular action.⁷³ This means that the law must be sufficiently clear, accessible and precise that those affected can ascertain the extent of their rights and obligations,⁷⁴ it must apply equally to all and it must not

⁶⁸ *S v Manamela* 2000 (3) SA 1 (CC) para 32.

⁶⁹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 166.

⁷⁰ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 168.

⁷¹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 169.

⁷² Section 8(3)(b) specifically authorises the courts, in cases involving the direct horizontal application of the Bill of Rights to common law, to 'develop rules of the common law to limit... [rights], provided that the limitation is in accordance with s 36'.

⁷³ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 169.

⁷⁴ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 46.

be arbitrary in its application.⁷⁵ The ‘law of general application’ requirement in s36 therefore prevents laws that have personal, unequal or arbitrary application from qualifying as legitimate limitations of rights.⁷⁶ Ackermann J has explained why there can be no room for such laws in a constitutional state:

‘In reaction to our past, the concept and values of the constitutional state, of the ‘regstaat’ and the constitutional right to equality before the law are deeply foundational to the creation of the ‘new order’ referred to in the preamble [to the interim Constitution]. We have moved from the past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the perceptions or principles of the Constitution. Arbitrariness must also, by its very nature, lead to unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing rational explanation as to why similarly placed persons are treated in a substantially different way. Without such rational justification mechanism, unequal treatment must follow’⁷⁷.

(iii) *Administrative action*

It is submitted that administrative action under the authority of law does not in itself qualify as law of general application.⁷⁸ However, it must be stated that law authorising an administrator to exercise a discretionary power which has the effect of limiting rights. The empowering law lacks the quality of general application, it grants the administrator a wide discretion to limit rights whom must abide to guidelines set down for the proper exercise of the discretion.⁷⁹

⁷⁵ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 169.

⁷⁶ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 171.

⁷⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 156.

⁷⁸ *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 41; Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 175.

⁷⁹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 175.

3.1.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

(i) *Proportionality*

The Constitutional Court adopted the following approach to the application of the general limitation clause⁸⁰:

'The limitation of the constitutional right for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) [IC]. The fact that different rights have different implications for democracy, and in our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) [IC], and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.⁸¹

(ii) *Section 36 (1)a: the nature of the right*

The proportionality enquiry vested in s 36 involves the weighing up of rights. It requires the Court to weigh the harm caused by a law and the infringement of the fundamental right, against the benefit the law is striving to achieve contained in its reasons or purpose for that law. Some rights attract more weight than others. The burden placed on the court is a difficult one, as the court needs to establish the importance of a particular right in the overall constitutional scheme. Therefore a right of importance within the constitutional sphere will attract more weight and less inclined to be justified for their infringement.⁸²

(iii) *The importance of the purpose of the limitation*

Limiting a right must be reasonable and justifiable. Reasonableness requires that the limitation of a right must serve a purpose. This goal it wishes to achieve will bring

⁸⁰ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 176.

⁸¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

⁸² Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 178.

about the consequence of rights being infringed. Justifiability requires that the goal set to be achieved must be noteworthy and of importance in an constitutional democracy. Limiting a right for a purpose that does not contribute to an open and democratic society can never be justifiable.⁸³

A limiting measure must serve a purpose that all reasonable citizens would agree to be compellingly important. The following has been considered by the constitutional court as legitimate purposes in the context of limitation analysis⁸⁴:

- 1) Protecting the administration of Justice at its broadest;⁸⁵
- 2) The prevention, detection, investigation and prosecution of crime generally;⁸⁶
- 3) Reduction of unemployment among South African citizens;⁸⁷
- 4) Inspection and regulation of the multiple health undertaking in modern society which impact on the welfare and general well-being of the community;⁸⁸
- 5) Protection of the rights of others;⁸⁹
- 6) Compliance with constitutional obligations;⁹⁰
- 7) Promoting healing of the divisions of the past and the building of a united society;⁹¹
- 8) Complying with South Africa's international obligations;⁹²
- 9) Preventing people from gaining entry to the country illegally.⁹³

⁸³ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 178.

⁸⁴ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 180.

⁸⁵ *S v Singo* 2002 (4) SA 858 (CC) para 33: 'essential that courts be equipped with the power to deal effectively with any conduct that threatens the smooth running of the administration of justice'.

⁸⁶ *S v Mbatha* 1996 (2) SA 464 (CC) para 16; *S v Manamela* 2000 (3) SA 1 (CC) para 27, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 53.

⁸⁷ *Larbi-Odam v MEC for Education (North- West Province)* 1998 (1) SA 745 (CC) para 30.

⁸⁸ *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

⁸⁹ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC).

⁹⁰ *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC).

⁹¹ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 45.

⁹² *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) para 52 and 72.

⁹³ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 37.

(iv) *The nature and extent of the limitation*

The Court is required under this factor to assess the way in which the limitation imputes the right concerned. This is an essential part of the proportionality enquiry because proportionality dictates that the infringement of rights should not be more severe than is required by the purpose it wishes to achieve. The Court will therefore have to assess how extensive the infringement is.⁹⁴

(v) *The relation between the limitation and its purpose*

As stated above, a legitimate limitation of a right must be reasonable and justifiable. Therefore there must be a legitimate reason or goal for the infringement. It also means that the harm caused by the infringement must be proportional to the beneficial purpose the law seeks to achieve. Therefore logically deduced, this requires a causal connection between the law and its purpose. The law must tend to serve the purpose that it is designed to serve.⁹⁵

(vi) *Less restrictive means to achieve the purpose*

The purpose to be achieved should be more beneficial than the cost of the limitation. Therefore if alternative means exist whereby the same purpose can be achieved by less restrictive means, then the less restrictive method must be preferred.⁹⁶

Therefore in conclusion, where a law of general application infringes a right contained and protected by the Bill of Rights, the party relying on that law must argue that the infringement constitutes a reasonable limitation to that right. By implication this means that rights are not absolute and may be infringed if a compellingly good reason exists for the limitation. This reason must serve a purpose considered by all reasonable citizens as legitimate in the constitutional scheme. Finally, the infringement must be proportional to benefits gained by the limitation. If less restrictive means exist to achieve the same goal, then the less restrictive method must be preferred.⁹⁷

4. Section 35 of the Constitution and DNA

In *S v Orrie and Another* 2004 (1) SACR 162(C), the state applied, by way of a notice of motion and founding affidavit for an order in terms of section 37(1)(c) of the Criminal Procedure Act read with subsections (2)(a) and (b), that the investigating

⁹⁴ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 181.

⁹⁵ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 182.

⁹⁶ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 183-184.

⁹⁷ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005, page 185.

officer is authorized, in conjunction with a medical officer or a district surgeon, to take a blood sample of each of the accused “in order to ascertain whether such sample(s) has any mark, characteristic or distinguishing feature by means of DNA analysis”. The state brought this application after the accused’s refusal to furnish blood samples in response to an informal request therefore. The accused opposed the application and argued that being subjected to such blood tests for the purpose of compiling a DNA profile will infringe the accuseds’ fundamental rights to dignity, to freedom and security of the person, the right to bodily integrity, the right to privacy and the right to be presumed innocent and not to have to assist the prosecution in proving its case (section 10; 12(1); 12(2); 14(a); 35(3)(h) and 35(3)(j) of the Constitution). The Court held in this regard:

“There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the suspect’s right to privacy and an infringement, albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for the use in criminal proceedings infringes his or her right to privacy, dignity and bodily integrity. I am of the view that the limitation clause of the Constitution permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e) of the Constitution, such a limitation is necessary and justifiable in a open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples of DNA testing for the purposes of a criminal investigation is a reasonable and necessary step to ensure that justice is done and is reasonable and necessary in balancing the interests of justice against those of individual dignity”.

In *Levack and Others v Regional Magistrate, Wynberg, and Another* 2004 (5) SA 573 (SCA), the application of section 37 of the Criminal Procedure Act was broadened to include voice recognition. The Court held that although the section does not expressly mention the voice it does form part of the innumerable bodily features that the wording of the section expressly contemplates. It was again confirmed by Cameron JA, that “*autoptic evidence*”, evidence derived from the accused’s own bodily features, does not infringe the right to silence or the right to be compelled to give evidence (paragraph 19). Cameron JA held in this regard as follows: “*Differently put, it is wrong to suppose that requiring the appellants to submit voice samples infringes their right either to remain silent in court proceedings against them or not to give self-incriminating evidence*” (paragraph 17). Therefore Cameron JA reaffirmed the findings of courts in the cases of *S v Huma and Another* 1996 (1) SA 232 (W) and *S v Maphumulo* 1996 (2) SACR 84 (N). Cameron JA relied heavily on the findings of the court in *Ex parte Minister of Justice: In R v Matemba* 1941 AD 75, where Watermeyer JA held as follows:

“Now, where a palm print is being taken from an accused person he is, as pointed out by Innes CJ in *R V Camane* 1925 AD at 575, entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in Court”.

In *S v Maphumulo*, Combrink J held:

“I have concluded, accordingly, that the taking of the accuseds’ fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in section 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in section 25(2)(c), or 25(3)(d) of the [Interim] Constitution. Nor does it appear to be a violation of the accused’s rights as contained in section 10 of the [Interim] Constitution, which reads: “Every person shall have the right to respect for and protection of his or her dignity”.

In *S v Huma and Another* (2) 1995 (2) SACR 411 (W), the accused objected to having his fingerprints taken on two grounds. The first is that taking of impairs the dignity of a person and is therefore a contravention of the constitutional right to dignity contained in sections 10 and 11 of the Interim Constitution. The second ground of objection was based on the constitutional right to remain silent as contained in section 25 (3)(c) and (d) of the Interim Constitution. In colloquial terms this is called the privilege against self-incrimination. Claassen J held as follows in regard to the question as to whether or not the taking of fingerprints constitutes inhuman or degrading treatment (page416):

“In my judgement it does not constitute inhuman or degrading treatment for the following reasons:

- (1) The taking of fingerprints is accepted worldwide as a proper form of individual identification. It is throughout the world used for the issuing of identity documents and passports. The same holds true for South Africa. The act of making one’s fingerprints available for the purposes of issuing an identity document or a passport can never be regarded as inhuman or degrading treatment.
- (2) The taking of fingerprints per se in private and not in court or a public place (see *S v Mkize* 1962 (2) SA 457 (N) at 460) can in no way lower a person’s self-esteem or bring him into dishonour or contempt, or lower his character or debase him. The definition of ‘inhuman’ or ‘degrading’ as referred to above in the judgement of Mahomed AJA therefore cannot, in my view, apply to the mere act of taking one’s fingerprints.
- (3) The process of taking one’s fingerprints does not, in my view, constitute an intrusion into a person’s physical integrity. No physical pain of any kind accompanies this process. By comparison, the taking of a blood sample constitutes more than an intrusion into a person’s physical integrity than the mere taking of one’s fingerprints. When a blood sample is taken the skin is

ruptured and it is accompanied by a small element of pain. Pain and violation of a person's physical integrity are also associated with corporal punishment and other forms of punishment. By comparison, in my judgement, the taking of fingerprints is on par with the mere taking of a photograph, which does not, in my view, violate the physical integrity of a person.

- (4) When fingerprints are taken pursuant to the provisions of section 37 it has to be borne in mind that those fingerprints will be destroyed in the event of the accused being found not guilty. There is therefore an additional safeguard built into the application of the provisions of this section.
- (5) The taking of fingerprints can potentially be a helpful procedure to the benefit of the accused in proving his innocence. If, after the fingerprints have been taken, a comparative chart is made and it is found that the necessary requirements for the purposes of comparison are lacking, then the whole process of taking fingerprints would actually have redounded to the accused's benefit.

For the above reasons I have come to the conclusion that the value judgment which I have to make is such that the taking of fingerprints does not constitute a contravention of a person's dignity, protected and enshrined in subsection 10 and 11(2) of the Constitution. However, even if I am wrong in this finding, I am of the view that section 33(1) allows a limitation to a person's constitutional right to dignity which is reasonable and necessary in a democratic society in respect of fingerprint-taking for the purposes of compiling a comparative chart in criminal proceedings. This limitation is reasonable and necessary to enable the administration of justice to run its proper course. In my view, the fact that fingerprints are to be taken for the purposes of a criminal investigation is a reasonable and necessary step in a democratic society to ensure that justice is done and is reasonable and necessary to balance the interest of justice against the interest of individual dignity".

With regard to the privilege against self-incrimination, Claassen J held that the *"privilege against self-incrimination does not apply to procedures relating to the ascertainment of bodily features such as the procedures involved in identification parades, the taking of finger- and footprints, blood samples and the showing of bodily scars...[t]hese procedures relate to the furnishing of what has been termed "real" evidence, as opposed to the furnishing of oral or testimonial evidence by the accused"* (at page 417).

5. Conclusion

It is clear from the above that the ascertainment of a bodily feature such as a fingerprint or DNA sample does not violate or infringe upon the fundamental rights of an accused not to be compelled to give evidence, or to give self-incriminating evidence. Where compulsion is used to ascertain a bodily feature such as a fingerprint or DNA sample the accused right to privacy is infringed, however this right

is limited through the Criminal Procedure Act. This limitation is a necessary one, and justifiable in an open democratic society as ours.

Chapter 4: Comparative overview

1. General

South Africa would not be the first country to adopt legislation that governs the collection of DNA profiles and storing them in a DNA database. It is submitted that other countries have adopted similar legislation to strengthen their crime detection capacity, and therefore created means by which real evidence can be obtained, retained and compared to crime scenes of the past and future.

2. England and Wales

The National DNA Database of the United Kingdom was established in 1995 as an intelligence database. However due to lack of funding and national strategy the collection of offender DNA profiles on the database was random. According to the “DNA Expansion Programme 2000-2005” it became clear the potential intelligence value the DNA database could have. In 2000 England and Wales made a commitment to expand their national DNA database and to provide the police with more useful DNA intelligence, by linking DNA evidence found at crime scenes to offenders’ DNA on the DNA database.⁹⁸

The DNA Expansion Programme was implemented in April 2000 with its aim of specifically funding the police forces to enable the collecting of DNA samples of known offenders, and therefore to promote the acceleration of the expansion and growth of the offender profiles in the National DNA Database. The funding allocated to the police forces, secondly, provided the police with the means to collect more DNA material left at the crime scenes by the offenders. Finally, funding was allocated for the procurement and training of forensic staff, vehicles and equipment to enable the police to attend to more crime scenes.⁹⁹

In order to create DNA Database as an intelligence tool, the programme was accompanied by certain key legislation changes throughout the development stages of the programme. Firstly, it was aimed to hold a DNA Profile of all active offenders. The police was then empowered to take a DNA sample from any person with or reported for a recordable offence. Recordable offences are offences that have to be recorded on the Police National Computer to form part of a person’s criminal record, which include most offences other than traffic offenders. Secondly, all DNA profiles of persons not prosecuted or was acquitted, by law, had to be removed from the Database. This is currently the same stance as in South-Africa. In May 2001 the law

⁹⁸ DNA Expansion Programme 2000-2005: Reporting achievement- Forensic and Pathology Unit at page 1.

⁹⁹ DNA Expansion Programme 2000-2005: Reporting achievement- Forensic and Pathology Unit at page 2-3.

was changed to allow DNA profiles to be retained. Thirdly, the amendment of the Criminal Justice Act 2003 introduced powers to the police enabling them to take fingerprints and DNA samples from individuals who have been arrested on suspicion of committing a recordable offence. This enabled the police to take a non-intimate sample¹⁰⁰ from a person in police detention arrested for a recordable offence, in addition to be charged with a recordable offence.¹⁰¹ The changes brought forth the following:

- (1) Drastically increase the number of DNA profiles on the Database;
- (2) A 10% increase in crime scene visits over the first four years of the programme;
- (3) A significant increase in potential DNA material retrieved at crime scenes;
- (4) An estimated 75% increase in DNA suspect-to-crime scene matches.¹⁰²

The achievements recorded by the United Kingdom as a result of their DNA expansion programme is as follows:

- (1) Increased detections through DNA.
- (2) Enhanced the capacity to detect serious crimes.¹⁰³
- (3) Ability to solve serious crimes committed.
- (4) DNA helps eliminate innocent persons from the investigations.¹⁰⁴
- (5) DNA scene-to-scene matches help identify patterns of criminal behaviour that might help solve past, present and future crimes.
- (6) Plea bargains increase when suspects are confronted with DNA evidence.¹⁰⁵

¹⁰⁰ A non-intimate sample is typically a mouth swab or a hair with root attached thereto taken by the police without the presence of a medical practitioner.

¹⁰¹ DNA Expansion Programme 2000-2005: Reporting achievement- Forensic and Pathology Unit at page 7.

¹⁰² DNA Expansion Programme 2000-2005: Reporting achievement- Forensic and Pathology Unit at page 4.

¹⁰³ On average the Database provides the police with around 3000 matches each month.

¹⁰⁴ In the UK they have a separate Database for police officers that might contaminate the crime scene and material received from the crime scene.

¹⁰⁵ DNA Expansion Programme 2000-2005: Reporting achievement- Forensic and Pathology Unit at page 16.

2.1 Legislative changes.

Section 64 of the Police and Criminal Evidence Act 1984 (PACE), stated that where a person has been acquitted of an offence or the charges has been dropped, any DNA sample and data derived from the sample had to be destroyed. Section 82 of the Criminal Justice and Police Act 2001 (CJPA) amended the Police and Criminal Evidence Act 1984 so as to remove these requirements placed on the police. Section 82 reads as follows:

“Where-

- (a) fingerprints or samples taken from a person in connection with the investigation, and
- (b) Subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution”.

It must be stated that these changes has since been challenged in the case of *R v Chief Constable of South Yorkshire (ex parte S and Marper)* where the claimants argued that the changes are in breach of articles 8 and 14 of the European Convention on Human Rights. Article 14 deals with discrimination, whereas article 8 reads as follows:

- “(1) Everyone has the right to respect for his right for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right expect such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

3. Scotland

In Scotland the existing legislation allows an individual’s DNA data to be retrained without consent in three circumstances, namely:

- 1) DNA maybe retained permanently, following a criminal conviction;
- 2) DNA maybe retained temporarily, if the person is charged but not convicted of a relevant violent or sexual offence. It may be retained for three years, after which an application must be made to retain for a further period;
- 3) DNA maybe retained for so long as the person is part of an on-going investigation for which the DNA was taken and in relation to which he may eventually be prosecuted.

DNA data and fingerprint records, may be retained only in the first and third of the above mentioned circumstances. With regards to children, DNA and fingerprint records must be destroyed if it is decided not to institute criminal proceedings regardless of the type of offence they have committed.¹⁰⁶

4. Canada

The DNA Identification Act of 1998 provides for the establishment of a DNA databank and amended the Criminal Code of Canada to provide a mechanism for a judge to order persons convicted of designated offences to provide blood, buccal or hair samples from which DNA profiles could be derived. The DNA Identification Act includes strict guidelines on genetic privacy and stipulates that samples collected from convicted offenders can only be used for law enforcement purposes. Therefore the Canadian DNA identification Act is limited in its application and to convicted offenders and limited to designated offences as defined in the Criminal Code.¹⁰⁷

Section 9(1) of the DNA Identification Act, provides that DNA profiles retained in the convicted offender index is to be kept indefinitely. Section 9(2) provides for the removal of a DNA profile from the convicted offender index if the person's conviction is set aside.

The Act provides for the retroactive collection of DNA profiles. In *R v Rodgers* (2006), the Supreme Court of Canada upheld the legality of the DNA database, including the retroactive collection of profiles. The Court held: "DNA sampling is no more part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints. The fact that the DNA order may have a deterrent effect on the offender does not make it a punishment".¹⁰⁸

¹⁰⁶ See "Review to strengthen forensics power to fight crime" at <http://www.scotland.gov.uk/news/Releases/2007/09/24105858>.

¹⁰⁷ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 29.

¹⁰⁸ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 29.

5. Australia

In Australia legislation is subject to commonwealth principles across all states. The Commonwealth Crimes Act of 1914 (as amended up to July 2008) regulates the taking, use and destruction of fingerprints and DNA samples.¹⁰⁹

With regards to DNA samples-

- (1) The Act deals in part ID in detail with the forensic procedures to be conducted on suspects in relation to indictable offences.
- (2) Intimate or non-intimate samples may be collected from a suspect with or without the suspects consent. Where consent is not given by the suspect, a non-intimate sample can be collected from a suspect in lawful custody by order of a senior constable. However an intimate sample may only be collected against the will of a suspect by an order granted by a Magistrate.
- (3) The Act Provides for the taking of DNA samples, be it intimate or non-intimate samples from an offender upon conviction of serious or stipulated offences.
- (4) There is a specific category for persons who volunteer to give their DNA sample to the DNA database. When consent is withdrawn then the DNA sample must be destroyed.
- (5) DNA samples must be destroyed after a lapse of 12 months if prosecution was not instituted, or if the accused was acquitted of the charges. However an application can be brought to extent the 12 month period.¹¹⁰

6. New South Wales¹¹¹

The collection, usage and destruction of DNA samples in New South Wales is regulated by the Crimes (Forensic Procedures) Act of 2000 No 59, which came into operation in 2001. The collection of samples may be performed on:

- (a) Suspects: before authorising a non-intimate sample procedure, the senior police officer must be satisfied that:
 - (i) The suspect is under arrest;

¹⁰⁹ White CE(June 2008) Study of International Statute Requirements for the Management of DNA databases, page 6.

¹¹⁰ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 31.

¹¹¹ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 32-33.

- (ii) The suspect is not a child or incapable person;
 - (iii) There are reasonable grounds to believe that the suspect has committed an offence;
 - (iv) There are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect has committed an offence;
 - (v) Carrying out such a procedure is justified under the circumstances.
- (b) All convicted serious indictable offenders serving sentences in New South Wales correctional centres, whether convicted before or after the legislation comes into force. A serious indictable offender is defined as a person convicted of an offence carrying a maximum penalty of five or more years imprisonment.
- (c) On a volunteer, other than a child or incapable person, with the volunteer's informed consent.
- (d) Unknown deceased persons.
- (e) Missing persons.

The taking of DNA samples may only be taken after obtaining a court order in the following circumstances:

- (a) DNA samples taken from children or incapable persons;
- (b) DNA samples taken from a suspect not under arrest who does not consent to a procedure; and
- (c) An intimate sample or a buccal swab on a suspect under arrest who does not consent to such a procedure.

The Act provides for the destruction of DNA samples if the proceedings against the accused has been dropped or if the accused is acquitted.

7. United States¹¹²

The Federal Bureau of Investigation created the Combined DNA Index System program (CODIS) enables federal, state and local laboratories with the power to store and compare DNA profiles electronically. This creates the means by which

¹¹² The discussion of the legislation used in the United States to regulate databases is sourced from the SAPS document prepared by Superintendent CE White (June 2008) Study of International Stature Requirements for the Management of DNA Databases, at page 14-16.

DNA profiles of crime scenes, convicted offenders and arrestees can be compared to each other.

7.1 Legislation

The DNA Identification Act, 1994, allows for DNA identification records to be kept of:

- (a) Convicted persons.¹¹³
- (b) DNA samples recovered from crime scenes.
- (c) DNA samples found from unidentified human remains.
- (d) DNA samples voluntarily contributed from relatives of missing persons.

The Justice for All Act, 2004, allows DNA profiles to be retained in the National DNA Index (NDIS) from persons who have been charged in an indictment, even if charges are dropped. According to this Act only certain offences qualified entry into the National DNA database. These were sexual offences and offences of a serious violent nature. In terms of this Act, DNA profiles may not be uploaded to the National DNA database if:

- (a) The arrestee has not been charged; or
- (b) DNA samples have been submitted voluntarily for the purposes of elimination from a crime sample.

Therefore in the United States, legislation authorises the collection, use and storage of DNA in databases for law enforcement purposes. With regards to the misuse of DNA databases other than for law enforcement purposes, creates both civil and criminal liabilities. In certain States private cause of action may be instituted by aggrieved individuals affected by the misuse of DNA databases. However certain states explicitly provide immunity from civil and criminal liability for the misuse of DNA databases. In most States criminal penalties are imposed for:

- (a) Tampering with DNA samples and records;
- (b) Improper entry of DNA samples and records into the database;
- (c) Improper access to and use of DNA samples and records; and
- (d) Improper disclosure of DNA samples and records.

¹¹³ This will vary from State to State in accordance with DNA database laws of each State.

8. Conclusion

It is clear that South-Africa will not be the first country to venture in the path of DNA database legislation. From statutes of other countries that currently have legislation regulating DNA databases, it is clear that DNA databases are a valuable forensic tool to combat crime. There are aspects in the legislation of these countries that correspond with each other and should be duplicated if South Africa wants to adopt similar legislation. The first would be to empower the South African Police Service with the means to collect DNA samples and store them electronically in a database. Secondly, strict guidelines should be placed on the South African Police Service governing the collection and storage of these DNA profiles. Thirdly, the DNA samples that maybe retained and stored should be quantified by the type of offences, for example offences of a violent nature or sexual nature. Fourthly, legislation should consider if DNA samples maybe retained in the database when dealing with a child offender. Fifthly, strict guidelines should be placed on the South African Police Service with regards to the destruction of DNA profiles. Lastly, the misuse of the DNA database for any other purpose than what it was intended for should attach criminal liability.

Chapter 5: The Criminal Law (Forensic Procedure) Amendment Bill of 2009

1. Introduction

In October 2010 the Criminal Law (Forensic Procedure) Act came into operation. The Act amends the Criminal Procedure Act in regards to the taking, retention and creation of fingerprint-databases. It also provides for comparative searches with other databases. When the Bill was considered DNA was included, however DNA was excluded from the final Act. It was argued that DNA should be dealt with in a separate bill. The question arises what the value if any, a DNA database will lend to the investigative capacity of the South African Police Service.

2. The Criminal Law (Forensic Procedures) Amendment Bill

The purpose of this bill was clearly set out in the preamble as being the following:

“ To amend the criminal procedure Act, 1977, so as to further regulate powers in respect of the ascertainment of bodily features of persons; to provide for the compulsory taking of finger-prints of certain categories of persons; to provide for the taking of prints and samples for investigative purposes; to provide for the taking of specified bodily substances from certain categories of persons for the purposes of DNA analysis; to provide that prints and samples taken under this act are retained; to further regulate proof of certain facts by affidavit or certificate; to further regulate evidence of prints or bodily features of accused; to amend the South African Police Service Act, 1995, as s to regulate the storing and use of finger-prints, palm prints, foot-prints and photographs of certain categories of persons; and to establish and regulate the administration and maintenance of the National DNA Database of South Africa; to amend the firearm control Act, 2000, so as to further regulate the powers in respect of body prints and bodily samples; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of prints and samples for investigation purposes; and to provide for matters connected therewith”.

It is clear that this act wants to empower the South African Police Service with the means of taking, retaining and use of bodily features in all its forms as a powerful investigative tool. Furthermore to create databases for fingerprints and DNA, whereby profiles can be stored for a comparative analysis and enable the detection of crime and the identification of an offender.

3. Ascertainment of bodily features of persons

It was contained in the Criminal Law (Forensic Procedures) Amendment bill that the following sections be inserted in Chapter 3 of the Criminal Procedure Act, 1977, after section36.

3.1. Interpretation of Chapter 3

Section 36A reads as follows:

(1) For the purposes of this Chapter, unless the context indicates otherwise-

(a) **'authorised person'** means in reference to-

- (i) photographic images, fingerprints or body prints, any police official in the performance of his or her official duties; or
- (ii) the NDDSA, the police official commanding the Division; Criminal Record and Forensic Services within South African Police Service or his or her delegate;

(b) **'body-prints'** means prints taken from a person's ear, foot, nose, palm, knee, arm or toes;

(c) **'child'** means a person under the age of 18 years;

(d) **'DNA'** means deoxyribonucleic acid;

(e) **'DNA analysis'** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;

(f) **'DNA profile'** means the result of forensic DNA analysis of an intimate sample, or a non-intimate sample or any other bodily substance;

(g) **'intimate sample'** means a blood sample other than a blood finger prick;

(h) **'NDDSA'** means the National DNA Database of South Africa, established in terms of 15F of the South African Police Service Act;

(i) **'non-intimate sample'** means-

- (i) a sample of hair other than pubic hair;
- (ii) a sample taken from a nail or from under a nail;
- (iii) a swab taken from the mouth (buccal swab);
- (iv) a blood finger prick;
- (v) a combination of these;

(j) **'South African Police Service Act'** means the South African Police Service Act no 68 of 1995; and

(k) **'speculative search'** means that the body-print, finger-print, photographic images, intimate samples or non-intimate samples or the information derived from such samples taken under any power conferred by this Chapter, may for purposes related to identification of missing persons, the identification of unidentified human remains, the identification of an alleged offender, the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against-

- (i) in the case of photographic images, body- prints or finger-prints, by any police official in the performance of his or her official duties, against the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of the state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act; or
 - (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, by the police officer commanding the Division, Criminal Record and Forensic Services within South African Police Service or his or her delegate; against the NDDSA.
- (2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a “person” includes a “child”.

It is important to note the interpretation of non-intimate samples and speculative search. It is submitted that non-intimate samples are samples that can easily be administered and uses the least amount of violence or force that infringe on the bodily integrity of the suspect. The speculative search allows any bodily feature obtained to be compared to any database in the government sphere. DNA samples or the information derived from these samples may be compared to the National DNA Database of South Africa. When the Criminal Law (Forensic Procedures) Amendment Act¹¹⁴ came into operation, speculative search was renamed as comparative search but with similar effect as contained in the draft bill.

3.2. Powers in respect of finger-prints and non-intimate samples of accused and convicted persons

Section 36B reads as follows:

- (1) A police officer must-
- (a) take the finger-prints or must cause such prints to be taken of any-
 - (i) person arrested upon any charge;
 - (ii) person released on bail or on warning under section 72, if such person’s finger-prints were not taken upon arrest;
 - (iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit permissible or prescribed;

¹¹⁴ Act 6 of 2010

- (iv) person convicted by a court and sentenced to-
 - (aa) a term of imprisonment, whether suspended or not; or
 - (bb) any non-custodial sentence correctional supervision, if such person's fingerprints was not taken upon arrest;
 - (v) person convicted by a court in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph; or
 - (vi) person deemed under section 57 (6) to have been convicted in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph;
- (b) take a non-intimate sample or must cause such sample to be taken of any-
- (i) person arrested upon any charge;
 - (ii) person released on bail or on warning under section 72, if a non-intimate sample was not taken upon arrest;
 - (iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit permissible or prescribed;
 - (iv) person convicted by a court and sentenced to-
 - (aa) a term of imprisonment, whether suspended or not; or
 - (bb) any non-custodial sentence correctional supervision, if a non-intimate sample was not taken upon arrest;
 - (v) person convicted by a court in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph; or
 - (vi) person deemed under section 57 (6) to have been convicted in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph;
- (2)(a) The finger-prints taken in terms of subsection (1)(a), must be stored on the finger-print database maintained by the South African Police Service as provided for in Chapter 5A of the South African Police Service Act.
- (b) A police official must immediately furnish each non-intimate sample taken under subsection (1)(b), to the National Commissioner of the South African Police Service or his or her delegate, who shall carry out a DNA analysis on each such sample in terms of Chapter 5B of the South African Police Service Act, and include the results in the NDDSA.

- (3) Nothing in this Chapter, shall prohibit a police official from retaking the finger-prints of any person referred to in subsection (1), if-
- (a) the finger-prints taken on the previous occasion do not constitute a complete set of his or her finger-prints;
 - (b) some or all of the finger-prints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis comparisons or matching;
 - (c) the finger-prints taken was lost, misfiled or not successfully stored in the finger-print database maintained by the SAPS.
- (4) Nothing in this Chapter, shall prohibit a police official from re-taking a non-intimate sample from any person referred to in subsection (1), if the non-intimate sample taken from him or her was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.
- (5) The finger-prints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, may be the subject of a speculative search.
- (6)(a) Subject to paragraph (b), finger-prints, non-intimate samples, where applicable and scientifically possible, or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to identification of missing persons, the identification of unidentified human remains, the identification of an alleged offender, the detection of crime, the investigation of an offence or the conduct of a prosecution.
- (b) Nothing in paragraph (a), shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any finger-prints taken under the powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.
- (c) Any person who uses or who allows the use of the finger-prints, non-intimate samples of the information derived from such samples as referred to in paragraph (a), for any purpose that is not related to identification of missing persons, the identification of unidentified human remains, the identification of an alleged offender, the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.
- (d) Any person who tampers with, manipulates or in any way changes finger-prints, intimate or non-intimate sample to be submitted in terms of subsection (2) , or any police official who submits finger-prints, intimate or non-intimate samples falsely claiming that it has been taken from a specific person, whilst knowing it to have been taken from another person or source, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

- (7) Paragraphs (a)(iv) of subsection (1), apply to any person convicted of any crime, irrespective of sentence, including-
- (a) any person serving such a sentence at the time of the commencement of this section; and
 - (b) where applicable, any person released on parole in respect of such a sentence, irrespective of the fact that such a person was convicted of the offence in question, prior to the commencement of this section.
- (8) Despite subsection 6(a), the finger-print, non-intimate sample or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.

It is submitted that the police upon arrest has a discretion regarding the taking of fingerprints of the accused. This was done in order to ascertain whether the accused has previous convictions for bail and sentence purposes. Fingerprints were also taken upon conviction to indicate that the accused now has a criminal record. DNA was never taken from the accused except as evidence in a trial to establish a link with the accused to the crime scene or victim. It is further submitted that after the trial the DNA evidence became redundant and of no further use. This section in the amendment bill creates a duty on the South African Police Service or officer in charge to take a non-intimate sample of the accused upon arrest, serve of summons or when the accused is released on bail and a sample was not taken upon arrest. Furthermore this section places a duty to take non-intimate samples of an accused convicted in a trial court. This section therefore ensures that all possible evidence with regards to fingerprints and DNA evidence are captured by the police. All non-intimate samples after being taken by the police must be send for analysis and results thereof must be captured and stored in the National DNA Database of South Africa. The results may be subject to a comparative search. DNA profiles or the information derived from these profiles may only be used for the purposes catered for in this section. The identification of missing persons, the identification of unidentified human remains and the identification of an alleged offender are the sole purposes profiles may be used for. This section further has a build in safeguard in the form of criminal liability with regards to tampering of profiles or the use of these profiles for any other purposes than what it was intended for. Furthermore it is submitted that any person who uses the information contained in the database for any other purpose is guilty of an offence and liable upon conviction to imprisonment not exceeding 15 years.

3.3. Body-prints and samples for investigation purposes

Section 36C reads as follows:

- (1) Any police official may without a warrant take finger-prints, body-prints and non-intimate samples of a person or a group of persons, if there are reasonable grounds to-

- (a) suspect that the person or that one or more of the persons in that group has committed an offence; and
 - (b) believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as possible perpetrators of the offence.
- (2) The person who has control over prints or samples taken in terms of this section may-
- (a) examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and
 - (b) cause any prints, non-intimate samples, or the information derived from such samples, taken under any power conferred by this section, to be subjected to a speculative search.
- (3)(a) The finger-prints, body-prints or non-intimate samples where applicable and scientifically possible, or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of prosecution.
- (b) Any person who uses or who allows the use of the finger-prints, body-prints, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the identification of missing persons, the identification of unidentified human remains, the identification of an alleged offender, the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 15 years.
 - (c) The finger-prints and body-prints referred to in paragraph (a), must be stored by the Division: Criminal Record and Forensic Science Services of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act.
 - (d) The non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act.
- (4) Despite subsection 3(a), the finger-print, non-intimate sample or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.

This section empowers a police official to take fingerprints or non-intimate samples from a person or group of persons without a warrant, if there are reasonable grounds to believe that a person or one or more persons of that group committed an offence. A police official may also take such fingerprints or non-intimate samples if he believes that the fingerprints or non-intimate samples taken may be of value in the investigative process. Non-intimate samples or the information derived from such samples must be stored on the National DNA Database of South Africa. This section

places a duty on the commanding officer of the Division responsible for the criminal records referred to in Chapter 5A to destroy such samples after 5 years if such a person is not convicted by a court of law. This means that even if the accused is found not guilty, his profile may be retained for another 5 years before it has to be destroyed and taken off the DNA database. Even though DNA was left out in the Act, this part of the section was changed and a duty was placed on the commanding officer of the Division responsible for the criminal records to destroy all samples taken under any section of the Act -

- 1) if it is decided not to prosecute the accused;
- 2) if the accused is tried and found not guilty;
- 3) or the conviction is set aside by a higher court.

Furthermore, this section spells it out clearly the purpose of taking non-intimate samples and the goal regarding the storage of the DNA profiles or any information derived from such samples. The purpose of taking, retaining and storing DNA profiles may only be used for the following purposes:

- 1) the identification of missing persons;
- 2) the identification of unidentified human remains;
- 3) the investigation of an offence; or
- 4) the conducting of a prosecution.

As stated criminal liability will follow if these profiles are used for any other purpose than intended for in this bill.

4. Conclusion

The proposed Bill creates the means by which the South African Police Service are given the means to effectively investigate crime. It empowers the police to take and obtain bodily features of an accused in a profile format which can be used in the current investigation of an offence and store the profile for future use. It places a duty on the police to take the bodily features of an accused and store it in a database which could be used at a later stage in a comparative search. This piece of legislation will ensure that real evidence obtained from the suspect and from a scene of a crime is utilised to the fullest extent. Furthermore this legislation ensures the integrity of the databases by creating criminal liability if information derived from this bill is used for any other purpose than intended for. It is submitted that a further safeguard could be placed on the state to verify each and every sample where a link is established by the database. The proposed legislation is a step forward in the fight against crime.

Chapter 6: Conclusion

1. Introduction

Every country in the world is plagued by crime. As criminals adapt to the ever changing criminal system, it would seem that it has become more difficult to bring these criminals to book. It is therefore submitted that as criminals adapt to more efficient and smarter ways to commit crime, so does the system combating these individuals have to evolve to keep up with the ever changing criminal. This can be achieved by new laws governing criminal behaviour and the acceptance of newer and more sophisticated means to investigate crime, as well the use of all available spheres of government to combat crime. Science is also a valuable tool for both the investigator of crime and for the prosecution aiming for a conviction. Science is tested and evaluated and therefore the results ascertained from these scientific methods are absolute. The results are not open to misinterpretation or fault, and only convey the truth. Therefore any system that uses science in their arsenal to detect crime, investigating crime and prosecute crime is keeping with the latest trends and methods of combating crime.

It is therefore submitted in order to combat crime effectively; the investigator and the prosecutor need to use all possible means and methods available to ensure a conviction. However it must be stated that scientific means of investigating crime not only link possible offenders to the commission of a criminal offence but can exclude suspects from the investigation.

2. DNA as an investigative tool

“Real evidence” is a term used to cover the production of material objects for inspection by court, and include fingerprints and DNA profiles. The value of “real evidence” in securing a conviction is well documented in South African Law of Evidence. Every person has a unique DNA profile and also a unique fingerprint profile. This means that linking a suspect to a crime scene with his DNA profile or fingerprint profile in most cases is a strong indication that the suspect committed the offence. Fingerprints that were found at the scene of the crime or on a particular object are, according to *Schwikkard et al.*, “often of strong probative value in linking the accused with the commission of the crime”.¹¹⁵ Therefore every suspect that comes into contact with any object by a scene of a crime has the potential to leave valuable evidence behind by which the suspect can be identified and be linked to the commission of the offence.

However obtaining this valuable evidence from the scene in most cases is of no value if a suspect is never arrested. Our current system makes no provision for

¹¹⁵ Schwikkard, Skeen and Van Der Merwe: *Principles of Evidence* (3ed) 2009. Page 257

comparative searches in this regard. The investigator first has to link the suspect by other means and only after arrest the scientific methods come into play. Therefore it is submitted that in our country the use of DNA profiles and in most cases fingerprint profiles are not used to identify the suspect, but rather a confirmation of the already existing link the investigator has established.

It is further submitted that our system does not place emphasis on collection of these type of evidence in the first place. Our investigators are not sufficiently trained in the methods of collecting scientific evidence, indicating the current view our investigators take when conducting their investigation. Valuable evidence is lost at every crime scene due to the fact that our investigators are not trained to retrieve such evidence. Therefore a change in the mind set of our whole system with regard to the collection of evidence need to take place before this type of evidence can come into play and be used to secure a conviction. The investigators are to be trained in identification of possible samples for collection, the proper collection and lifting of evidence and maintaining the integrity of the evidence until trial of the accused. Only after the investigator has mastered the concept of collection of evidence, the true power of scientific evidence will come forth.

3. Proposed legislation

Current legislation allows the taking of blood samples for a DNA comparison analysis. This will be done to link an accused to a crime scene, object or in most cases to a victim of rape. After this step all evidence in this regard will be destroyed. The investigator is not empowered to retain the accused DNA profile to compare this profile to any other crime scene or victims unless another link exists. Furthermore the investigator cannot retain this profile to compare it to future crime scenes and victims. It would be a valuable system at the disposal of the investigator if he could search a database of all convicted offenders and other crime scenes to establish the identity of the suspect and possibly identify other unsolved cases.

Currently in our system every piece of evidence is stored in the police evidence storage room. If the evidence collected is not used it becomes redundant and destroyed. It is submitted evidence such as fingerprint and DNA profiles can be stored digitally and by electronic means. Therefore valuable evidence that are destroyed can never be retrieved for future use. On the other hand, evidence stored electronically is never lost and can be used in the future. The value of this evidence is paramount if the suspect eludes the authorities for a period of time and is arrested at a later stage. With his DNA profile electronically stored the investigator can match his profile to every scene the same profile was lifted from. This is a powerful investigating tool to the investigator if available to him. Databases will be a powerful tool to the investigator. It has the advantages that all evidence collected at a scene can be stored electronically in the database and be kept for any amount of time. Past

and present crimes can be linked to each other. This will help the authorities in establishing the fact that a serial criminal is at work.

If legislation is passed that empower our authorities to create and maintain a DNA database it will create an effective method by which crime can be combated. It will create the means by which the investigator can identify suspects, build a case and ensure effective prosecution. The database will create means by which crime scene profiles and profiles of convicted accused can be stored. This will mean that an investigator can now take a profile found at a crime scene and enter it into the database and this will enable him to establish if the profile found matches any other crime scene profiles stored in the database. This will in turn inform him that the suspect has possibly committed other offences, and the investigations conducted in those cases may be useful for the current investigator in his case. Secondly the investigator can do a comparative search of the profile found at the scene to all the profiles of convicted accused stored on the database. This may help with the early identification of a suspect in the matter.

However it must be stated that the database will be of no value if the necessary role players are not doing their part. It all starts with the collection and lifting of the DNA profiles from the scene of crime, object or victim. This would be the fragile pillar this piece of proposed legislation stands on. Secondly, the capture and storing of these DNA profiles are of great concern. Improper capturing of DNA profiles could easily lead to incorrect identification of a suspect and unlawful arrest of an innocent person. This in effect will bring the whole system is disrepute. It is therefore of utmost importance that all roll players should receive sufficient training and guidelines regarding all aspects governing DNA profiles and the DNA database. Mismanagement of the information in the database is also a worrying aspect that should be considered. The legislator should foresee this possibility and create a safeguard in the form of criminal liability for anyone that misuses this database for any purpose other than what it was intended for. It is submitted that a further safeguard should be implemented where every matched should be confirmed with independent testing.

4. DNA database and the Constitution

As all legislation must comply with the requirements set out in the Constitution, and therefore any proposed legislation will have to adhere to this constitutional scrutiny. We need to consider the constitutional impact of any proposed legislation, and the possible rights infringement caused by the general application of any proposed legislation. The Bill of Rights is embodied in chapter 2 of the Constitution, and it sets out fundamental rights that are guaranteed to all citizens of the republic including accused persons. The question now arises if a database created by the proposed legislation would infringe upon any right contained in the Bill of Rights.

In *S v Orrie and Another* 2004 (1) SACR 162(C), the state applied, by way of a notice of motion and founding affidavit for an order in terms of section 37(1)(c) of the Criminal Procedure Act read with subsections (2)(a) and (b), that the investigating officer is authorized, in conjunction with a medical officer or a district surgeon, to take a blood sample of each of the accused “in order to ascertain whether such sample(s) has any mark, characteristic or distinguishing feature by means of DNA analysis”. The state brought this application after the accused’s refusal to furnish blood samples in response to an informal request therefore. The accused opposed the application and argued that being subjected to such blood tests for the purpose of compiling a DNA profile will infringe the accused’s fundamental rights to dignity, to freedom and security of the person, the right to bodily integrity, the right to privacy and the right to be presumed innocent and not to have to assist the prosecution in proving its case (section 10; 12(1); 12(2); 14(a); 35(3)(h) and 35(3)(j) of the Constitution). The Court held in this regard:

“There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the suspect’s right to privacy and an infringement, albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for the use in criminal proceedings infringes his or her right to privacy, dignity and bodily integrity. I am of the view that the limitation clause of the Constitution permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e) of the Constitution, such a limitation is necessary and justifiable in a open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples of DNA testing for the purposes of a criminal investigation is a reasonable and necessary step to ensure that justice is done and is reasonable and necessary in balancing the interests of justice against those of individual dignity”.

In *Levack and Others v Regional Magistrate, Wynberg, and Another* 2004 (5) SA 573 (SCA), the application of section 37 of the Criminal Procedure Act was broadened to include voice recognition. The Court held that although the section does not expressly mention the voice it does form part of the innumerable bodily features that the wording of the section expressly contemplates. It was again confirmed by Cameron JA, that “*autoptic evidence*”, evidence derived from the accused’s own bodily features, does not infringe the right to silence or the right to be compelled to give evidence (paragraph 19). Cameron JA held in this regard as follows: “*Differently put, it is wrong to suppose that requiring the appellants to submit voice samples infringes their right either to remain silent in court proceedings against them or not to give self-incriminating evidence*” (paragraph 17). Therefore Cameron JA reaffirmed the findings of courts in the cases of *S v Huma and Another* 1996 (1) SA 232 (W).

In *S v Maphumulo* 1996 (2) SACR 84 (N). Cameron JA relied heavily on the findings of the court in *Ex parte Minister of Justice: In R v Matemba* 1941 AD 75, where Watermeyer JA held as follows:

“Now, where a palm print is being taken from an accused person he is, as pointed out by Innes CJ in *R V Camane* 1925 AD at 575, entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in Court”.

In *S v Maphumulo*, Combrink J held:

“I have concluded, accordingly, that the taking of the accuseds’ fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in section 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in section 25(2)(c), or 25(3)(d) of the [Interim] Constitution. Nor does it appear to be a violation of the accused’s rights as contained in section 10 of the [Interim] Constitution, which reads: “Every person shall have the right to respect for and protection of his or her dignity”.

In *S v Huma and Another* (2) SACR 411 (W), with regard to the privilege against self-incrimination, Claassen J held that the “*privilege against self-incrimination does not apply to procedures relating to the ascertainment of bodily features such as the procedures involved in identification parades, the taking of finger- and footprints, blood samples and the showing of bodily scars...[t]hese procedures relate to the furnishing of what has been termed “real” evidence, as opposed to the furnishing of oral or testimonial evidence by the accused*” (at page 417).

Therefore it would seem that on face value a database containing DNA profiles of convicted persons will not infringe any right contained in the Bill of Rights. The only open question would be if the retainment of a convicted person’s DNA profile would constitute an infringement of any right contained in the Bill of Rights. It is submitted that if the retainment of a DNA profile infringes upon a right contained in the Bill of Rights; it would pass the scrutiny of the limitation clause. In a country rife with criminal activity such infringement will be justifiable in an open and democratic society based on human dignity and equality.

5. Conclusion

It is therefore submitted that South Africa will immensely benefit from having a DNA database at the investigators disposal. This will ensure effective investigation and prosecution of criminal matters. On the face value a DNA database will not infringe on any right contained in the Bill of Rights. It can be said that to ensure sufficient and effective use of the DNA database, strict guidelines will have to be put in place with strict ethical guidelines regulating the use of the database. Furthermore legislation

has to ensure there are build in safeguards regulating the DNA database to insure the integrity of the system. Criminal liability should follow any misconduct regarding the use or tampering of the DNA profiles in the database. For reliability issues every match should be confirmed by subsequent test for confirmation. It is clear that it will take some time before a DNA database will be operational; whatever the time span may be it will still be an invaluable tool to the investigator in the fight against crime.

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