

CHAPTER 6

THE POSSIBLE RELIANCE OF AN APPLICANT IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW ON A RESIDUAL RIGHT TO PROCEDURAL FAIRNESS IN TERMS OF SECTION 7 OF THE CANADIAN CHARTER AND SECTION 12 OF THE FINAL CONSTITUTION RESPECTIVELY

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6.1 INTRODUCTION

Both the Canadian and South African Constitutions contain specific provisions that provide for the right to a “fair trial”,¹ “bail”² and the “freedom and security”³ of the person. The question arises whether an applicant in bail

¹ See section 11(d) of the Canadian Charter and section 35(3) of the Final Constitution. Also see section 34 FC which affords the right to a fair public hearing to decide any dispute that can be resolved by application of law.

² See section 11(e) of the Canadian Charter and section 35(1)(f) of the Final Constitution.

³ See section 7 of the Canadian Charter and section 12 of the Final Constitution.

proceedings under Canadian and South African law can rely on a residual right to procedural fairness in terms of section 7 of the Canadian Charter and section 12 of the Final Constitution. The answer to this question is crucial in determining the rights of an applicant for bail. If the answer is yes, it means that the courts have to abide by the rules of fair play when adjudicating bail. If the answer is no, it opens up a huge gap between the protection afforded at trial, and the protection afforded at the bail application under Canadian and South African law.⁴ In other words, the implication will be that in terms of the Canadian and South African Constitutions the guilt or innocence of an accused must be determined fairly, but fairness is not essential when bail is adjudicated.⁵

In this chapter it is investigated whether there is a right to procedural fairness at the bail hearing in terms of the Canadian and South African Constitutions. An appraisal is made of the position under Canadian and South African law. In conclusion, the principles under the two systems are compared.

⁴ That is before conviction (see chapter 5 where the presumption of innocence is discussed). Unless of course, due process at the bail application is guaranteed by some other provision in the Canadian Charter or South African Bill of Rights. See section 34 FC.

⁵ There will of course not be much cause for concern if there are policies or legislation in place which secure and promote procedural fairness. While the Canadian government proactively adopted legislation as far back as the early 1970s which promotes procedural fairness at the bail hearing, the procedural deficiency of the South African policies and legislation has been shown time and again in the instance of bail matters. It is accordingly crucial that the South African Constitution provide a safety net by ensuring that the notions of basic fairness, which now applies to the trial (see section 35(3)), also be applied to the bail hearing. See *S v Zuma* 1995 (4) BCLR 401 (CC) par 16 per Kentridge J with respect to the change in policy concerning the trial heralded by section 25(3) of the Interim Constitution.

6.2 CANADIAN LAW

6.2.1 General

The Canadian Charter provides as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁶

Two aspects of the Canadian Supreme Court’s interpretation of section 7 have comparative value for my analysis of section 12 of the Final Constitution:⁷

- the restrictive definition of “liberty”;
- the residuary definition of “fundamental justice”, a definition which invites the court to entertain a wide and un-enumerated variety of substantive challenges to the law.⁸

“Liberty” is the functional equivalent of “freedom” in section 12 of the South African Constitution and has been interpreted by the Canadian Supreme Court to mean freedom from physical restraint. This restraint primarily occurs in the criminal context and has been understood to include imprisonment,⁹ mandatory

⁶ Section 7.

⁷ The relatively restrictive definition of “security of the person” seems to primarily deal with some guarantee of personal autonomy. See Hogg (1992) 1029.

⁸ See Currie & Woolman in Chaskalson *et al* (1996) 39 - 2.

⁹ See *Reference re section 94(2) of the Motor Vehicle Act* [1985], 2 SCR 486 512 (Can); *R v Swain* [1991], 1 SCR 933, 63 CCC (3d) 481 (SCC); *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123 (Can).

fingerprinting,¹⁰ document production¹¹ and oral testimony.¹²

The Canadian courts have opted for (due process) seepage of the provision in the Canadian Charter relating to deprivations of liberty "in accordance with the principles of fundamental justice" in section 7 above, to the specifically enumerated criminal procedure rights found in sections 8 to 14 of the Charter. In *Reference re section 94(2) of the Motor Vehicle Act*¹³ Lamer J held that the enumerated criminal justice rights in sections 8 to 14 of the Charter were merely illustrative of the generic due process right contained in section 7. It also seems that section 7 is not limited in its ambit to procedural challenges, but the Supreme Court appears to have imputed a substantive dimension to the term "fundamental justice".¹⁴ Section 7 therefore not only protects those

¹⁰ See *R v Beare* [1988], 2 SCR 387, 45 CCC (3d) 57 (SCC).

¹¹ See *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* [1990], 1 SCR 425, 67 DLR (4th) 161 (SCC).

¹² *Ibid*; *Stelco Inc v Canada (Attorney-General)* [1990], 1 SCR 617, 68 DLR (4th) 518 (SCC).

Liberty for purposes of section 7 does not include political liberty (freedom of expression, association or political activity) which is protected elsewhere in the Charter. It also does not include economic liberty in the sense of for example freedom of contract. It is noted that the protection of property has also been omitted from section 7 and also from the other provisions of the Charter. This supports the proposition that the section is not concerned with rights and obligations in respect of economic interests. However, Hogg (1992) 1027 points out that some of the members of the Supreme Court of Canada have called for a more expansive approach. Wilson J for one citing *Re Singh v Minister of Employment and Immigration and 6 other appeals* [1985], 1 SCR 177 205, 17 DLR (4th) 422 (SCC); *Operation Dismantle Inc v The Queen* [1985], 1 SCR 441 488, 18 DLR (4th) 481 (SCC); *R v Jones* [1986] 2 SCR 284 318 - 19 (Can); *R v Morgentaler* [1988] 1 SCR 30, 164 - 6 (Can) as authority for the proposition, has constantly argued for a broad definition of liberty that would bring economic liberty within its ambit.

¹³ [1985] 2 SCR 486 502ff (Can).

¹⁴ See *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486

values already guaranteed in the criminal justice rights provided for in sections 8 to 14 of the Charter. If none of the provisions in sections 8 to 14 is understood to apply to a particular factual situation, section 7 will also be used to determine whether the law in question corresponds with the principles of fundamental justice.¹⁵

6.2.2 Appraisal

From the general discussion it appears that the structural relationship of this right with, and its effect on criminal justice rights, have been wholly settled. The utilisation of section 7 of the Canadian Charter as a generic and residual “due process right” ensures structural and conceptual similarity in the analytical process that allows for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this conceptual structure can be easily assimilated into the analysis of constitutional criminal procedure rights.

(Can).

¹⁵ See for example *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 (Can) where an oral inquiry into whether a corporation had committed an offence was not found to violate either the section 11(c) protection against self-incriminating evidence or section 13’s provision that self-incriminatory evidence given in one proceeding cannot be used against a witness in another. However, the Supreme Court held that section 7 could be read to include additional rights against self-incrimination. On this reading section 7 can be used to create new rights not expressly provided for in existing and applicable sections of the Charter.

6.3 SOUTH AFRICAN LAW

6.3.1 General

In terms of section 12 of the Final Constitution everyone has “the right to freedom and security of the person, which includes the right –

- (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”.¹⁶

¹⁶ The Interim Constitution provided for similar protection in section 11:

- (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhumane or degrading treatment or punishment.

Section 12(1)(a) and (b) of the Final Constitution correspond with similar protections against arbitrary arrest and detention in a number of international human rights instruments. See article 3 of the Universal Declaration of Human Rights (1948), article 9 of the International Covenant on Civil and Political Rights (1966), article 5 of the European Convention on Human Rights (1950) and article 7 of the American Convention on Human Rights (1969). See also Dinstein “Right to life, physical integrity, and liberty” in Henkin (ed) *The International Bill of Rights* (1981) 114, 128 - 136, Sieghart *The International law of human rights* (1983) 134 - 159 as cited by De Waal, Currie & Erasmus (1998) 193.

However, the question as to the interrelationship between section 12 and the criminal justice rights has created immense problems for many concerned with bail matters.

The right to freedom and security of the person played a conspicuous role in the early days of South African constitutional jurisprudence. Its predecessor¹⁷ was considered in five Constitutional Court decisions.¹⁸ This right proved difficult to interpret and led to disagreement between the members of the court.

In *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* Sachs J, while focusing on the rights subsumed in the expression “freedom and security of the person”, pointed out some of the difficulties.¹⁹ He held that determining the precise limits and content of these words would no doubt burden the Constitutional Court for a long time to come. He pointed out that other jurisdictions have battled with the

¹⁷ Section 11(1) IC.

¹⁸ See *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC); *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC); *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC); *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC).

¹⁹ In a separate judgment but agreeing with the order proposed by Kriegler J for the majority of the court. The constitutionality of section 65 of the Magistrates' Courts Act (32 of 1944) which provides for the enforcement of judgment debts was considered in this case. The system referred to allowed for the imprisonment of a recalcitrant debtor. In light of the substantial invasion of freedom and security that imprisonment involves, Sachs J did not think it necessary to investigate any of these complex issues. Kriegler J in addressing the question of whether the limitation of the right to freedom could be justified in terms of the limitation clause, found the absence of procedural safeguards decisive and declared imprisonment in terms of section 65 unconstitutional.

problem of whether the phrase should be construed as referring to one right with two facets, or to two distinct, if conjoined rights.²⁰ According to Sachs J another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint, or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges which have long been considered fundamental.²¹ Sachs J saw as even more difficult the questions relating to:²²

- the nature of citizenship and civic responsibility in a modern industrial-administrative state;
- the degree of regulation that is appropriate in contemporary economic and social life; and
- the extent to which freedom and personal security is achieved by protecting human autonomy on the one hand and recognising human interdependence on the other.

The words of Sachs J were prophetic in that it was not long after this that the members of the Constitutional Court were engaged in a dispute on the interpretation of section 11(1) IC. Ackermann J in *Ferreira v Levin* saw the "right to freedom" in section 11(1) as the constitutional protection of a sphere of individual liberty. Read in this way, he contended that the right amounted to a presumption against the imposition of legal and other restrictions on conduct without sufficient reason: "I would, at this stage define the right to

²⁰ Sachs J referred to two Canadian decisions as authority. They are *Re Singh v Minister of Employment and Immigration and 6 other appeals* (1985) 17 DLR (4th) 422 458 (SCC) and *R v Morgentaler* (1988) 44 DLR (4th) 385 493 (SCC).

²¹ Par 44 of the judgment.

²² *Ibid.*

freedom negatively as the right of individuals not to have 'obstacles to possible choices and activities' ... placed in their way by ... the State."²³ Ackermann J proceeded to hold that an unspecified number of residual freedom rights, guaranteeing liberties not specifically protected elsewhere in the Bill of Rights, are also protected by section 11(1). Included among these residual freedom rights was an immunity against self-incrimination in contexts where section 25(3) IC fair trial rights of accused persons did not apply.

However, Ackermann J's expansive analysis of the right was largely rejected by the majority of the court. Chaskalson P held that the primary though not necessarily the only purpose of section 11(1) was to ensure the protection of the physical liberty and physical security of the individual.²⁴ According to the majority it did not depend on the construction of section 11 in isolation whether "freedom" had a wider meaning but on its construction in the context of chapter 3.²⁵ They found chapter 3 to be an extensive charter of freedoms that guarantees and gives protection in very specific terms.²⁶ The detailed formulation of the rights in chapter 3 could therefore not be ignored in construing section 11. However, the majority accepted that section 11(1) had

²³ At par 54 of the judgment.

²⁴ Chaskalson P for the majority (with Mohamed DP, Didcott, Langa, Madala JJ and Trengove AJ concurring) argued that this was also the primary sense in which the phrase "freedom and security of the person" was used in public international law. They found nothing to suggest that the primary purpose was anything different in our law. They also found support in its contextual setting and being juxtapositioned with provisions dealing with torture and detention without trial.

²⁵ See par 170 of the judgment.

²⁶ See par 171 of the judgment. The abstract notion of freedom includes more than the protection of physical liberty and physical security. The wider concept of freedom is in the majority of cases protected by other specific provisions in the Bill of Rights. See Currie & Woolman in Chaskalson *et al* (1996) 39 - 16; De Waal, Currie & Erasmus (1998) 191.

a residual content and that it may, in appropriate cases, protect fundamental freedoms not enumerated elsewhere in chapter 3.²⁷

The court accordingly interpreted section 11(1) IC as principally protecting the individual against arbitrary detention or imprisonment. In the process the court rejected an interpretation of the subsection as a right of the individual to be free of state interference or otherwise stated at its widest, "to be left alone". However, the possibility was left open that section 11(1) may confer a right to substantive due process in cases where some residual but fundamental freedom of the individual is violated.²⁸

In *De Lange v Smuts NO*²⁹ the Constitutional Court read section 12(1) FC in much the same way as it read section 11(1) IC in *Ferreira v Levin*. The court indicated that the right to freedom and security of the person primarily

²⁷ The finding that section 11 did not protect fundamental freedoms enumerated elsewhere in chapter 3 was apparently based on the argument that all the fundamental rights were subject to a limitation clause in section 33. It was said to be significant that section 33 differentiated between the criteria to be used when the different categories of rights are to be limited. In the case of some the limitation not only had to be "reasonable" but "necessary". This was an indication that section 11 was concerned with a freedom of "higher order" than the freedoms not subject to such an onerous test.

Apparently underlining the contention that "freedom" should be interpreted narrowly they found that it would be highly anomalous to give unenumerated rights forming a residue in section 11(1) a higher status, subject to closer scrutiny, than other important rights which were only subject to the "reasonable" test. It was furthermore contended that if freedom were to be given its broad meaning all regulatory laws of our modern society would have to be justified as being "necessary". Courts would then have to sit in judgement on essentially political issues. This could not have been the intention. See par 173 and 174 of the judgment.

²⁸ See par 184 of the judgment. See also Currie & Woolman in Chaskalson *et al* (1996) 39 - 1.

²⁹ 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

protected an individual's physical integrity. The right to freedom functions as a "residual right, and may protect freedoms of a fundamental nature - especially procedural guarantees - not expressly protected elsewhere in the Bill of Rights".³⁰

The Constitutional Court had therefore erected a conceptual wall between the right not to be deprived of liberty in terms of section 12 and the rights of persons once detained, arrested or accused in terms of section 35. This prevented "due process seepage" from section 12 to section 35. It follows that because the right to be released from detention has been specifically catered for in section 35(1)(f), the residual right to procedural fairness in terms of section 12 will not be activated when release from detention is adjudicated.³¹

³⁰ At SA 794 par 16 and further.

³¹ However, this principle of the Constitutional Court of rejecting recourse to a general right contained elsewhere have often been disregarded by the courts. In dealing with section 25 rights (and therefore also section 35) the courts have at times based their arguments on the principles of liberty and due process. See for example *Moeketsi v Attorney-General, Bophuthatswana* 1996 (7) BCLR 947 (B), 1996 (1) SACR 675 (B) where the right to be tried within a reasonable time after being charged was discussed in terms of *inter alia* the right to liberty. In *S v Manyonyo* 1996 (11) BCLR 1463 (E) the right to pass through the criminal justice system within a reasonable period was discussed exclusively around the common law right of the liberty of the individual. In *Msomi v Attorney-General Natal* 1996 (8) BCLR 1109 (N) the court decided a question involving the taking of fingerprints without consent, in terms of the right against self-incrimination contained in section 25(3)(d) IC rather than in terms of section 11 IC, but relied on Canadian seepage jurisprudence relating to the principles of fundamental justice, to hold that there was no violation of the right against self-incrimination. In *S v Vilakazi* 1996 (1) SACR 425 (T) the presiding officer discussed the unlawful taking of fingerprints in the light of the presumption of innocence and the right to liberty even though there is a right against self-incrimination at trial in the Constitution.

The fact that the conceptual wall erected by *Ferreira* and *Nel* has not been respected by the courts, does not make the relationship between liberty, due process and section 35 FC any clearer.

Looking at the cases it seems that section 11 of the Interim and section 12 of the Final Constitution are not deemed broad enough to provide a general right to procedural fairness at all stages of the criminal process.³²

However, the approach by the Constitutional Court in *S v Dlamini; S v Dladdla; S v Joubert; S v Schietekat* is of special significance.³³ Kriegler J, on behalf of the unanimous court while referring to section 35(1)(f), indicated that the "Constitution itself ... places a limitation on the liberty interest protected by s. 12".³⁴ As authority Kriegler J quoted the provisions of section 7(3): "The Rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, *or elsewhere in the Bill.*"³⁵ Later in the judgment Kriegler J held: "But it is not only trial courts that are under a statutory and *constitutional* duty to ensure that fairness prevails in judicial proceedings."³⁶ The command that the presiding officer ensure that justice is done applies with equal force to a bail hearing."³⁷

³² See Klaaren in Chaskalson *et al* (1996) 25 - 1.

³³ 1999 (7) BCLR 771 (CC).

³⁴ See par 6 of the judgment.

³⁵ The italics are mine.

³⁶ See par 99 of the judgment (the italics are mine). In footnote 145 Kriegler J added that the message in *R v Hepworth* 1928 AD 265 remained as valid as it ever was. At page 277 Curlewis J stated:

A criminal trial is not a game where the one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

³⁷ Par 99 *ibid.*

It is furthermore noted that both the Director of Public Prosecutions and counsel for the defence treated section 12 as if there were no conceptual wall.³⁸ It therefore seems that the parties concerned, including the court, while not specifically deliberating about the interaction between sections 12 and 35, chose to ignore the prior decisions by the Constitutional Court.

6.3.2 Appraisal

It therefore appears that if you are an accused, procedural fairness at trial is ensured by section 35(3). If the right to a fair trial does not apply, the right to freedom provides protection if the physical liberty and security of a subject is deprived without due process of law. Physical freedom is described narrowly and is something analogous to detention. A deprivation by way of arrest or detention that is not authorised by law or that is not in compliance with law will be a clear violation of the right to freedom.³⁹ However, a deprivation will not comply with section 11 simply because it is authorised by law.⁴⁰ The authorisation in law may be arbitrary in the sense that it is not in accordance with fair or due process.⁴¹ The requirements of fair process will depend on the

³⁸ See page 86 of the heads of argument by the DPP and par 36 on page 33 of the judgment.

³⁹ A principle of the rule of law is that the state's action must be lawful.

⁴⁰ *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

⁴¹ *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC). The sections in the Criminal Procedure Act dealing with applications for bail being of specific relevance.

particular circumstances of the case.⁴² However, detention by order of a court will violate where it follows extraordinary procedures, which impact unfairly on the detainee.⁴³

Irrespective of the sound principles stated by the *Coetzee* and *Nel*⁴⁴ cases, there is no constitutional principle of procedural fairness in terms of section 12 at the bail hearing, because it has been excluded by the majority in *Ferreira v Levin*.⁴⁵

However, if one bears in mind that the Bill of Rights proposes to ensure that a

⁴² *Ibid.*

⁴³ *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

⁴⁴ See *ibid* and footnote 41.

⁴⁵ The erection of the conceptual wall by the Constitutional Court is supported by the Explanatory Memorandum to the Early Draft Bill of Rights of 9 October 1995 where it states as follows:

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

It may also be argued that section 7 of the Canadian Charter that requires procedure to adhere to the "principle of fundamental justice" can more easily be interpreted to lay down a principle of due process.

In addition even if it is decided that section 12 applies the decisions seem to indicate that the sort of "trial" that one is entitled to in terms of section 12 differs from the one in terms of section 35(3). The former lays down less rigorous requirements, or requirements less generous to the individual concerned than the latter.

government can be called upon to justify as fair the procedures it uses to mediate interactions between itself and the public, the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁴⁶ must without a doubt be correct where it holds that there must be fair play at the bail hearing.⁴⁷

The approach by all the parties concerned in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁴⁸ in tearing down the wall between sections 12 and 35 is also, I submit, correct. The criminal justice process constitutes an interference with the liberty of the subject by the state starting with the framing of laws which prohibit conduct. This is followed by the arrest and detention of suspects, the process of determining guilt, the passing and enforcing of sentence, up to the restoration of the subject's liberty, either upon acquittal or the setting aside of a conviction, or after service of sentence, or on parole. It does therefore seem that the rights in section 35 of the Final Constitution must be regarded as part of, or specific instances of, the right enumerated in section 12 of the Final Constitution.⁴⁹

In addition, the objection of the Constitutional Court in *Ferreira v Levin* as to the different criteria that have to be applied to different rights has disappeared with the new limitations clause in section 36 of the Final Constitution.⁵⁰ The

⁴⁶ 1999 (7) BCLR 771 (CC).

⁴⁷ See par 99 of the judgment.

⁴⁸ 1999 (7) BCLR 771 (CC).

⁴⁹ See also Snyckers in Chaskalson *et al* (1996) 27 - 1 and further; Du Plessis & Corder (1994) 171 where they indicate that the rights in section 25 of the Interim Constitution are either direct or indirect manifestations of the right to freedom of the person entrenched in section 11(1) or manifestations of the right to security of the person.

⁵⁰ See footnote 27.

unenumerated rights would therefore not enjoy a higher status than the rights specifically protected by way of section 35 and in so doing defeat conceptual similarity in the analytical process.

Whatever the case may be, it seems that the drafters of the Final Constitution wanted to strengthen procedural fairness by expanding the procedural guarantees of the Interim Constitution. As an example, the provision ensuring access to courts now includes the right to a “fair public hearing”⁵¹ and arrested, detained and accused persons can rely on the provision for the exclusion of evidence obtained in a manner which violates a fundamental right.⁵²

It is suggested that the new “access to courts” provision in section 34 is certainly able to perform the due process seepage into section 35 that the Constitutional Court in *Ferreira* and *Nel* denied the deprivation of liberty clause.⁵³ Section 34 FC provides that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public

⁵¹ Section 34.

⁵² See section 35(5) FC. Also see De Waal (1997) 13 *SAJHR* 228 229.

⁵³ This is especially so if regard is had to the interpretation of article 6 of the European Convention on Human Rights which bears a remarkable resemblance to section 34 FC. Article 6(1) is the general fair trial provision that applies to “everyone” in the determination of his civil rights and obligations or where a criminal charge is laid against him. The Convention organs have afforded this general fair trial right an “extensive and autonomous” interpretation resulting in its operation not only as a residual fair trial right, but also impounding on those aspects of a fair trial which are specifically provided for in article 6(2) and 6(3). As an example the right to be presumed innocent which is not even contained under the “minimum” inclusionary umbrella of article 6(3) is granted in isolation to everyone “charged with a criminal offence” and has been held to apply outside the sphere of criminal conviction wherever a penalty may be exacted. See *Adolf v Austria* (1982) 4 EHRR 313, *Minelli v Switzerland* (1983) 5 EHRR 554 & *Snyckers in Chaskelson et al* (1996) 27 - 11.

hearing before a court or, where appropriate, another independent and impartial tribunal”.

The pertinent mention of “fair public hearing” in section 34 is clearer than the reference to “trial” in section 12(1)(b) of the Final Constitution and the reference to deprivation of freedom “arbitrarily or without just cause” in section 12(1)(a). Some might argue that this is an indication by and the intention of the legislator that the Constitutional Court should break down the conceptual wall that was built up in their judgments on section 11 and 12.

However, in *S v Pennington*⁵⁴ the unanimous court remarked *obiter* that section 34 FC did not apply to criminal proceedings:⁵⁵

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

Having mentioned the two contenders it is not clear on what the Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* based the constitutional duty, to ensure that fairness prevails at the bail hearing. However, I agree that there must be and is such a constitutional duty.

Perhaps the most compelling reason for the existence and acceptance of a general “principle of fundamental justice” is the fact that provision cannot be specifically made for fairness at each occurrence that might present itself in the criminal justice process. This is presumably exactly the reason why an

⁵⁴ 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) as per Chaskalson P.

⁵⁵ At par 46 of the judgment.

accused is guaranteed a fair trial apart from the specific enumerated rights in section 35(3) of the Final Constitution. This misconception by the drafters of the Bill of Rights and the Constitutional Court has been evident time and again in the instance of bail procedures.

Taking into account the close link between the presumption of innocence, the right to freedom and security in section 12, and the criminal procedure rights in section 35, it is difficult to accept otherwise than that section 12 must have a residual due process function in the Canadian fashion. As far as the protection of the liberty of someone confronted by the criminal justice system goes, section 34 therefore seems redundant. Because section 12 has its own due process function, the application of section 34 to issues of liberty alongside section 12 might even cause a dissimilarity in approach by the criminal justice system towards someone who comes into contact with that system.

6.4 CONCLUSION

Under Canadian law section 7 of the Charter operates as a generic and residual “due process” right and assumes the character and status thereof. This due process right operates independently and informs the interpretation of all the rights dealt with in sections 8 to 14 of the Charter. This includes the right to bail in section 11(e). If none of the provisions in sections 8 to 14 is understood to apply to particular facts, section 7 will be used to determine whether the law in question corresponds with the principles of fundamental justice.

The utilisation of section 7 as a generic and residual “due process right” ensures structural and conceptual similarity in the analytical process that would allow for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this

conceptual structure could then be easily assimilated into an analysis of constitutional criminal procedure rights.

Although this utilisation of section 7 forms part of the Canadian “fundamental justice” jurisprudence, it seems that the Constitutional Court did not approach the situation in the same way. The Constitutional Court has erected a conceptual wall between the right not to be deprived of liberty in terms of section 12 and the rights of persons in terms of section 35 once detained, arrested or accused. This prevents “due process seepage” from section 12 to section 35. However, remarks by Kriegler J on behalf of the unanimous Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁵⁶ may now indicate that there was a change of heart.

It therefore appears that an applicant for bail under Canadian law can rely on a residual right to procedural fairness in terms of section 7 of the Canadian Charter. Because the Constitutional Court erected a “conceptual wall” between section 12 and 35,⁵⁷ it would notwithstanding the approach by all parties in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*, have to be accepted that an applicant for bail under South African law is not afforded similar protection.

⁵⁶ 1999 (7) BCLR 771 (CC).

⁵⁷ When it specifically addressed the interaction between the liberty and criminal procedure rights.