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11.1 INTRODUCTION

This chapter draws together the issues that have been pursued and the

conclusions that have been reached in this study.¹ This is effected by posing and answering three questions after which recommendations and concluding remarks are made.

Because this is mainly a comparative study, the question is first addressed whether the Canadian Charter and Charter jurisprudence are suitable sources of reference for human rights and particularly the right to bail in South Africa. In the second part a holistic overview of the right to bail under Canadian and South African law is given. This part also takes note of the principles that have been applied, and the balance that has been struck at different times in history. In the third part the question is addressed whether the correct balance has been achieved between the individual's right to freedom and security, and the interests of society under South African law. In this part the contemporary South African position is put under the magnifying glass and the lessons that have been learnt from this study are applied in answering the posed question. Finally, recommendations for an effective and equitable system of bail which are based on the correct interpretation and application of the principles which have been designed to ensure a fair contest, are made.

11.2 ARE THE CANADIAN CHARTER AND CHARTER JURISPRUDENCE SUITABLE SOURCES OF REFERENCE FOR HUMAN RIGHTS AND PARTICULARLY THE RIGHT TO BAIL IN SOUTH AFRICA?

The Canadian Charter and Charter jurisprudence are excellent sources for human rights and specifically the right to bail in South Africa. The Charter did not arrive suddenly or unexpectedly in Canada on 17 April 1982. Unlike the position in South Africa, the move away from the principle of parliamentary

¹ The conclusions are included in this chapter for easy reference and to facilitate the discussion.

supremacy inherited from the British Empire was incremental. This gradual process spanned across more than a century, rather than happening overnight. Under Canadian law tentative protection was first afforded to certain rights and eventually formal entrenched guarantees saw the light.

Some of the fundamental rights and liberties that Canadians enjoy have their roots as far back as manifestos like the Magna Carta, the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement. In addition the need for and extent of constitutional rights that are immune to the lawmakers had been debated from as far back as 1865 at the "Confederation Debate". As a result of the management of relationships, the constitutional protection of a limited number of rights already appear in the Constitution Act of 1867. Since the formation of the Dominion in 1867, Canadians have also tried to manage relationships by way of federalism. The balancing of interests has therefore for a very long time formed part of Canadian law.²

However, the balancing of interests still proved to be problematic³ and led to the development and protection of the interests of newly politicised categories relating for example to sex, ethnicity and, of special relevance for this study, persons confronted by the criminal justice system. As far back as 1960 the Canadian Bill of Rights already contained a declaration of fundamental rights and freedoms which contributed to the development of a human rights culture. Although the rights in the Bill, including the right to bail, were not

² The English common law principles of bail that were adopted into Canadian law have been developing since the 7th century AD. At that time payment was made to the alleged victim to temporarily satisfy the accuser and to prevent a feud between the families. By the 11th century AD the accused was already allowed to pay a sum of money to the sheriff to avoid pre-trial incarceration.

³ Massive violations of individual's rights took place especially where race, religion and communism played a role.

constitutionally entrenched, the Bill ensured their scrutiny, especially by the courts, as both legislative and non-legislative matters had to be construed in light of the Bill. Some of these rights, including the right to bail, were duplicated in the Charter.

In the 1960s and 70s there were also many other legislative initiatives mainly dealing with discrimination that strengthened the rights of Canadians. However, it was the serious and sometimes frantic debate among members of the legal fraternity and especially politicians from the 1950s up to 1982, when the Charter commenced, which proved invaluable in shaping these new civil liberties. Since 1982 these liberties have been guaranteed by the Canadian Constitution and utilised along with federalism to fashion harmonious coexistence. Since 1994 South Africa has also been a federal state with a supreme constitution providing protection to civil liberties along similar lines.

Of utmost importance is the clarifying role that the Canadian courts have played after the adoption of the Canadian Charter. The Canadian courts in accepting their new socio-political role to reconcile the individual and the community, interpreted and applied the Charter responsibly, and thereby built up a huge body of judicially developed protections. The judgments by the Canadian courts not only show the experience that has been gained, but points to the kind of society that Canada is and wants to be.⁴

Of course the reference to foreign law will not be a safe guide unless the principles of comparative law are followed.⁵ In the area of criminal procedure

⁴ There is a wide perception that as far as human rights are concerned, Canada is the country that is the best to live in.

⁵ See *S v Makwanyane* 1995 (3) SA 391 (CC) par 37 and *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 133. See also the *caveats* in par 1.1 and 1.5.5.3.

the comparison is extremely apposite in light of the fact that the law of criminal procedure and evidence in both Canada and South Africa is premised on the English common law of criminal procedure and evidence.⁶ Both systems are therefore based on the same fundamental principles.⁷ As with the Canadian Charter, the Bill of Rights in South Africa was superimposed on the English common law of criminal procedure and evidence.⁸ As a result many of these English principles were taken up in both Constitutions.⁹ The underlying rationale or reasoning for the existence of these principles are therefore similar and accordingly suitable for consideration.¹⁰ As far as the principle of bail is concerned, the earliest roots of bail under Canadian law can be traced back to English common law. This beginning is also part of the South African common law heritage.¹¹

The value of comparison for this study is further enhanced by the similarity in the constitutional structure within which the criminal procedure rights operate under Canadian and South African law. Particularly with regard to this study, both Constitutions provide for the “freedom and security” of the person¹² and

⁶ See chapter 1 footnote 3, par 2.5.1.2, Dugard (1977) 25, Schmidt (1989) 12 and further and Steytler (1998) 13.

⁷ For example the presumption of innocence which forms the cornerstone of the criminal justice system in both countries (see chapter 5) and the right against self-incrimination (see chapter 9).

⁸ See chapter 1 footnote 4 and Steytler (1998) 1 - 6 & 13.

⁹ See chapter 1 footnote 4.

¹⁰ See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) par 72.

¹¹ See chapter 2.

¹² See chapter 6. The underlying reasoning for this legal norm has steadily become more universal and can therefore fruitfully be used for comparative purposes. See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) par 72.

lodged together with other criminal procedure rights, the right to be presumed innocent, the right against self-incrimination and the right to bail. In addition both Constitutions provide for a general limitation clause.¹³ The undeniable debt that the South African limitation clause, which is definitive to the method of fundamental rights analyses, owes to Canadian law, calls for an even closer scrutiny of these principles.¹⁴ The Canadian example is therefore ideally suited to assist in the interpretation and application of these principles which are highly contentious under South African law. It would indeed be folly to not look at the Canadian example as the Supreme Court of Canada, and other courts to a lesser extent, have been particularly helpful in explaining the basis and structure of these similar fundamental rights.

Canada, to a lesser extent than South Africa, is also burdened with circumstances that frustrate the objectives and the proper functioning of the bail system (in some instances under Canadian law).¹⁵ Charter jurisprudence can therefore provide solutions to troublesome provisions as the right to bail has proved to be in South Africa.

As the Canadian Charter and Charter jurisprudence are such an appropriate source of reference for human rights and the right to bail in South Africa, it is a pity that the South African courts and legislature did not take better cognisance of the substantial jurisprudence under Canadian law. With the insight provided from this jurisprudence, the imbalance¹⁶ and many of the problems that now exist under South African law could have been avoided.¹⁷

¹³ Section 1 of the Charter and section 36 of the Final Constitution.

¹⁴ See chapter 1 footnote 15 & chapter 8 footnote 164.

¹⁵ See par 8.2.2.2.c.1.

¹⁶ See par 11.4.

11.3 HOW DOES THE RIGHT TO BAIL UNDER SOUTH AFRICAN LAW COMPARE WITH THE RIGHT UNDER CANADIAN LAW?

11.3.1 General

While both systems afford the right to bail constitutional protection by way of a fundamental rights provision, the future existence of this right, or continued existence in the same form, is not ultimately guaranteed by either the Canadian or South African Constitution. This is so because the Canadian Charter by way of section 33 provides that this right may be overridden by a “notwithstanding” clause under Canadian law and both Constitutions contain amending formulas.¹⁸ Because of this there is an uneasy coexistence. The fundamental rights provisions, and the “notwithstanding” clause and amendment formulas, disagree on the fundamental purpose of the Constitution and for whose benefit it exists. This tension derives from the following syllogism:

- The Canadian Charter and Bill of Rights provide citizens with rights against their respective governments.
- The “notwithstanding” clause gives the Canadian legislature the power to override certain Charter rights¹⁹ and the amending formulas under both

¹⁷ As an example, a reading of the Canadian Supreme Court decision in *R v Pearson* (1992), 12 CRR 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC) would have gone a long way towards explaining the function of the presumption of innocence as a substantive principle of fundamental justice in the criminal process.

¹⁸ See chapter 7 footnote 1.

¹⁹ However, this controversial provision has been used sparingly to date. The provision was only added to the Charter as late as 5 November 1981 as a

Constitutions give the governments a monopoly on formal constitutional change.²⁰

- The fundamental rights are accordingly conditional on the Canadian government not abusing the monopoly power to override or on both governments not abusing their monopoly of the amending power.

The Constitutions therefore make two contradictory statements about sovereignty with all the symbolism which that involves. On the one hand the Canadian Charter and Bill of Rights indicate that the rights of people are more

political compromise to secure the consent of the seven provinces that had until then been opposed to the Charter on the ground that it limited the sovereignty of their legislatures (see also par 3.2.9). Quebec, the one province that did not give its assent to the Charter, by way of an Act entitled "An Act respecting the Constitution Act, 1982" added a standard-form "notwithstanding" clause to each of the statutes in force in Quebec on 16 April 1982. But as the Act did not override the Quebec Charter of Rights and Freedoms the purpose of the Act was clearly not to abridge civil liberties but to protest the imposed national charter. Outside Quebec the override has been used only once by the Saskatchewan government to protect the SGEU Dispute Settlement Act SS 1984 - 85 - 86 which ordered striking workers to return to work. See Hogg (1992) 891 and further, Funston & Meehan (1994) 192 - 193 and Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 597. Hogg (1992) 898 indicates that the governments are exceedingly reluctant to use section 33. This is so because of a principled commitment to the Charter and partly because of the political resistance that can be expected from opposition parties, the press, the organised bar and civil liberties groups. Powerful reasons of public policy would therefore have to be present to justify the use of section 33.

²⁰ It might also not be that easy to secure an amendment by way of the amending formulas under both systems because of the high level of agreement required by the amending formulas. Under Canadian law the central government and at least seven of the ten provinces must agree to an amendment. In addition, the fifty percent requirement in the general amendment formula under Canadian law means that at least one of Ontario or Quebec must agree to the amendment since the combined population of these provinces comprises more than fifty percent of the population. Under South African law two thirds of the National Assembly, and the National Council of Provinces with at least a supporting vote of six of the nine provinces, must agree to an amendment of the Bill of Rights. See section 74. See also Hogg (1992) 74 and chapter 7 footnote 1.

important than those of governments. On the other hand the “notwithstanding” clause enables the Canadian government to remove a statute from the reach of the Charter, and the amending formulas under both systems provide that the governments can amend the Constitution in terms of their own self-interest and announce the result as a *fait accompli*.

But there does not seem to be any present or foreseeable need for, or danger of the Canadian government in overriding or either amending or removing this provision. The basic guidelines on which bail is granted under Canadian law have remained essentially intact since the early 1970s. Under South African law the right to bail has already been watered down in the Final Constitution.²¹ Despite this, the Minister of Safety and Security, Mr Steve Tswete, in October 1999 indicated that he would change the Constitution to amend the laws “behind which criminals hide”.²² It seems that the continued existence of the right to bail under South African law is less safe than under Canadian law.

11.3.2 The scope of the right

Under Canadian and South African law the right to bail only applies to natural persons and includes all forms of release. Under Canadian law it applies from when a person is “charged” within the meaning of section 11 of the Charter when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. Under

²¹ See par 8.3.4.

²² See the *Pretoria News* of 15 October 1999 at page 5 under the heading “Thugs can’t use ‘rights’” and *Beeld* of 16 October 1999 at page 5 under the heading “Regering gekritiseer oor menseregtekultuur in SA”. The Minister made the remark before the National Council of Provinces on 14 October 1999. See par 11.4 where I discuss the remarks made by the Minister and the reaction thereto by the Human Rights Commission.

South African law a person has the right to bail once legally arrested. It may be on the mere suspicion of having committed an offence.

As a person is usually arrested, then detained, and then becomes an accused on being charged, it seems that the constitutional right to bail under South African law in this instance becomes available at an earlier stage. After arrest and before being charged a person under Canadian law does not have a right to bail. Under South African law application can be made for bail at that stage. On the other hand, if a person is charged under South African law, and attendance is secured by subpoena, the accused does not have the right to bail for he has not been arrested. If an information is sworn or a grand jury brings out an indictment under Canadian law, the charged person has a right to bail even if attendance is secured without arrest.

It seems that under both systems a person may in certain circumstances have the right to bail where there is no need for it. Where a person is charged under Canadian law and means other than arrest is used to secure attendance at court, the accused would have the right to bail. Where a person is arrested and released under South African law the accused retains the right to be released on bail.

Because one is not "charged with an offence" or "arrested for allegedly committing an offence" after conviction or acquittal it seems that these rights do not extend beyond the verdict of the court a quo.

The right to bail under Canadian law has wider application. It applies to all matters of a public nature, intended to promote public order and welfare within a public sphere of activity. If a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline or integrity

or to regulate conduct within a limited private sphere of activity, the right to bail will exist if the proceedings involve the imposition of true penal consequences. Under South African law, the courts have limited the right to bail to the normal criminal process.

But certain South African tribunals or institutions other than criminal courts have the power to arrest, hear and sentence an individual for the alleged commission of an "offence". Common sense dictates that an individual who is subject to this severe deprivation of liberty should be entitled to the highest procedural protection in our law. It would furthermore be in line with the spirit of the Constitution.

11.3.3 The foundational basis and structure

11.3.3.1 General

The position under Canadian law is complemented by the predominantly sound understanding of the foundational basis and structure of the rights of an individual confronted by the criminal justice system, including an applicant for bail. Under South African law there is little if any clarity on the foundational basis or interrelationship of these rights within the constitutional structure. Nevertheless many criminal procedure rights are granted under South African law.

11.3.3.2 The presumption of innocence

Under Canadian law the role that the presumption of innocence plays before conviction is certain. Section 11(d) of the Charter ensures that the presumption of innocence operates at trial, where the guilt or innocence of the accused is to

be established. It is also accepted that this presumption protects the fundamental liberty of every person at each step of the criminal justice process prior to conviction. Section 11(e) entrenches the effect of the presumption at the stage of the bail hearing.

Yet, there is some disagreement as to whether it is this presumption that forms the substantive principle in section 7 of the Charter which affords protection in the criminal justice process after conviction. What is certain, is that the substantive principle in section 7 provides protection after conviction up to the end of the criminal process. The residual content of the substantive principle is determined by the particular step in the process.

Under South African law the presumption of innocence is entrenched by section 35(3)(h) of the FC. Section 35(3)(h) operates at trial where the guilt or innocence of the accused is to be established. However, even the extent of this presumption at trial has not always been altogether clear, and its operation outside the trial context if any, which is relevant for this study, has posed immense problems.

The Constitutional Court and some high courts have indicated an interrelationship between this presumption and some other rights in the Bill of Rights. However, these decisions do not seem to be authority to widen the scope of the presumption outside the narrow context at trial. At common law and at least one high court has indicated that the presumption operates at all pre-trial procedures and up to conviction. A number of high courts have indicated that the presumption applies at the bail hearing before trial.

In spite of it being certain that section 35(3)(h) only applies to trial, some courts have even held that this constitutional provision had to be considered

when bail was considered. On other occasions courts and academics have argued that the presumption of innocence had to be discounted when application is made for bail, without it being clear whether reference is made to the constitutional provision, or the common law presumption.

However, the South African authorities seem to agree that there is no right to bail, or a presumption that favours bail, after conviction. Notwithstanding, it seems that after conviction this presumption, in some respects is given greater effect than under Canadian law, where the application of the substantive principle in section 7 is accepted.²³

When a new trial has been ordered, Canadian case law indicates that the accused is in the same position as a person confronted with a new trial. He has a conviction outstanding against him and is entitled to the same presumption of innocence. Under South African law no authority could be found dealing directly with this issue. It seems reasonable to accept that the same principles would apply as those principles which apply to one who is initially confronted by the criminal justice system.

11.3.3.3 The right to “freedom and security”

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 contained in sections 8 to 14 of the Charter. Therefore also the right to bail in section 11(e). If none of the provisions in sections 8 to 14 is understood to apply to a particular fact scenario section 7 will be used to determine

²³ And it is accepted that the presumption of innocence is the substantive principle in section 7 of the Canadian Charter.

whether the law in question complies with the principles of fundamental justice.

This 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 analysis of constitutional criminal procedure rights.

Although this forms part of the Canadian “fundamental justice” jurisprudence it seems that the Constitutional Court has not approached 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 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*²⁴ may indicate that there has been a change of heart.

11.3.4 The principles in general

11.3.4.1 General

In spite of the disagreement as to the structure and foundation, the basic principles are very similar under the two systems. The similarities suggest that South Africa borrowed heavily from Canadian law when it constructed the constitutional right and guidelines to bail.

²⁴ 1999 (7) BCLR 771 (CC).

11.3.4.2 Arrest and appearance in court

In the normal process both systems provide that arrest without a warrant may only be made in certain circumstances by a peace officer. Even though the unlawful arrest can certainly be contested in court under both systems, the detainee under Canadian law is advantaged in that the Criminal Code directs the arresting officer to release such person, as soon as practicable hereafter. In certain instances of arrest without a warrant there is even in effect a review by a superior.

If an arrest is effected legally, the Criminal Code of Canada provides that an arrested person must be brought before a justice of the peace without delay, and in any event within a twenty-four hour period after arrest. Where a justice is not available in the time period the arrested person shall be taken before a justice as soon as possible. Under South African law an arrested person who is similarly not released by a police official or the attorney-general has to be brought before a lower court as soon as possible, but not later than forty-eight hours after arrest. If the forty-eight hours expires outside court hours or an ordinary court day, the accused must be brought before a lower court not later than the end of the first court day.

11.3.4.3 Remand in custody

The accused under Canadian law is further advantaged, in that the enquiry into whether the accused should be released on bail, or otherwise, may not be postponed for more than three clear days at a time without the permission of the accused. Under South African law, the court may postpone for not more than seven days at a time. While these postponements are most frequently used by the prosecution to gather information to contest a bail application, it

seems that the lengthier time frame under South African law points to the lesser capability to deliver on the part of the South African prosecution.

However, the idea that a person should only be entitled to bail once sufficient information has been gathered regarding the transgression is not new to our law. The principle was introduced by Ordinances 30 of 1928 and 72 of 1830 along with the introduction of the preliminary investigation. This was done by only conferring a right to bail once the preliminary investigation has been completed. However, the magistrate had the discretion to grant bail. After completion of the preliminary investigation, but before committal for trial, the attorney-general had to approve the release.

From this time period and into the Union we see the principle that once the case has been committed to trial an accused was entitled to bail. The Criminal Procedure and Evidence Act of 1917 again made the granting of bail possible before the facts of the case had been adequately looked at, except in the case of certain serious offences. But the entitlement to bail still only arose after committal for trial and then only the supreme court could grant bail in case of certain serious offences. However, bail could be granted by the supreme court at any stage of the proceedings.

Yet, one must appreciate that an accused was entitled to be brought before a court at his request to pursue his release in the previous era at any time, even after hours. There was also no provision enabling the state to postpone an application for bail in order to gather information. In this regard the individual's right to liberty has therefore diminished considerably under South African law with the advent of the fundamental rights era. It seems that the ability of the prosecution to deliver must have deteriorated markedly.

11.3.4.4 Onus

Under both systems there is a basic but prescribed entitlement to bail before conviction where the onus is on the state to justify continued incarceration, except in certain prescribed instances.²⁵ However, under South African law this may not be a true onus. Where the prescribed circumstances present themselves, the onus is on the applicant to convince the presiding officer that he should be released. While the onus is similarly reversed in case of some serious offences, where the applicant is a repeat offender, the alleged offence is committed while out on bail or where there is some kind of common purpose or conspiracy, the South African legislator went one step further in that it expects something above the constitutional standard from the applicant in the case of the very serious offences mentioned in schedule 6 of the Criminal Procedure Act. It has been noted that the Canadian Committee on Corrections under Roger Quimet as far back as 1969, indicated that the principle that bail will be granted only in "exceptional circumstances", even pending appeal, was too restrictive.²⁶ The list of offences where the burden is reversed is also much more extensive under South African law.

11.3.4.5 Terms of release

In addition the applicant before a justice under Canadian law, will be released on the least restrictive terms if the prosecutor does not convince otherwise. This represents a marked difference in approach. The more onerous prescribed

²⁵ Even if it is accepted that section 35(1)(f) does not confer a basic entitlement to bail under South African law, section 60(1)(a) of the CPA surely does so. Under Canadian law it is afforded by the CCC and by the Canadian Charter.

²⁶ See par 5.2.2.3.

terms only come into play once the prosecution has proved that “lesser” terms are not adequate.

By whatever name it is called, it seems that Canadian and South African law provide for release on “warning” and “bail” with or without conditions. However, under Canadian law sureties are first considered under the less onerous conditions when a decision on bail is made. Money or other valuable security therefore only has to be deposited when the prosecution has proven sureties inadequate. As a last resort before refusing release, Canadian law in one prescribed instance even provides that sureties may be called for and money or other valuable security must be deposited. Both systems provide that excessive bail cannot be granted.

This approach under Canadian law clearly gives due regard to the liberty interests of an applicant for bail and accords with the structural and analytical similarity of the criminal justice process.

11.3.4.6 Role of presiding officer

Under Canadian law the presiding officer has the power to act inquisitorially, but the system is basically accusatorial. Under South African law a greater responsibility is cast upon the presiding officer in that he is obliged to act inquisitorially, also it seems where the reverse onus does apply. The Criminal Procedure Act expressly instructs the court not to act as a passive umpire. If neither side raises the question of bail, the court must do so.²⁷ If the party that bears the burden of proof does not on his own accord adduce the necessary evidence, the court must take the initiative.²⁸ Even where the prosecution does

²⁷ Section 60(1)(c).

²⁸ Section 60(3).

not contest bail, the court must still make up its own mind.²⁹ Even though these provisions were only enacted recently the idea is not new to South African law. We have already seen that the procedure to determine bail in the time period 1652 until 1806 was inquisitorial.

This difference in emphasis is probably justified by the lesser ability of the prosecution and applicant, depending on where the onus lies, in the majority of cases under South African law to present the court with the necessary facts. The added procedural safeguard under South African law is therefore necessary to ensure equitable criminal justice.

11.3.4.7 Authority to grant bail

Under Canadian law only the Supreme Court may grant bail for the serious offences listed in section 469 of the Criminal Code of Canada. Under South African law the regional court has been tasked to consider bail for the “most serious” offences mentioned in schedule 6. The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is hereafter instituted. On the same principle the regional court would also have to consider the bail application for a “lesser” offence once the case has been transferred to it. While the granting of bail for certain serious offences was limited to the supreme court by the Criminal Procedure and Evidence Act of 1917, and thus has historical precedent, the sheer quantity of schedule 6 offences probably makes such a proposal impractical.

²⁹ Section 60(10).

11.3.4.8 Constitutional standard

Under both systems a constitutional standard is imposed in terms of which bail is granted or denied. While these criteria, which set the normative pattern and are central to any discussion on bail, are described in different words, that is, “if the interests of justice permit” and “without just cause”, the circumstances to be taken into account in terms of the respective legislation show great similarity. When appraising this standard, sight must not be lost of the fact that the liberty interests of the applicant are included in, and have to be given full value under both systems. The potential factors, broadly speaking, to be taken into account and which are common to both systems are attendance at trial, protection of the public and good administration of justice. While the propensity to commit crimes is to be taken into account under Canadian law, only the likelihood to commit a schedule 1 offence is indicated under South African law as justifying refusal of bail.

Even though objections have been raised under South African law against the propensity to commit crimes as being preventative detention, it has been shown to be mandated in the common law of both countries, along with the danger of the offender to society. The strength of the case, and the nature of the offence against the offender, have similarly been determining factors. However, the nature of the offence seems to have been incorrectly used in some instances as punishment. Even under Roman-Dutch law it was understood that an offender (or the surety) would be less willing to stand trial in view of the harsh punishment that could be imposed.

Of late a new ground was added under each of the legal systems. Under South African law the refusal will also be in the interests of justice “where in exceptional circumstances there is the likelihood that the release of the

accused will disturb the public order, or undermine the public peace or security". Under Canadian law refusal of bail is justified "on any other just cause being shown and, without limiting the generality of the foregoing" "in order to maintain confidence in the administration of justice". However, the ordinary factors mentioned in the subsection that would point to incarceration in order to ensure that confidence be maintained are in main not new factors to be taken into account when bail is adjudicated. Only the ground, that is, to maintain confidence in the administration of justice, is an innovation.

But it seems that an adverse opinion by the public is not enough to constitute the disturbance or undermining that the South African addition requires,³⁰ while the maintenance of confidence is expressly included under Canadian law. While public opinion may be helpful under Canadian law, it must be agreed that it should not be a determining factor under South African law. In general Canadian society is much more advanced than our's. Our courts have accordingly on numerous occasions stated that a large part of our population is ignorant of the law. This must surely be so to a much greater extent with regard to international accepted standards. It is therefore submitted that public opinion should not dictate the principles of the system in South Africa, but be a reminder to the government to improve the efficiency of the police and criminal court system so that we can make the accepted principles work. The accepted principles should therefore not be compromised to appease the uninformed majority.

It is clear under Canadian law that any other just cause may be shown that would invite incarceration. However, the finding by the Constitutional Court that the open-ended character of section 60(5) to (8A) of the Criminal

³⁰ *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 54 and further.

Procedure Act permits other factors than those in subsection (4) to be taken into account, is not convincing. What the final subsection in subsections (5) to (8A) says, is that any other relevant factor may be taken into account, to determine whether the factors in subsection (4) are present. However, it is clear that the Constitution does not allow for such a limitation on the power of the court to decide the matter. The Constitutional Court's finding that other factors may be taken in account is therefore in line with the Constitution and the position under Canadian law. However, the Constitutional Court should have concluded that the legislature offended the separation of powers doctrine.

While the circumstances only have to be *likely* to prevent release under South African law, incarceration has to be *necessary* under Canadian law to ensure attendance or to maintain confidence in the administration of justice. In addition, custody under Canadian law is justified where there is a *substantial likelihood* that the accused if released from custody will commit a criminal offence, or interfere with the administration of justice.

11.3.4.9 Use at trial of evidence by an applicant for bail

The prosecution under South African law is furthermore significantly favoured by the fact that the evidence by an applicant for bail, informed that his evidence will be admissible at his later trial, is admissible at the subsequent trial to incriminate or test the credibility of the accused. While the evidence may be excluded under South African law in the interests of justice, it seems not to be in the interests of justice where the applicant has thus been informed. In this situation Canadian law guarantees an accused that his prior testimony at the bail hearing may not be used to incriminate him at the trial. It is certain that answers to which an accused objected in his testimony at the bail hearing may not be used to test his credibility during cross-examination at

trial. However, it is uncertain under Canadian law whether the remaining testimony by the accused presented at the bail application, may be used to test the credibility of the accused at trial.

Where the use of evidence is prohibited under South African law, for example where the accused was unaware of his right against self-incrimination, the admissibility of derivative evidence at the subsequent criminal trial is on similar footing as under Canadian law. Here the courts under both systems have the discretion to exclude such evidence to ensure a fair trial.

11.3.4.10 Discovery

One area where an applicant for bail in South Africa might have a slight edge over his counterpart applying for bail under Canadian law, is where access is sought to information held by the prosecution. This is so, notwithstanding the fact that the South African legislature has expressly refused access to information for purposes of the bail application, and there is no similar prohibition under Canadian law. While it is clear from the judgments of the Canadian courts that there was only a duty to disclose for purposes of trial, the Constitutional Court has diluted the effect of the prohibiting legislation under South African law to allow for information in some instances.

The Constitutional Court has indicated that section 60(14) of the Criminal Procedure Act did not sanction an absolute denial to divulge information. The court concluded that the prosecutor would sometimes have to inform the applicant of the grounds against bail being granted to afford an applicant burdened with an onus a reasonable opportunity. The Constitutional Court also proposed a less absolute interpretation of the words "have access to" in subsection (14) to bring the subsection in harmony with subsection (11) of the

Criminal Procedure Act.³¹ Where “exceptional circumstances” have to be proved in terms of section 60(11)(a), the principle clearly applies. The veil must be lifted to afford the applicant a reasonable opportunity to prove the “exceptional circumstances”. An applicant resorting under section 60(11)(b) would be entitled to the information held by the state for purpose of the bail application if the information is required to afford the applicant a reasonable opportunity. What is or is not a reasonable opportunity depends on the facts of each case. It is not clear whether an applicant for bail that does not carry the burden of proof might under the appropriate circumstances be entitled to be informed of the grounds against the granting of bail. It seems doubtful. Under Canadian law, an applicant for bail whether burdened with the onus or not, is not entitled to the information held by the Crown for purposes of the bail application.

11.3.4.11 Bail pending sentence

An applicant for bail pending sentence under Canadian law would have to justify his post-conviction release. Under South African law the court must apply sections 60(11)(a) or (b) of the Criminal Procedure Act, as the case may be, pending sentence, where a person has been convicted of a schedule 6 or 5 offence. It seems that the court has the discretion to grant bail when a person has been convicted of some other offence. A perpetrator of one of the more serious offences mentioned in section 60(11)(a) would therefore in addition under South African law have to prove “exceptional circumstances” in order to secure release when compared to the position in Canada. For the offences mentioned in section 60(11)(b) the applicant for bail carries the burden of proof

³¹ It remains to be seen whether the courts will order the veil to be lifted in case of section 60(11)(b) of the CPA where exceptional circumstances does not have to be proved.

as under Canadian law. With regard to the other offences the applicant under South African law seems to be advantaged in that the court has the discretion to grant bail.

11.3.4.12 Bail pending appeal

Another example where an applicant for bail is advantaged under South African law is where bail is sought pending appeal. After conviction and sentence the applicant under Canadian law who appeals the conviction is burdened to satisfy the court on certain issues before bail may be granted. When only the sentence is appealed, bail may only be granted where leave to appeal has been given. Under South African law the sentencing court, and the court of appeal or review, is afforded the discretion to grant bail.

11.3.4.13 Review

The Criminal Code of Canada provides that the accused or the prosecutor may have any order made by a justice reviewed by a judge on two clear days notice at any time before the trial. While the hearing may be adjourned, the adjournment may not be for more than three clear days if the accused is in custody.³² At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown. The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice. Under South African law an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail. Conversely the attorney-general may appeal to a superior court having jurisdiction against the decision

³² Unless the accused consents.

of a lower court to release the accused on bail, or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible. There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

The Criminal Code of Canada furthermore provides for "automatic review" in those instances where the trial is delayed and accused is held on a detention order. The person who has custody of a accused charged with an offence, other than an offence listed in section 469,³³ for a period of ninety days, and which trial has not commenced, must fix a date for a hearing before a judge to determine whether release should be effected. At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay. In the case of summary conviction offences the period is thirty days. There is no such review under South African law.

On a theoretical analysis the liberty right in the context of the right to bail, to a considerable extent therefore favours the applicant under Canadian law, when compared to the South African situation.

³³ And where the accused is not in custody on any other matter.

11.4 HAS AN EQUITABLE BALANCE BEEN ACHIEVED BETWEEN THE INTERESTS OF SOCIETY AND THE INDIVIDUAL'S RIGHT TO LIBERTY UNDER SOUTH AFRICAN LAW?

The correct balance between the individual's right to liberty, and the interests of society will, at any given time, be determined by the prevailing circumstances. The limitation clause reminds us that the right to bail is not absolute and must be weighed against the legitimate needs of society.³⁴ Although the right to bail must be interpreted purposively, it cannot be done in a vacuum. To determine this balance, all relevant factors must be taken into account.³⁵ What is reasonable and justifiable in a specific open and democratic society based on human dignity, equality and freedom³⁶ today, may not be reasonable and justifiable in that society tomorrow, because circumstances have changed. In this sense the correct balance is a moving target. If there is a balance, bail will not be granted too easily nor will bail be too difficult to obtain.

The present circumstances in South Africa are not conducive to the "strong" right and principles of bail which many advocates of fundamental rights favour. The higher level of protection afforded to the right to bail under the Interim Constitution has fallen away under the Final Constitution. The infringement of the right to bail therefore does not need to be "necessary" any more.³⁷ It is furthermore fair to say that the right to bail was watered down in the Final Constitution and Parliament enacted certain sections of the Criminal Procedure

³⁴ See section 36 FC.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See chapter 8 footnote 162.

Act, with the clear purpose of deterring and controlling especially serious crime. All of this in effect limited, to an appreciable extent, the right of an arrested person applying for bail. But how does this balance that has been achieved compare with the balance under Canadian law?

Under Canadian law the expansive and effective system of police and prosecutors gives the prosecution a powerful advantage over an accused. Inherent in this advantage is the advanced fact-finding capability of the prosecution and the ability to competently present the facts that would determine the granting of bail. The Canadian courts have furthermore indicated that it was not easy to abscond from justice in Canada.

It must immediately be said that South Africa is not blessed with the same situation. On the contrary, it is fair to say that the South African criminal justice system is not up to the task of effective law enforcement. Add to this the marked difference and impact of criminal activity between the two countries and it seems that provisions more intrusive on the right to liberty or freedom would be sustainable under South African law.

Is the answer then not to deny bail in certain circumstances? Advocates of this view will be quick to point out that the Constitutional Court in the first certification judgment indicated that the right to bail was not a universally accepted human right.³⁸ It can furthermore be said that a person's constitutional right to release in terms of section 35(1)(f) is dependent on a finding that the interests of justice permit, and consequently favours liberty less than section 60(1)(a) of the Criminal Procedure Act. An applicant for bail

³⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) par 88.

did in addition not have a right to bail in any circumstance with the advent of the constitutional dispensation. In history there are many examples where bail could only be granted in respect of certain and usually less serious offences. Roman-Dutch and early South African law are cases in point. Early English law refused bail in the event of homicide and the list of non-bailable offences was expanded from time to time.³⁹

However, the not too distant South African history has caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or “political offences”, effectively removing that decision from the discretion of the court. The individual was thus effectively at the mercy of the state which led to government heavy-handedness that in some instances ran along political or racial lines.

Under Canadian law, legislation like the Public Order (Temporary Measures) Act of 1970⁴⁰ that was enacted in response to the October crisis, and empowered the Attorney-General to detain accused for prolonged periods, caused similar concern. These provisions became contentious and contributed towards the desire for a Bill of Rights with universal values that stood above the government of the day. These aspirations were to ensure that all citizens could lead their lives in safety and with security.

As history has taught us the value of the right to bail, the contention that bail should be denied in certain circumstances can therefore not be supported. Tomorrow, the refusal of bail may again be used on political lines. Due to these events the protection of the right to bail became an important part of the

³⁹ See for example the Statute of Westminster I.

⁴⁰ SC 1970 - 71 - 72, c 2.

interim constitutional scheme in South Africa. However, memories are fading. We must not relax the boundaries that keep out tyranny and oppression. He who does not resist in such cases betrays his own rights. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension. In remembering that the primary purpose of bail has since its early roots been to assure attendance at trial, we must not allow panic to justify the loss of a valuable right.

It does seem that the policy makers have pushed the limits in tightening up the conditions under which bail will be granted under South African law, to such an extent that one would be hard-pressed to say that bail is granted too easily. I am of the opinion that the constitutional provision regarding bail has already been weakened to such an extent that it does not do justice to the doctrine and principles that a right to liberty and freedom mandates. Some may furthermore even say that the legislature has stopped short of denying the right to bail in certain circumstances. In addition the government in its quest to combat crime, has gone so far as to give an applicant a “choice” between receiving bail or forfeiting the right not to assist the state in its case. It does therefore seem that the policy makers have also neglected due process to some extent, and opted for a crime control approach.

Another worrying factor is the tendency by the legislature to bestow certain functions on the prosecution that should rest with the courts. It is especially questionable as the courts are the protectors of basic rights in a fundamental rights dispensation. The legislature should therefore have bestowed upon the courts the power to adjudicate bail outside hours for certain offences. They should also have been empowered to decide whether the contents of the docket is to be supplied to the accused for purposes of the bail application.

While being aware of the underlying problems and emotions created by the unprecedented wave of crime in the country, some provisions seem to indicate that the authorities have fallen back on the old way of thinking. Instead of creating new mechanisms to ensure human rights, they act in conflict with the requirements of our new culture. In doing so the government threatens rather than serves the values of an open and democratic society based on freedom and equality. It is especially disturbing to see remarks such as those by the Minister of Safety and Security Mr Steve Tshwete to the National Council of Provinces on 14 October 1999.⁴¹ He was reported to have said that “[c]riminals should not believe that they could violate human rights guaranteed in the Constitution and yet at the same time hide behind those rights when caught”. He also indicated that many people were beginning to seriously question the wisdom of legislatures who were “pretty shy to revisit those areas in our laws” that made it difficult to handle armed banditry and other violent crime. He indicated that he would change the Constitution to amend the laws behind which criminals hide.⁴² These remarks only confirm my concerns. Does the Minister now say that criminals should not have protected rights? Not long ago many people were refused criminal procedure rights not only because they were in many instances deemed terrorists, but also criminals. The requirement of due process is not a fair-weather assurance only

⁴¹ See the *Pretoria News* of 15 October 1999 at 5 under the heading “Thugs can’t use ‘rights” and *Beeld* of 16 October 1999 at 5 under the heading “Regering gekritiseer oor menseregtekultuur in SA”.

⁴² These remarks attracted sharp criticism from the chairman of the Human Rights Commission, Dr Barney Pitso, at a press conference held in Johannesburg on the next day (15 October). Dr Pitso criticised the role that the government has played in the deterioration of the human rights culture in South Africa. Dr Pitso voiced his concern about the impression that human rights were the biggest stumbling block in the fight against crime, adding that it was possible to fight crime within the existing framework. Any attempt to amend the Constitution would therefore be resisted by the Human Rights Commission. See *Beeld* *ibid*.

to be respected in times free from trouble. Has the new government now given up on trying to be different, or is the government acting in the same way as the previous one while trying to be different? If the government is the big teacher, it imparts an ominous lesson.

The Minister does not seem to share the hallowed appreciation for “due process” with many “proven” democracies. In these democracies the seeds of what has come to be known as “due process”, were sown as far back as 1215, when an English nobleman exacted from King John the pledge that he would not deprive his subjects of life, liberty or property, except in accordance with “the law of the land”.⁴³ Under American law Supreme Court justices with the most disparate views have nevertheless agreed on the vital role of due process in the preservation of democratic society. Warren CJ in *Coppedge v United States*⁴⁴ held that the methods employed in the enforcement of the criminal law have aptly been called the measures by which the quality of the civilisation may be judged. Frankfurter J, the classic judicial conservative, repeatedly noted that the history of American freedom was in no small measure the history of procedure.⁴⁵ He also noted that the history of liberty has largely been the history of observance of procedural safeguards.⁴⁶ Douglas J, the epitome of the judicial activist, indicated that it was not without significance that most of the provisions in the Bill of Rights are procedural. He added that it was procedure that spelt out the difference between rule by law and rule by whim or caprice.⁴⁷

⁴³ In the Magna Carta.

⁴⁴ 369 US 438 449 (1962).

⁴⁵ *Malinski v New York* 324 US 401 414 (1945).

⁴⁶ *McNabb v United States* 318 US 332 347 (1943).

⁴⁷ *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 179 (1951).

The American Supreme Court has also commented on the notion that due process must give way to the claimed need for governmental efficiency. The court indicated that prompt efficacious procedures, whether benevolently or malevolently inspired to achieve legitimate state ends, was a proper state interest worthy of cognisance in constitutional adjudication. However, the court indicated that the Constitution recognised higher values than speed and efficiency. The court added that the Bill of Rights and the due process clause “were designed to protect the fragile freedoms of a vulnerable citizenry from the overbearing concern for efficiency that may characterise praiseworthy governmental officials no less, and perhaps more, than mediocre ones”.⁴⁸

By reverting to outdated notions the South African authorities are treating the symptoms and not the cause of the malaise. This is not helpful. However, few people are aroused by injustice when they are certain of not being its victim. But when authority in any form bullies a person unfairly, all other people are guilty. It is their tacit assent that allows authority to commit such abuse.

I am therefore of the opinion that the policy makers have overstepped the mark in combating crime. This has caused the balance to shift in favour of the prosecution. It also seems to be true when compared to the situation in Canada.

While there is therefore without a doubt scope for legislation more intrusive of the individual’s right to liberty concerning bail under South African law, the long-term answer, at least, does not lie in continuously tightening the conditions under which bail will be granted. It is crucial that the unhappy state

⁴⁸ *Stanley v Illinois* 405 US 645 656 (1972).

of affairs be corrected without encroaching upon, let alone sacrificing, the very heart of the Constitution, namely the Bill of Rights. Our rights and freedoms are the product of years of struggle by individuals and groups. There is a need to set a threshold for the protection of the liberty and freedom rights of the individual, over which the state may not intrude.

However, an effective criminal justice system would go a long way in eradicating the necessity to weaken the individual's right to liberty in order to obtain a balance. It is not necessary to jeopardise this human right, at least in the long term, in order to try and stop the infringement of other human rights. An equitable modern-day dispensation based on fundamental human rights will only be able to function effectively, if in the first place the prosecution and the police service are at an acceptable standard. A police force where 30 000 of the approximately 130 000 police officers are functionally illiterate will certainly not cope.⁴⁹ Truths will have to be confronted and political agendas set aside. Without this step, I am afraid that the aspirations for suitable protection will be defeated. The key therefore lies with the better training and guidance of police officers and prosecutors and realistic employment policies.

However, the Bill of Rights and an effective police force and prosecution alone are no magical safeguard against the inherent massive exercise of power by a government dealing with criminal justice issues. The strength of the Bill of Rights also depends on the ideology, commitment and competence of those who interpret it. In interpreting the Bill, the courts determine the reach and scope of these rights. It is highly unlikely that the legislature will interfere where the courts have set the standard too low. The assessment of popular

⁴⁹ These statistics were reported in the *Pretoria News* of 12 October 1999 at page 7 under the heading "Chance for illiterate cops to make the grade" and the *Business Day* of 16 November 1999 at page 3 under the heading "Gauteng capital of commercial crime".

opinion, which is essentially a legislative function,⁵⁰ does not allow for this in South Africa. The courts must therefore stand firm otherwise law and order will in any event give way to repression.

11.5 RECOMMENDATIONS FOR AN EFFECTIVE AND EQUITABLE SYSTEM OF BAIL IN SOUTH AFRICA

11.5.1 General

My recommendations include the bringing about of an effective prosecution, conceptual clarification by the Constitutional Court, and an amendment of the constitutional guarantee to bail in the Bill of Rights. As part of a libertarian legislative dispensation certain amendments to existing provisions of the Criminal Procedure Act are proposed in combination with some new measures. These new measures should form part of the principles that govern release on bail in the Criminal Procedure Act.

My first recommendation relates to the ineffective South African criminal justice system. The first and probably the most crucial step in any reform programme is to bring the prosecution and the police service in South Africa up to a first-world standard. It will not only improve the efficiency of the existing dispensation but also forge a playing-field susceptible to principles affording better and proper protection. In this the government will have to play the leading role. As in Canada, proper protection can then be afforded to individuals confronted by the criminal justice system while the system still remains effective.

⁵⁰ As opposed to a judicial function. See *Makwanyane* 1995 (3) SA 391 (CC) par 188; *Furman v Georgia* 408 US 238, 92 SCt 2726 (1972) 443; *West Virginia State Bd of Edu v Barnette* 319 US 624, 63 SCt 1178 (1943) 638.

In addition, the following recommendations are made in light of the prevailing circumstances:

11.5.2 The right to freedom and security

The foundational confusion in the interpretation and application of the right to freedom and security in section 12 must be corrected. More specifically, the operation of section 12 of the FC as a general and residual due process right must be substantiated. Section 7 of the Canadian Charter is an excellent example of the role that this right, which has become increasingly universal, fulfils in a criminal justice system based on a bill of rights.⁵¹ This application will lend consistency to the analytical process. It informs the interpretation of the relevant principles.⁵² Without this application, we will forever be plagued by dissimilarity in the approach by the criminal justice system towards those who come into contact with the system with resultant confusion. In the context of bail it will ensure that the government has to abide by the rules of fair play when adjudicating bail issues.

The Constitutional Court has made an about-turn in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁵³ with regard to the application of section 12 and the section 35 rights. The court also indicated that there has to be due process at a bail application. However, when specifically dealing with section 11 of the

⁵¹ See chapter 6. The similarity in the constitutional structure in which this right and the criminal procedure rights in both systems function has been shown in par 11.2.

⁵² See chapter 6.

⁵³ 1999 (7) BCLR 771 (CC).

Interim Constitution and later section 12 of the Final Constitution, it erected a conceptual wall. This must be clarified by the Constitutional Court.

Because I am of the opinion that an understanding of the interaction between sections 12 and 35 goes hand in hand with an understanding of the presumption of innocence as an animating principle throughout the whole criminal process, this presumption would most probably also have to be dealt with. Again Canadian jurisprudence can lead the way. The Canadian courts have shown that the presumption of innocence is discounted in every provision impacting on the criminal justice process. This presumption is therefore the starting point for any interference with the freedom and security of an individual. Section 12, together with the criminal procedure rights, therefore safeguards the individual against abuse by the state when confronted by the criminal justice system.⁵⁴

11.5.3 The constitutional right to bail

The constitutional right to bail must be corrected to provide at least a basic entitlement to bail.⁵⁵ I am of the opinion that the right to bail as provided for in section 35(1)(f) of the Final Constitution does not do justice to the freedom and security of the individual in a fundamental rights dispensation and the presumption of innocence. The Constitutional Court in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*⁵⁶ indicated that unless the equilibrium is displaced, an arrested person is not entitled to be released in terms of section 35(1)(f). It

⁵⁴ See chapter 5.

⁵⁵ In par 8.3.4.2 I indicated that although section 35(1)(f) arguably does not provide an entitlement to bail, it was probably not the intention of the legislature to take away the basic entitlement under the Interim Constitution.

⁵⁶ *Ibid.*

therefore seems that section 35(1)(f) is an inversion of the normal operative presumption in favour of liberty.⁵⁷ The existence of the right to bail must not be subject to the interests of justice, but must exist irrespective thereof and must only be taken away when the interests of justice dictate otherwise. Section 11(e) of the Canadian Charter sets such an example where there is a basic entitlement to bail. Bail can only be denied if there is just cause to do so.⁵⁸

It is therefore recommended that section 35(1)(f) should provide that *everyone has the right to be released from detention subject to reasonable conditions, unless the interests of justice permit otherwise.*

If of course the prosecution (including the police service) is brought up to standard, it would not necessitate that the presiding officer carry such a heavy burden. Instead of section 35(1)(f) *permitting* otherwise, the interests of justice could then *require* otherwise, in effect placing the burden on the state in an essentially accusatorial system.⁵⁹ As under Canadian law the presiding officer can then instead of being obliged to act inquisitorially, be afforded the power

⁵⁷ See chapter 8 footnote 135 - 136 for American, international and local authority that stresses this presumption and the necessity that the state must be required to prove the grounds for a denial of bail.

⁵⁸ See par 7.2.4.

⁵⁹ Under the Interim Constitution an applicant for bail had the right to be released on bail unless the interests of justice "require" otherwise. Release from detention under section 35(1)(f) depends on whether the interests of justice "permit". The Criminal Procedure Second Amendment Act 85 of 1997 changed the operative part of section 60(11) of the CPA from "satisfied the court that the interests of justice do not *require* his or her detention in custody" to "adduces evidence which satisfies the court that exceptional circumstances exists which in the interests of justice *permit* his or her release" (11(a)) and "adduces evidence which satisfies the court that the interests of justice *permit* his or her release" (11(b)). The italics are mine. See par 8.3.4 and further where these changes are discounted in the discussion.

to act inquisitorially.⁶⁰ Because the prosecution is now forced to convince the court that the applicant for bail must be detained pending trial, the prosecution will be encouraged to do a proper investigation. All the while the presiding officer has the authority to make such enquiries as he considers desirable. The state as the investigator of the crime will also be in a better position to answer these queries.

11.5.4 Terms of release

In accordance with the guarantee to freedom and security of the person in terms of section 12 of the FC, legislation must be enacted that would ensure that an arrested person is released on the least restrictive terms possible. Under Canadian law the "just cause" aspect of section 11(e) of the Charter and section 515 of the Criminal Code of Canada ensure that people charged with offences are released in the least restrictive manner possible.⁶¹

This is a logical aspect of the right to freedom and security of an applicant for bail. It could never be a reasonable and justifiable limitation of the freedom and security of an applicant for bail if such applicant is released on strict conditions, and lesser conditions of release comply with the interests of justice. Even if it is argued that presiding officers in deciding on interim judicial release in practice probably set the least onerous conditions anyhow, it must be made subject to judicial control.

The starting point must therefore be that an arrested person is entitled to be released on the least restrictive terms, and it is for the presiding officer in

⁶⁰ See par 11.3.4.6.

⁶¹ See par 7.2.5 - 7.2.6.

South Africa to find why more restrictive terms have to be imposed. The starting point should therefore be that an applicant should be released on warning without conditions. If that is not feasible the presiding officer must find why the detainee should not be released on warning with conditions. If that is not feasible, bail without conditions must be considered and so forth. This process must of course also be subject to appeal at the instance of the accused or the prosecution. Similarly, if the prosecution is brought up to standard, the burden on the presiding officer could be lessened in that the prosecution could be made to carry the burden of proof in an essentially accusatorial system.

11.5.5 “Exceptional circumstances”

The legislature should do away with the burden on schedule 6 offenders in terms of section 60(11)(a) of the Criminal Procedure Act to prove “exceptional circumstances” in order to obtain bail. The same reverse onus that applies to schedule 5 offenders should also be made applicable to schedule 6 offenders.

Even taking into account that presiding officers in South Africa are obliged to act inquisitorially, and therefore should assist the many uneducated and indigent applicants for bail, it seems obvious that the reverse onus, and especially where “exceptional circumstances” have to be proven, is detrimental to the uneducated and indigent when compared to the informed and affluent. Statistics compiled in Canada have shown that there is a significant lesser percentage of underprivileged, when compared to the privileged, who secure bail when they are burdened with the onus than in the scenario where the state carries the burden.⁶² In addition, the principle of exceptional

⁶² See the *Report on the Systemic Racism in the Ontario Criminal Justice System* (1996) referred to in chapter 8 footnote 41.

circumstances has been rejected under Canadian law as far back as 1969, as not providing enough guidance for even the presiding officer before whom the application is made.⁶³ In *R v Farrinaci*⁶⁴ the Ontario Court of Appeal found that the practice of only granting bail in exceptional circumstances before the reform in 1970 may have led to bail being unjustly denied.⁶⁵

What chance does the uninformed have to comprehend his task when he has to prove “exceptionable circumstances”, a principle that has also provided noted legal scholars under South African law with serious problems?⁶⁶ Is the idea not to try and provide all people with equal protection before the law, and in doing so, foster democracy? Was this not one of the disadvantages to the destitute applying for bail under the previous era? Again it is not the generals, politicians or judges that suffer, but the destitute.⁶⁷ It is submitted that the legal aid imported by the Bill of Rights simply does not get to benefit many applicants for bail. In the light of the serious problems and limitations that beset the provision of aid by the state, and the speculations of imminent collapse of the Legal Aid Board, it is not a safe premise on which to construct an efficient and equitable system.

⁶³ The Canadian Committee on Corrections also found the principle that bail will be granted only in exceptional circumstances, even pending appeal, too restrictive of the liberty right of an applicant for bail in Canada. See par 5.2.2.3.

⁶⁴ (1993) 18 CRR (2d) 303.

⁶⁵ See par 5.2.2.3.

⁶⁶ See par 7.3.5.

⁶⁷ At least this disadvantage to the destitute has been done away with in respect of lesser crimes where the burden of proof now rests on the prosecution.

11.5.6 Self-incrimination

An applicant for bail should not be forced to forfeit his right against self-incrimination in order to exercise his right to obtain bail. The right against self-incrimination is the result of centuries of accumulated wisdom and has been designed to ensure a fair trial. The criminal process is not a relentless pursuit to obtain a conviction. There are certain boundaries which the prosecution may not cross in order to secure a conviction. This is a good example of where the inflamed and uneducated public should not dictate the principles of the system in South Africa. I therefore recommend that protection similar to section 13 of the Canadian Charter be afforded under South African law. In this way the prior testimony may still be used to test the credibility of the accused at trial, but not to incriminate him. In the absence of protection similar to that of section 13 of the Canadian Charter, section 60(11B)(c) of the Criminal Procedure Act must be amended to achieve this in the context of bail. To put this issue beyond dispute, section 60(11B)(c) should provide as follows:

The testimony of an accused during bail proceedings, excluding the information in paragraph (a), may be used and becomes admissible to test his credibility in any subsequent proceeding against him, but the testimony so given may not be used to incriminate that accused in any subsequent proceeding.

11.5.7 Disclosure

The contents of the police docket, or information in possession of the state, should be available to the accused as soon as the investigation has been sufficiently completed to put down the case for trial.⁶⁸ The fruits of the

⁶⁸ See chapter 10 in general as to the position in Canada and South Africa and my appraisal of the duty to disclose for purposes of the bail hearing in par 10.3.4.

investigation in possession of the prosecution are after all the property of the public, to be used in order to ensure that justice is done.⁶⁹ Under the present South African law the information in the possession of the state will only be available to an applicant for bail under section 60(11)(a) who has to prove exceptional circumstances, and an applicant under section 60(11)(b), if the information is required to afford the applicant a reasonable opportunity to obtain bail.⁷⁰ Even though the majority of accused persons would have applied for bail by this stage, it is necessary to ensure that an applicant is informed of all the facts as soon as possible, so that if necessary, the acquired facts can be presented on higher review also in respect of bail. A new application for bail may even be brought on the new facts, which may have come to light. This would ensure that an accused is entitled to the information immediately after the investigation is sufficiently completed, even though the case may only be heard months later.

11.5.8 “Automatic review”

A refusal to release from detention, and the conditions of release by a lower court where the accused has not complied with the conditions, must be subject in the ordinary course to automatic review by a judge in open court.⁷¹ This recommendation is driven by many factors. Some of these factors are:

⁶⁹ See par 10.2.2.2 for Canadian authority and chapter 10 footnote 19, for South African authority.

⁷⁰ The sections referred to are of the Criminal Procedure Act. See the discussion of the validity of section 60(14) of the same Act in par 10.3.3 and my conclusions in par 10.4.

⁷¹ “Automatic review” is not foreign to our criminal justice system. Such a system ensures the validity and fairness of convictions and sentences in certain categories of lower-court proceedings. Under the existing system the judge receives the trial record, together with any written remarks which the trial

- The high percentage of unrepresented applicants for bail who are also mostly unsophisticated. These people are mostly unable to press their rights because of ignorance or a lack of means.
- The little confidence that the criminal justice system as a whole generates.
- The long time it takes to start and finalise matters.
- The appalling and dangerous conditions under which people accused of crimes are incarcerated.

Under present South African law the appropriate legal redress is by way of an appeal.⁷² Despite the principle that a bail application should be heard as soon as possible, the appeal is analogous to an ordinary appeal. The matter is determined on the material on record and there is no provision that additional information may be furnished to the court hearing the appeal. The court can therefore only intervene if it is satisfied that the magistrate was wrong. A high percentage of accused simply do not benefit from this system due to ignorance or the lack of means. Even if this redress is utilised, and as it usually happens, a date for the appeal can be secured much sooner than with an ordinary appeal, it still takes a week or two to get before court.

magistrate, or written statement which the convicted person, may wish to furnish. On the basis of these documents the reviewing judge decides whether the proceedings were in accordance with justice. If the judge concludes that the legal rules were complied with and an appropriate sentence was imposed, he certifies that the proceedings were in order. If the reviewing judge is uncertain whether the legal rules were complied with he may seek information from the magistrate that presided or the attorney-general. If the reviewing judge is still uncertain, he places the case before a court which considers the case as an appeal. See sections 302, 303 and 304 of the Criminal Procedure Act.

⁷² See par 2.6.3.3.e.

The purpose of this recommendation is to protect people from being warehoused in prisons while the prosecution or the system causes unreasonable delay in the prosecution of the person's trial. It is not proposed that such an extensive system of reviews as that which exists prior to trial under Canadian law, be implemented. In certain instances of arrest by a peace officer⁷³ under Canadian law there is in effect a review by the officer in charge.⁷⁴ The accused may have any order made by the justice reviewed by a judge on two clear days notice at any time before trial.⁷⁵ Where the commencement of the trial has been delayed, there is an "automatic review" every 90 days for certain indictable offences, and 30 days in the case of summary conviction offences where the accused is held on a detention order.⁷⁶

A system of automatic review based on the Canadian model is proposed which makes the continued detention of an accused before conviction subject to review. The differences in the system that I propose have been influenced by the circumstances in South Africa including an understanding that an already struggling criminal justice system should be burdened as little as possible. It is important that the system puts an affirmative duty on the warden or keeper of the remand prison or cell to initiate the proceedings. The system should ensure that the person having custody of an accused pending his trial after 90 days' detention shall without delay, where bail has been denied by the district court, apply to a judge to fix a date for a hearing to determine whether he should be released from custody. Where bail has been denied in the case of the more serious offences in schedule 6 that have been allocated to the regional court,

⁷³ Or where the accused has been delivered to the peace officer.

⁷⁴ See par 4.3.3 - 4.3.4.

⁷⁵ See par 4.3.6.

⁷⁶ *Ibid.*

such application must be made after 180 days incarceration. Upon receipt of the application the judge must fix a date for the hearing. He must also direct that notice be given to the prosecutor and the accused.

At the hearing the judge must consider the record of the proceedings and any additional evidence which may be presented by the accused or the Crown. If the judge is satisfied that the interests of justice permit the accused's release, he must be released on the least restrictive terms possible. On hearing the application the judge may take into consideration whether the prosecution or the defence has been responsible for any unreasonable delay in concluding the trial. However, this provision should not apply where the accused has unsuccessfully taken his detention on appeal or review.

11.5.9 Bail after hours

A right to bail be must be conferred at all hours for individuals accused of "lesser offences". These offences should not include schedule 5 and 6 offences. This recommendation takes note of the appalling and frequently dangerous conditions under which individuals accused of "lesser crimes" are locked up and the resultant horror stories that flow from this.⁷⁷ Under the

⁷⁷ Reports of female and "male rape" of incarcerated individuals have not been uncommon in recent years. In the instance of "male rape", many who are apparently strangers, set upon individuals in what seems a race-related attacks. A chilling encounter of such an occurrence was given by one young man on the actuality program "Carte Blanche" on Channel M-net during 1999. He was arrested in KwaZulu-Natal on a traffic offence and while being held overnight he was "gang raped" and subsequently contracted AIDS. In addition Channel e-TV on 26 October 1999 by way of its main news bulletin reported that 753 people have died during 1999 while in police custody. A surprise inspection of police cells in Gauteng, the Western-Cape and Kwazulu-Natal by the Human Rights Commission during 1999 has revealed that many persons while being detained feared for their safety, were assaulted, were not informed of their rights, had difficulty in communicating with their family and legal representatives and found themselves in dirty and overcrowded cells. See the

previous government an arrested individual was not only incarcerated in relative safety but could appear before a court at his request at any time and pursue his release.⁷⁸

If release is not secured in terms of sections 59 or 59A of the Criminal Procedure Act, the arrested person must on his request be brought before a magistrate where his release or further incarceration will be adjudicated. The argument that one will in any event be heard in the case of real urgency does not hold water. Experience has shown that if the system is not structured and prepared to hear these cases after hours, the necessary personnel will, in the first instance, not be available. The prosecution will furthermore most definitely not see the incarceration with dangerous criminals as a situation of real urgency, and bring the arrested person before a magistrate. Experience has also shown that horrendous crimes have even been committed against other detainees by the so-called lesser criminals whose true colours were not apparent at that stage. These are the facts that we have to deal with.

Due mostly to lack of facilities and the high incidence of crime, it will have to be accepted that joint incarceration is a fact for at least the foreseeable future. Neither is there any indication that the strained fabric of the South African society is going to improve.⁷⁹ The freedom and security of the individual should ultimately in this regard, as anywhere else, be guarded by the judiciary.

report in *Beeld* of 16 October 1999 at page 5 under the heading "Regering gekritiseer oor menseregtekultuur in SA".

⁷⁸ See chapter 2 footnote 336.

⁷⁹ The following sickening national statistic gives food for reflection. Channel e-TV on 25 October 1999 by way of its main news bulletin at 7 pm reported that one in five men are "raped" in South Africa at some time.

11.5.10 Remand in custody

Section 50(6)(d) of the Criminal Procedure Act must be amended to provide that “lesser offenders” may not be remanded in custody for more than three days, instead of 7 days, at a time.⁸⁰ Under Canadian law no accused may be remanded in custody for more than 3 clear days at a time without the permission of the accused.⁸¹ In the previous era under South African law before the onset of rampant serious crime there was no such provision enabling the state to remand the accused in custody while gathering information.⁸²

The purpose of the legislature to combat serious crime does not obviate this serious limitation of the liberty right of “lesser offenders”. While the purpose of the limitation is ostensibly to ensure that serious offenders are not granted bail erroneously, this stringent provision also strikes at “lesser offenders” who have nothing to do with this purpose. The limitation is therefore “over broad” or “over inclusive”.⁸³

11.5.11 Sections 60(4), 60(9) and 60(10) of the Criminal Procedure Act

Sections 60(4), 60(9) and 60(10) of the Criminal Procedure Act must be amended to clearly reflect the meaning afforded to these provisions by the Constitutional Court. One hopes that the legislature would have taken note of

⁸⁰ See par 2.6.3.2.

⁸¹ See par 4.3.5.2.

⁸² See par 11.3.4.3.

⁸³ 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) par 12 & 13.

the problems in interpretation, and deliberations that have been caused by vague legislation. It is also fair to say that the Constitutional Court had been at great pains to merge the provisions of the Criminal Procedure Act with the constitutional requirements. It is therefore recommended that:

- The reference to the “the interests of justice” in sections 60(4), 60(9) and 60(10) be substituted with “the interests of society”.⁸⁴ In deciding whether the interests of justice permit, the considerations in the interests of society in section 60(4)(a) - (e) will then clearly have to be weighed up against the liberty interests of the applicant for bail as directed by subsections (9) and (10).⁸⁵
- Section 60(4) must be amended to show that other factors may also be taken into account to determine the interests of society.⁸⁶ In this way section 60(4) will not be a deeming provision that prescribes to the court what is, or what is not in the interests of society. It is therefore suggested that the following paragraph be added to subsection (4) as subsection (f): “on any other just ground being shown.”

⁸⁴ See my discussion in par 7.3.5.

⁸⁵ My recommendation is based on the conventional way of referring to this equation. However, it has been suggested that it may be an oversimplification to draw a distinction between the interests of the accused on the one hand and the interests of society on the other (see chapter 1 footnote 29). If the suggestion that two competing community interests are at stake is accepted, it may be technically more sound to substitute the reference to “the interests of justice” in these provisions with something like “the interests of the state representing society”. These interests will then have to be weighed against “the interests of society representing the accused”. Accordingly sections 60(9) and 60(10) will have to be amended by expunging “the right of the accused to his or her personal freedom” in section 60(9) and “the personal interests of the accused” in section 60(10) and to instead include references to “the interests of society representing the accused”.

⁸⁶ *Ibid.*

11.6 CONCLUDING REMARKS

When society acts to deprive one of its members of his liberty, society takes one of its most intrusive steps. The deprivation of liberty inevitably leads to hardship and may have dire consequences for the individual concerned. A prison in modern-day South Africa is not a safe place. In many instances the loss of freedom leads to the disintegration of relationships, the loss of employment and the loss of housing. This state of affairs is detrimental to society in general and must be avoided where incarceration is not actually necessary. In turn, the fact that incarceration is only ordered when necessary will result in the prisons not being so overpopulated.

South Africans must be wary not to seek solutions to criminal justice issues on false criminological and social premises in the vain hope of accomplishing useful or beneficial results. We will never have a society where liberty and dignity is allowed to flourish if the real causes of the problems are not addressed. It is hoped that these recommendations will contribute to a system in respect of bail where the two salient features of “the worth and dignity of man, [and] a repugnance of authoritarianism”⁸⁷ will prevail while the system still remains effective. In this way the equilibrium between the right to liberty of the accused and the interests of society that has been skewed in favour of the prosecution will be restored.

⁸⁷ Alan Paton envisaged these ideals for a future South Africa (as quoted by Mr Bobby Godsell in a memorial address in June 1994).