

Fingerprint database: Strengthening the fight against crime or Constitutional right infringement?

Submitted in partial fulfilment of the requirement for the degree

LLM

Master of Laws

by

Bradford Gil Dias 22064169

Prepared under the supervision of

Mrs. Illsley

At the University of Pretoria

TABLE OF CONTENTS

Chapter 1: Introduction

1. Research question
2. Problem statement
3. Assumptions
4. Chapter outline

Chapter 2: Ascertainment of Bodily Features of an Accused

1. Introduction
2. Section 37 of the Criminal Procedure Act
3. Relevance of evidence regarding bodily features (section 225)
 - 3.1 Proving the correspondence between prints
 - 3.2 Prints as circumstantial evidence
 - 3.3 Section 225(2) of the Criminal Procedure Act
4. The Criminal Law (Forensic Procedure) Amendment Act
 - 4.1 General
 - 4.2 The Criminal Law (Forensic Procedure) Amendment Act
5. Ascertainment of bodily features
 - 5.1 Interpretation of Chapter 3
 - 5.2 Powers in respect of fingerprints of accused
 - 5.3 Fingerprints and body-prints for investigation purposes
6. Section 37 after the Amendment Act
7. Conclusion

Chapter 3: Constitution of South Africa

1. Introduction
2. Unconstitutionally obtained evidence
3. Section 36 – Limitation of rights
 - 3.1 Criteria justifying the limitation of rights
 - 3.1.1 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom
4. Section 35 of the Constitution and fingerprint evidence
5. Comparative overview
 - 5.1 Introduction
 - 5.2 United Kingdom
 - 5.2.1 England and Wales
 - 5.2.2 Scotland
 - 5.3 Canada
 - 5.4 Australia
6. Conclusion

Chapter 4: Conclusion

1. Introduction
2. Fingerprints as an investigative tool
3. Criminal Law (Forensic Procedures) Amendment Act
4. Criminal Law (Forensic Procedures) Amendment Act and the Constitution
5. Conclusion

Bibliography

Chapter 1: Introduction

1. Problem statement

In October 2010 the Criminal Law (Forensic Procedure) Act¹ came into operation. The Act amended the Criminal Procedure Act² with regards to the taking, retention and creation of fingerprint-databases. It also provides for comparative searches with other spheres of government³. The question arises what value a fingerprint database will bring to the investigative capacity of the South African Police Service. Furthermore one has to consider the constitutional implication of such a piece of legislation on the rights of an accused, which is afforded and guaranteed to him or her by the Bill of Rights.

Before the enactment of the Criminal Law (Forensic Procedures) Amendment Act, South Africa did not have any specific legislation regulating the taking of fingerprints or the establishment of a fingerprint database. In criminal cases the ascertainment of bodily features was broadly regulated by section 37 of the Criminal Procedure Act. Chapter 3 of the Criminal Procedure Act regulated and granted powers in respect of taking fingerprints, palm-prints, foot-prints, the drawing of blood samples, attendance at an identity parade and the taking of photographs.⁴

The Criminal Procedure (Forensic Procedure) Act 6 of 2010 came into operation in 2010. The Act amended the Criminal Procedure Act of 1977, so as to provide for the compulsory taking of fingerprints of certain categories of persons, to provide for the taking of fingerprints and body-prints for investigative purposes and also for the retention and destruction of fingerprints taken under the Act. It further amended the section⁵ that regulate the proof of certain facts by certificate or affidavit. The Criminal Procedure (Forensic Procedure) Act 6 of 2010 further amended the South African Police Service Act⁶ of 1995, so as to regulate the storing and use of fingerprints, body-prints and photographic images of certain categories of persons, furthermore to provide the keeping of databases and to allow for comparative searches against these databases. It further amends the South African Police Service Act⁷ to provide for security measures relating to the integrity of information stored on these

¹ Act 6 of 2010

² Act 51 of 1977

³ For example: Department of Home Affairs and Department of Social Development.

⁴ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 2.

⁵ Section 212 of Act 51 of 1977.

⁶ Act 68 of 1995.

⁷ Chapter 5A of Act 68 of 1995.

databases, and to make provisions for the development of standing operating procedures regarding access to the databases of other state departments. The Criminal Procedure (Forensic Procedure) Act 6 of 2010 finally amends the Firearms Control Act of 2000 and the Explosives Act of 2003, as to regulate the powers in respect of fingerprints and body-prints for investigative purposes and for matters connected therewith.⁸

In essence the amendment created an investigative tool for the police to increase the opportunity to identify a potential suspect. A fingerprint found on a scene of crime can now be compared to fingerprints retained in the fingerprint databases of convicted persons, fingerprints registered under the Firearms Control Act of 2000 and the Explosives Act of 2003.

The Constitution of South Africa (Act 108 of 1996) is the supreme law of our country and any law or conduct inconsistent with the Constitution is invalid⁹. The Bill of Rights is entrenched in the Constitution in Chapter 2. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state. The rights in the Bill of Rights are subjected to the limitations contained or referred to in section 36, or elsewhere in the Bill. However the state must respect, protect, promote and fulfil the rights in the Bill of Rights.¹⁰ Therefore the Criminal Law (Forensic Procedures) Amendment Act must pass the scrutiny of the constitution, as the constitution applies to all law and all organs of the state. Therefore does the Criminal Law (Forensic Procedures) Amendment Act infringe on the right to remain silent and not to incriminate oneself.

2. Research question

Would fingerprint-database legislation in South- Africa strengthen the fight against crime or would such legislation infringe on our guaranteed Constitutional right against self- incrimination?

3. Assumptions

For purposes of this dissertation, it is vital to establish if the Act unjustifiably infringes on the right to remain silent and not to incriminate oneself. It is submitted that the creation of a fingerprint database will strengthen the forensic intelligence gathering capacity of the South African Police Service. Apart from the evidentiary value of securing real evidence in a criminal case, the advantages of a fingerprint database can be summarized as follows:

⁸ Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

⁹ Section 2 of the Constitution.

¹⁰ Constitution Act 108 of 1996.

- a) A fingerprint database is an important intelligence tool, particularly in crimes where detection is generally low, such as property crimes.¹¹
- b) Fingerprint scene-to-scene matches help identify patterns of criminal behaviour that may help solve past, existing and future crimes.
- c) Plea bargaining increase when suspects are confronted and linked to an offence with evidence that carries the weight of *prima facie* evidence. Fingerprint evidence can hardly be disputed and its existence of a crime scene is difficult to explain.
- d) It should be noted that fingerprints and DNA samples are used not only to prove guilt, but also to prove innocence.¹²

4. Chapter outline

The enactment of the new Criminal Procedure (Forensic Procedures) Amendment Act could be a step forward in the fight against crime and bringing criminals to justice. All legislation must, however, be consistent with the Constitution. This raises the question if the Criminal Procedure (Forensic Procedures) Amendment Act 6 of 2010 infringes on the rights contained in the Bill of Rights. This paper will aim to identify the advantages of the Criminal Procedure (Forensic Procedures) Amendment Act 6 of 2010. It will also attempt to establish if this piece of legislation infringes on these constitutional rights, such as the right to remain silent and not to incriminate oneself and, if so, whether these limitations may potentially be justified in terms of the limitation clause. Furthermore the Criminal Procedure (Forensic Procedures) Amendment Act 6 of 2010 will be compared to the international trend of other countries regarding the taking, retention and creation of fingerprint databases.

We will be discussing in the chapters following this one the position in law before the Criminal Procedure (Forensic Procedures) Amendment Act came into operation. We will identify the changes brought forth by the new Act and the possible advantages the Act creates. We will consider the Constitution especially the rights contained in the Bill of Rights. This paper will attempt to identify the rights that may be infringed by the new piece of legislation and if these rights may be limited by the limitation clause contained in section 36. Lastly we will consider how foreign democracies and their approach similar legislation in an attempt to answer the stated research question.

In Chapter 2 we will discuss the ascertainment of bodily features of a suspect or accused. We will consider the position in law prior to the amendment of the new Act,

¹¹ Offences such as housebreaking, theft out of motor vehicles and trespassing.

¹² An example of such a situation is where a person is excluded as a DNA donor of semen found on the vaginal swabs of a rape victim. The suspect is excluded as the culprit. Money and time is saved on an expositive court case and it decreases the likelihood that an innocent person is found guilty.

and finally the changes brought forth by the new Act. We will consider the Constitution and the rights guaranteed to accused persons in Chapter 3. Thereafter we will consider the right against self- incrimination, and if the new Act infringes upon this right. We will briefly discuss the international trend and approach followed by other countries with similar legislation. We will attempt to answer the research question whether the new Act will withstand the constitutional scrutiny in Chapter 4.

Chapter 2: Ascertainment of Bodily Features of an Accused

1. Introduction

Considering the legal question investigated in this study is essential in this chapter that we start with current legal position governing the ascertainment of bodily features. We will discuss the position in law before the enactment of the Criminal Procedure (Forensic Procedure) Act and the changes brought forth by the amendment of section 37 of the Criminal Procedure Act. Lastly the advantages of such a piece of legislation as investigative tool and the need for such legislation will be investigated.

2. Section 37 of the Criminal Procedure Act

In criminal cases the ascertainment of bodily features was broadly regulated by section 37 of the Criminal Procedure Act. Chapter 3 of the Criminal Procedure Act regulated and granted powers in respect of taking fingerprints, palm-prints, foot-prints, the drawing of blood samples, attendance at an identity parade and the taking of photographs.¹³

Section 37 (1)(a) confers upon a police official the powers to take an accused's fingerprints, palm-prints or foot-prints irrespective of whether the trial has commenced or not.¹⁴ Prints taken must form part of a person referred to in section 37 (1)(a)(i)-(v).¹⁵ The prints taken from the accused is real evidence and the accused cannot invoke the maxim '*nemo tenetur ipsum accusare*' as a valid excuse for refusing to have his prints taken.¹⁶

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

¹³ Joubert (ed) *Criminal Procedure Handbook* 8 ed (2007) 133.

¹⁴ **Nkosi v Barlow** 1984 (3) SA 148 (T).

¹⁵ Joubert (ed) *Criminal Procedure Handbook* 9 ed (2009) 131.

¹⁶ **Nkosi v Barlow** 1984 (3) SA 148 (T) at 154D.

Regarding the powers of police officials in relation to the taking of prints under section 37, it is submitted that:

- (a) The taking of finger-, palm- or foot-prints is not compulsory regardless of whether the prints could be taken before or after conviction.
- (b) In sub clause (5) it clearly provides “*Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person*”.
- (c) Since the Minister has not yet issued a notice under sub paragraph (v) of sub section (1)(a), it in effect means that no prints may be taken under this category of convicted persons unless a court so directs under sub section (4), which again is in the discretion of a court and not a given in every case.
- (d) It would seem that section 37 does not ensure that the fingerprints of each and every person arrested upon any charge or released upon bail or a warning is taken by the police. Even where such fingerprints are taken and the accused is not found guilty, or any of the other conditions in sub section (5) applies, such prints and the record of the steps taken under section 37 will be destroyed. In addition, since even the taking of prints from a convicted persons is not compulsory under section 37, it would seem that without any regard to what happens in practice, the taking of prints could be severely limited by the discretion given to the police under this section¹⁷.

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

¹⁷ Ad Hoc Committee’s Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009).

Section 37 has now been discussed and it is clear what the section entails. We need to consider the evidence that is derived from section 37, how it is presented and the evidentiary value thereof. Section 37 should be read together with section 212 (6) and (8)¹⁸, section 225¹⁹ and section 272²⁰ of the Criminal Procedure Act.

3. Relevance of evidence regarding bodily features (section 225)

Subsection (1) of section 225 of the Criminal Procedure Act provides for the admissibility of evidence which relate to finger-print, palm-print or foot-prints of the accused whenever such prints corresponds with any other prints that are relevant at such proceedings. It also provides for the admissibility of evidence of evidence of bodily marks, characteristics, distinguishing features or the condition or physical appearance of the accused whenever such condition or physical appearance, characteristic, bodily mark or distinguishing feature are relevant to such proceedings.²¹ In terms of subsection (2), evidence concerning bodily features is admissible even if the presence of those features was determined against the will of he accused or procured contrary to the provisions of section 37.²²

Evidence described in section 225(1) may only be received when it is relevant at such proceedings to consider whether finger-print, palm-print or foot-prints of the accused corresponds with the finger-print, palm-print or foot-prints with other prints lifted from a crime scene or object relevant to proceedings.²³ The same can be said

¹⁸ This subsection provides for proof of fingerprints and the dispatch thereof, by means of affidavit.

¹⁹ This subsection deals with admissibility of prints or bodily features as proof.

Section 225 of the Criminal Procedure Act reads as follows:

(1) Whenever it is relevant at criminal proceedings to ascertain whether any finger-print, palm-print or foot-print of an accused at such proceedings corresponds to any other finger-print, palm-print or foot-print, or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the finger-print, palm-print or foot-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the finger-print, palm-print or foot-print in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of section 37, or that it was taken or ascertained against the wish or the will of the accused concerned.

²⁰ This section deals with proof of previous convictions with the aid of fingerprints.

²¹ Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 24-94.

²² **S v Maphumalo** 1996 (2) SACR 84 (N).

²³ Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 24-94.

about bodily marks, characteristics, distinguishing features or the condition or physical appearance of the accused. The relevance of such evidence will invariably lie in its tendency to identify the accused as the same person who committed the crime.²⁴ Therefore we must first establish a correspondence between the print found at the scene or object on the scene, and the print of the accused. This is done by expert evidence. After the requisite correspondence has been established, a determination must be made of what inferences may properly be drawn once this correspondence has been shown. Prints are after all a form of circumstantial evidence, and the question arises concerning the weight to be placed on print evidence.²⁵ In **S v Mkhabela**²⁶ Corbett JA considered various cases dealing with identification by means of foot-prints and he stated that 'evidence of foot-prints is admissible' but warned that 'the Court must nevertheless be cautious of the circumstances of the case'.

3.1. Proving the correspondence between prints

Fingerprint identification in criminal proceedings must be done by an expert witness.²⁷ The duties placed upon the Court when assessing the evidence of a fingerprint expert, was set out in **S v Gumede & another** 1982 (4) SA 561 (T). The court must, first, be satisfied that the witness is competent to give evidence, that he is properly trained and has sufficient experience. Secondly, it must be satisfied as to the origin of the sets of fingerprints that are being compared, meaning the set that was found at the scene of the crime and the set of the accused. Thirdly, it must be satisfied that the expert conducted a proper enquiry in comparing the two sets and that he is capable of referring to sufficient points of similarity.²⁸ In practice there should be at least seven points of similarity before our Courts will accept the identity to be sufficient.²⁹ It is not necessary for the Court to see the seven points of similarity itself, it should be satisfied that it can safely rely on the expert witness opinion.³⁰ In **S**

²⁴ In **R v Plaatjes** 1939 EDL 1 at 1, the palm-print found at the scene of a crime matched a palm-print taken from the accused, and was found to be highly probative in establishing '*the identity of the person who made the print at the scene of the crime as being the same person who made the accused's palm-print.*'

²⁵ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) 24-95.

²⁶ 1984 (1) SA 556 (A) at 563B-C.

²⁷ **S v Malindi** 1983 (4) SA 99 (T) at 104D.

²⁸ **S v Gumede & another** 1982 (4) SA 561 (T) at 564.

²⁹ **S v Kimimbi** 1963 (3) SA 250 (C); **S v Nala** 1965 (4) SA 360 (A).

³⁰ **R v Morela** 1947 (3) SA 147 (A); **S v Malindi** 1983 (4) SA 99 (T).

v Blom³¹ the Court found that the correspondence of two sets of fingerprints had not been proven beyond a reasonable doubt where, inter alia, (1) the expert witnesses had changed their evidence as to the location of one of the seven alleged points of similarity; (2) they had initially told the investigating officer and the prosecutor that there were only five such points of similarity; and (3) they were unable to explain to the satisfaction of the court certain inconsistencies between the two sets of prints.³²

3.2. Prints as circumstantial evidence

Finger-print, palm-print and foot-prints can be categorised as circumstantial evidence which furnishes indirect proof.³³ In order to establish what inferences may properly be made from the fingerprint correspondence, reference must be made to the two cardinal rules of logic as set out in **R v Blom**³⁴:

- (1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn.
- (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

According to **R v Du Plessis**³⁵ The probative value of a fingerprint in a criminal case 'lies in the degree of probability that in the ordinary and natural course of things it would have been the perpetrator of the crime who made it, and in the degree of probability that, if it were made innocently, the person concerned would be able to account for it.'

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

At common law an accused may not be compelled to give self-incriminating evidence, either before or during the trial. In **R v Camane & others**³⁶ Innes CJ cited with approval the view of Wigmore³⁷ that 'testimonial compulsion' forms the basis of

³¹ 1992 (1) SACR 649 (E).

³² Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 24-95.

³³ Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009 183.

³⁴ 1939 AD 188 at 202-3.

³⁵ 1944 AD 314 at 319.

³⁶ 1925 AD 570 at 575.

³⁷ See footnote 17.

the common law maxim. Thus an accused can be compelled to furnish what Wigmore calls 'autopic evidence'.³⁸ Therefore the taking of fingerprints against the will of the accused does not fall within the common law rule against self-incrimination.³⁹ Section 225(2) provides that evidence referred to in subsection (1) shall not be inadmissible purely on the ground that procurement of evidence was contrary to the provisions of section 37 or against the will of the accused. One should consider the question whether taking of fingerprints or ascertaining of any bodily feature against the will of the accused is constitutionally sound. In **S v Huma & another** (2)⁴⁰ it was found that such course of action would violate two of the accused's fundamental rights under the interim Constitution: his right to dignity contained in ss 10 and 11⁴¹ and his right to remain silent and not to be a compellable witness against himself contained in s 25(3)(c) and (d)⁴². Claasen J held with regards to dignity, that the taking of fingerprints did not constitute inhuman or degrading treatment,⁴³ but that, even if it did, it constituted a reasonable and necessary limitation of the right since it was necessary to enable the administration of justice to run its proper course. As far as self-incrimination was concerned, he concluded that s 25(3)(d) of the Constitution was 'merely a codification of the common law principle against self-incrimination and [did] not take the principle any further'.^{44, 45}

With regards to section 212 of the Criminal Procedure Act, it should be noted that this section deals with proof of certain facts by affidavit or certificate. The manner in which the finding, lifting, dispatching and examination of prints can be proved is provided for in section 212 (4)(a), (6) and (8). Section 272 of the Criminal Procedure Act provides that a record, photograph or document,⁴⁶ which relates to a fingerprint is the normal evidential material through which previous convictions are proved.

³⁸ Evidence where the accused remains passive and is required to show his complexion, marks or features.

³⁹ **Ex parte Minister of Justice: In re R v Matemba** 1941 AD 71.

⁴⁰ 1995 (2) SACR 411 (W).

⁴¹ Now section 10 and section 12 of the Final Constitution.

⁴² Now section 35(3)(h) and (j) of the Final Constitution.

⁴³ At 416b-h.

⁴⁴ At 419d-e.

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

⁴⁶ Du Toit et al. *The Commentary on the Criminal Procedure Act* (Revision Service 45, 2010) at section 271. After conviction the State may produce to the court a list of previous conviction which it is alleged the accused committed. The State has a discretion to produce or hand in the list after conviction and before sentence and is not obliged to do so (hereafter SAP 69).

It is clear that fingerprint evidence is a valuable piece of evidence that could help the State prove beyond reasonable doubt that the accused committed the offence charge with. We have identified the means and procedures to be followed when suspects fingerprints may be taken. We have discussed the manner in which fingerprint evidence is used in court and the weight to be attached thereto. We will now be discussing the amendment of section 37 and the changes it brings forth. The advantages of such a piece of legislation will be considered and the need to implement the legislation as a valuable investigative tool. Understanding the importance of fingerprint evidence and the need for such evidence in our legal system can establish whether fingerprint legislation is in the interest of justice. This will in turn gives us an indication whether this piece of legislation will withstand the scrutiny of the Constitution.

4. The Criminal Law (Forensic Procedure) Act 6 of 2010

4.1 General

The Criminal Law (Forensic Procedure) Act was created to specifically govern the ascertainment of fingerprints, the retention of these fingerprints and the creation of a fingerprint database. The Act amended section 37 and inserted Section 36A, 36B and 36C in Chapter 3 of the Criminal Procedure Act. These sections now specifically govern the taking of fingerprints, body-prints and photographic images of persons. We will now identify the purpose of this piece of legislation which is clearly set out in the preamble of the Act.

4.2 The Criminal Law (Forensic Procedures) Amendment Act

The purpose of this act is clearly set out in the preamble as being the following:

“ To amend the Criminal Procedure Act, 1977, so as to provide for the compulsory taking of fingerprints of certain categories of persons; to provide for the taking of fingerprints and body0prints for investigative purposes; to further provide for the retention of fingerprints and body-prints taken under this act; to further regulate the destruction of fingerprints taken under this act; to further regulate proof of certain facts by affidavit or certificate; to amend the South African Police Service Act,1995, so as to regulate the storing and use of fingerprints, body-prints and photographic images of certain categories of persons; to provide for the keeping of databases and to allow for comparative searches against those databases; to provide for security measures relating to the integrity of information stored on these databases; to make provision for the development of standing operating procedures regarding access to the databases of other state departments; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of fingerprints and body-prints for investigative purposes; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of fingerprints and body-prints for investigative purposes; and to provide for matters connected therewith.”⁴⁷

⁴⁷ Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

It is clear that this act aims to empower the South African Police Service with the means of taking, retaining and use of bodily features in all its forms as a powerful investigative tool. Furthermore its purpose is to create a database for fingerprints whereby profiles can be stored for a comparative analysis of other retained fingerprints and enable the detection of crime and the identification of an offender. Having set out the objectives of this piece of legislation, we will now discuss the Act and indicate the legislative changes it brought forth.

5. Ascertainment of bodily features of persons

Criminal Law (Forensic Procedure) Act 6 of 2010 amended the Criminal Procedure Act by inserting sections 36A, 36B and 36C in Chapter 3 of the Criminal Procedure Act and amended section 37 of the Criminal Procedure Act. As with all new legislation it is of utmost importance that the interpretation thereof is correctly done. Section 36A was inserted as a guide when interpreting the Criminal Law (Forensic Procedure) Act.

5.1 Interpretation of Chapter 3

Section 36A reads as follows:

- (1) For the purposes of this Chapter, unless the context indicates otherwise-
- (a) **‘appropriate person’** means any adult member of a child’s family, or a care-giver of the child, which includes any person other than a parent or guardian who factually cares for a child, including-
 - (i) a foster parent;
 - (ii) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
 - (iii) a person who cares for a child whilst the child is in temporary safe care;
 - (iv) the person at the head of a child and youth care centre where a child has been placed;
 - (v) the person at the head of a shelter;
 - (vi) a child and youth care worker, who cares for a child who is without appropriate family care in the community; and
 - (vii) a child at the head of a child-headed household, if such a child is 16 years or older;
 - (b) **‘authorised person’** means, with reference to photographic images, fingerprints or body-prints, any police official in the performance of his or her official duties;

- (c) **'body-prints'** means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person;
 - (d) **'child'** means a person under the age of 18 years;
 - (e) **'Child Justice Act'** means the Child Justice Act 75 of 2008;
 - (f) **'comparative search'** means the comparing of fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter, by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act; and
 - (g) **'South African Police Service Act'** means the South African Police Service Act 68 of 1995.
- (2) Any police official who, in terms of this Act or any other law takes the fingerprints, a body-print or ascertains any bodily feature of a child must-
- (a) have due regard to the personal rights relating to privacy, dignity and bodily integrity of the child;
 - (b) do so in a private area, not in view of the public;
 - (c) ensure the presence of a parent or guardian of the child, a social worker or an appropriate person; and
 - (d) treat and address the child in a manner that takes into account his or her gender and age.

An important aspect of this section is the interpretation of the term “comparative search”. It is stated that fingerprints can be compared to any database referred to in Chapter 5A of the South African Police Service Act⁴⁸. Therefore any department of

⁴⁸ Chapter 5A – Deals with the storage and use of fingerprints, body-prints and photographic images.

Section 15A reads as follows:

- (1) the National Commissioner must ensure that fingerprints, body-prints or photographic images taken under-
 - (a) section 36B(1), section 36C(1) or section 37 of the Criminal procedure Act, 1977;
 - (b) Section 113 of the Firearms Control Act, 2000;
 - (c) Section 9 of the Explosives Act, 2003;
 - (d) any Order of the Department of Correctional Service,
- are stored, maintained, administrated, and readily available, whether in computerised or other form, and shall be located within the Division of the Service responsible for the criminal records.

government may be used to compare fingerprints, body-prints or photographic images taken under the Criminal Law (Forensic Procedure) Act 6 of 2010. We need to investigate the changes the Act grants our authorities and the use of bodily features.

5.2 Powers in respect of fingerprints of accused and convicted persons

Section 36B reads as follows:

- (1) A police official must take the fingerprints or must cause such prints to be taken of any-
 - (a) person arrested upon any charge related to an offence referred to in Schedule 1;
 - (b) person released on bail if such person's fingerprints were not taken upon arrest;
 - (c) person upon whom a summons has been served in respect of any offence referred to in Schedule 1;
 - (d) person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest;
 - (e) person convicted by a court in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subsection.
- (3) The fingerprints taken in terms of this section must be stored on the fingerprint database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.
- (5) The fingerprints taken under any power conferred by this section, may be subject of a comparative search.
- (6) (a) Subject to paragraph (c), any fingerprints, taken under any power conferred by this section-
 - (i) must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;
 - (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the

Section 15B reads as follows:

- (1) Any fingerprints or photographic images stored in terms of this Chapter, may for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution, be checked against the databases of the Department of Home Affairs, the Department of Transport or any other department of the state in the national sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this section.

expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and

- (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.
- (b) Fingerprints retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.
- (d) Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter-
 - (i) uses or allows the use of those fingerprints, body-prints or photographic images for any other purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or
 - (ii) tampers with or manipulates the process or the fingerprints, body-prints or images in question; or
 - (iii) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,

is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

Before the commencement of this Act, police officials had a discretion to take the fingerprints of an accused. According to this section, fingerprints must be taken upon arrest, at the service of summons and upon convicted. Therefore a duty is placed on the police official to take fingerprints of the persons mentioned in this section. Furthermore, every fingerprint taken under this section must be stored in the fingerprint database, and these prints may be subject to a comparative search⁴⁹. Even though a duty is placed upon the South African Police Service to take and store these fingerprints, the use of a comparative search is left to the official's discretion.

⁴⁹ For example the fingerprints stored in the police database may be compared to the fingerprint database retained by the Department of Home affairs, or to compare them to the fingerprints of all applicants of firearms.

The following discussion examines how the powers of the police officials regarding the taking of fingerprints have been amended by section 36B. These circumstances are stated in section 36C.

5.3. Fingerprints and body-prints for investigation purposes

Section 36C reads as follows:

- (1) Any police official may without warrant take fingerprints or body-prints of a person or a group of persons, if there are reasonable grounds-
 - (a) suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 1; and
 - (b) believe that the prints or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence
- (2) Prints in terms of this section may-
 - (a) be examined for the purposes of the investigation of the relevant offence or caused to be so examined; and
 - (b) be subjected to a comparative search.
- (3)(a) Subject to paragraph (c), any fingerprints or body-prints, taken under any power conferred by this section-
 - (i) must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;
 - (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and
 - (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified of such event as referred to in this paragraph.
- (b) Fingerprints retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing

persons, the identification of unidentified human remains or the conducting of a prosecution.

- (c) Subparagraphs (a)(i) and (ii) do not prohibit the use of any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.
- (d) The fingerprints or body-prints referred to in this paragraph (a) must be stored on the database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.
- (e) The National Commissioner must destroy the fingerprints of a child upon receipt of a Certificate of Expungement in terms of section 87(4) of the Child Justice Act.

This section empowers a police official to take fingerprints from a person or group of persons without a warrant, if there are reasonable grounds to believe that such a person or one or more persons of that group of persons committed an offence. A police official may also take such fingerprints if he believes that the fingerprints taken may be of value in the investigative process. Fingerprints taken under this section must be stored in the fingerprint database according to the regulations of Chapter 5A of the Police Service Act. This section places a duty on the commanding officer of the Division responsible for the criminal records referred to in Chapter 5A to destroy fingerprints taken under this Act if-

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

This section spells it out clearly the purpose of taking fingerprints and the goal regarding the storage of these fingerprints. The purpose of taking, retaining and storing fingerprints may only be used for the following purposes:

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

Furthermore it is submitted that any person who uses the information contained in the database for any other purpose than what it was intended for is guilty of an offence and liable upon conviction to imprisonment not exceeding 15 years.

The discussion of the amended Criminal Procedure Act has, up to this point, addressed the legislation that governed the taking of fingerprints of an accused person. In the next section the Criminal Law (Forensic Procedure) Act as a new piece of legislation that governs the ascertainment of bodily features will be discussed. The purpose of this piece of legislation is set out in the Act's preamble which can broadly be described as enhancing the use of bodily features as an investigative tool. The Criminal Law (Forensic Procedure) Act inserted sections 36A, 36B, 36C but also amended Section 37 which used to govern the collection of bodily features before the enactment of the new Act.

6. Section 37 after amendment by the Criminal Law (Forensic Procedures) Amendment Act

Section 37 reads as follows:

(1) Any police official may-

(a) take the **[fingerprints, palm-prints, foot-prints]** body-prints or may cause any such prints to be taken-

(b) make a person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B(1) available or cause such person to be made available for identification in such condition, position or apparel as the police may determine;

(c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B(1) has any mark, characteristics or distinguishing feature or shows any condition or appearance; Provided that **[no]** a police official **[shall]** may not-

(i) take [any] a blood sample of [the] any person [concerned nor shall a police official make any examination of];

(ii) examine the body of [the] a person [concerned where that person is a female and the police official is not a female] who is of a different gender to the police official;

(d) take a **[photograph]** photographic image or may cause a **[photograph]** photographic image to be taken of a person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1).

(4) Any court which has convicted any person of any offence or which has concluded which preparatory examination against any person on any charge, or any magistrate, may order that the **[finger-prints]** fingerprints, **[palm-prints or foot-prints, or]** body-prints or a [photograph,] photographic image of the person concerned be taken.

- (5) **[Fingerprints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.] Any fingerprints, body-prints or photographic image taken under any power conferred by this section, may be subject of a comparative search.**
- (6) (a) Subject to subsection (7), the body-prints or photographic images, taken under any power conferred by this section, and the record of steps taken under this section-
- (i) must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;
 - (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and
 - (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified of such event as referred to in this paragraph.
- (b) Body-prints or photographic images which may be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.
- (c) The body-prints or photographic images referred to in paragraphs (a)(i) and (ii) must be stored on the database established by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.
- (d) Subsection (6) does not prohibit the use of any body-prints or photographic image taken under any power conferred by this section, for the purpose of establishing if a person has been convicted of an offence."

Section 37 reads similar to its predecessor, merely incorporating the provisions of the inserted sections by the Criminal Law (Forensic Procedures) Amendment Act which have already been discussed. It is important to remember the changes

brought forth by the inserted sections,⁵⁰ which give a better understanding of the new substituted section 37. The most apparent changes brought forth is the duty placed on the SAPS to take a certain class of persons fingerprints. It states the circumstances under which these fingerprints must be taken and stored in the newly created fingerprints database.

7. Conclusion

As it stood before amendment by the Act of section 37, the Criminal Procedure Act only provided for the taking of a fingerprint sample for fingerprint comparison with regards to a specific case. This legislation did not support the gathering of fingerprint profiles for the purpose creating a fingerprint database, to locate fingerprint matches between different cases, or to cross reference a new fingerprint profile with existing fingerprint profiles of suspects or convicted offenders on a fingerprint database.

The Criminal Procedure (Forensic Procedure) Act 6 of 2010 amended the Criminal Procedure Act of 1977 by inserting sections 36A, 36B, 36C and substituting section 37. It further amended the South African Police Service Act of 1995, the Firearms Control Act of 2000 and the Explosives Act of 2003. The Criminal Procedure (Forensic Procedure) Act 6 Of 2010 regulates the compulsory taking of fingerprints of certain categories of persons, to provide the taking of fingerprints for investigation purposes, the creation of a fingerprint databases and to allow for comparative searches against these databases.

It is submitted that the creation of a fingerprint database will strengthen the forensic intelligence gathering capacity of the South African Police Service. Apart from the evidentiary value of securing real evidence in a criminal case, the advantages of a fingerprint database can be summarized as follows:

- a) A fingerprint database is an important intelligence tool, particularly in crimes where detection is generally low, such as property crimes.

In property crimes such as housebreaking cases, the only evidence left behind by the suspect is fingerprint evidence. Therefore fingerprints in these circumstances would be an invaluable tool to identify the perpetrator.

- b) Fingerprint scene-to-scene matches help identify patterns of criminal behaviour that may help solve past, existing and future crimes.

If the fingerprint found at a scene of the crime can be stored, matches can be found for numerous scenes. This will not only help with the identification of a repeat offender's but assist the SAPS with patterns of criminal behaviour which could lead to better detection of this type of offence

⁵⁰ Sections 36A, 36B and 36C.

c) Plea bargaining increase when suspects are confronted with real evidence.

As stated the value of fingerprints evidence and the weight to be placed on this type of evidence is high. This leads to guilty pleas as this evidence is not easily rebutted. This in turn this saves time spent in courts on trials, as we have already congested court rolls.

d) It should be noted that fingerprints and DNA samples are used not only to prove guilt, but also to prove innocence.

This would be the case where the accused arrested for the crime is eliminated by fingerprints found on the scene. Therefore prosecution would not proceed in the absence of other evidence.

In essence the amendment created an investigative tool for the police to increase the possibility to identify a potential suspect. Therefore a fingerprint found on a scene of crime can now be compared to fingerprints retained in the fingerprint databases of convicted persons, fingerprints registered under the Firearms Control Act of 2000 and the Explosives Act of 2003.

Therefore the Criminal Law (Forensic Procedure) Act 6 of 2010 grants more powers to the South African Police Services regarding the taking of fingerprints, body-prints and photographic images. This in effect enhances the Police ability to conduct investigations, identify possible offenders and exclude suspects with the use of the fingerprint database. Therefore this piece of legislation creates a powerful tool to the investigating officer and the means to link an accused to an offence and possibly other unsolved cases.

It is submitted that the new Act is a step forward in combating crime in South Africa and an aid to bring criminals to justice. However we should consider if the Criminal Procedure (Forensic Procedure) Act 6 of 2010 infringes the right against self-incrimination of a person guaranteed in the Bill of Rights. The aim of the investigated question is whether the Criminal Procedure (Forensic Procedure) Act 6 of 2010 infringes of these constitutional rights, if any, and if so may these rights be limited by the limitation clause. We have discussed the changes brought forth by the new Act, we will now consider the Constitution of South Africa and the Bill of Rights to identify the effect the Act might have on the rights of an accused.

Chapter 3: Constitution of South Africa

1. Introduction

The discussion so far has focused on the Criminal Procedure (Forensic Procedure) Act and the insertion of sections 36A, 36B and 36C of this Act into the Criminal Procedure Act. The amendment of section 37 and the collection of fingerprints were also discussed. Noteworthy changes brought about by the Criminal Procedure (Forensic Procedure) Act are that it creates a wider field of circumstances under which one may take accuseds fingerprints, but most importantly it empowers the police to retain the fingerprints under specific circumstances in a national database.

Up to this point we have dealt with the purpose of the new legislation, and changes it has brought forth. Throughout our discussion it is pointed out the possibility of infringement of rights the new legislation might have on an accused person. We need to consider what rights an accused has, if these rights may be infringed and what the implications of infringing these rights are. Only then we can move closer to the question regarding possible infringement of the new legislation and the impact thereof.

The Constitution of South Africa⁵¹ is the supreme law of our country and any law or conduct inconsistent with the Constitution is invalid. The Bill of Rights is entrenched in the Constitution in Chapter 2.⁵² The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state⁵³. The Bill of Rights is embodied in chapter 2 of the Constitution, and it sets out fundamental rights that are guaranteed to all citizens of the republic including accused persons.

The rights that are contained in the Bill of rights are guaranteed rights to all citizens including accused persons; however the rights in the Bill of Rights are subject to the limitations contained in the limitation clause embodied in section 36⁵⁴ of the Constitution.⁵⁵

⁵¹ Act 108 of 1996.

⁵² See sections 1, 2, 7 and 8 of the Constitution.

⁵³ Section 8(1) of the Constitution.

⁵⁴ The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom taking into account all relevant factors

⁵⁵ Section 7(3) of the Constitution.

The rights in the Bill of Rights are subjected to the limitations contained or referred to in section 36, or elsewhere in the Bill. However the state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁵⁶

All legislation must comply with the requirements set out in the Constitution. The Criminal Procedure Act needs to adhere to this constitutional scrutiny. We need to consider the constitutional impact on section 37, and the possible rights infringement caused by the general application of section 37 and section 225.

In the attempt to answer the investigated question, consideration should be placed on what the effect would be on evidence that have been obtained in violation of an accused rights contained in the Bill of Rights.

2. Unconstitutionally obtained evidence

Section 225(2) provides that evidence referred to in subsection (1) shall not be inadmissible purely on the ground that procurement of evidence was contrary to the provisions of section 37 or against the will of the accused. What would the case be if the evidence was obtained improperly, or was procured contrary to the Constitution? Before the enactment of the Constitution it was of no concern to our courts the manner in which the evidence was obtained, provided that the evidence was relevant to the proceedings.⁵⁷ Therefore the only requirement for admissibility was relevance and there was no principle in law to exclude evidence that was obtained in an improper way.⁵⁸ However in a criminal case a judge always had the discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused.⁵⁹

Section 35(5) of the Constitution states that evidence obtained in a manner that violates any of the rights contained in the Bill of Rights must be excluded if the admission of such evidence would render the trial unfair or be detrimental to the administration of justice. Therefore the underlining principle is that unconstitutionally obtained evidence is inadmissible despite its relevance and regardless of the fact that it would otherwise have been admissible.⁶⁰ Section 35(5) will only be applicable where the evidence was obtained by infringement of a right in the Bill of Rights.⁶¹

⁵⁶ Section 7(2) of the Constitution.

⁵⁷ ***R v Kuruma Son of Kaniu*** [1955] AC 197.

⁵⁸ ***R v Mabuya*** 1927 CPD 181.

⁵⁹ ***R v Kuruma Son of Kaniu*** [1955] AC 197 at 204.

⁶⁰ Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009 183.

⁶¹ Currie & De Waal *The Bill of Rights Handbook* 658

Therefore evidence obtained in an illegal or improper way would fall within the common law discretion of the courts⁶². Section 35(5) is flexible enough to permit a discretion on the court which has to be exercised on the basis of the facts of the case⁶³ and factors and considerations such as the nature and the extent of the constitutional infringement,⁶⁴ the presence or absence of prejudice to the accused,⁶⁵ the balance between due process and crime control,⁶⁶ the interest of society,⁶⁷ and, furthermore, it must be taken into account whether the admission of evidence would deprive the accused from his right to a fair trial entrenched in the Constitution.⁶⁸ Therefore section 35(5) still makes it possible to render unconstitutionally obtained evidence admissible, but only if the evidence will not render the trial unfair or be detrimental to the administration of justice. With regards to an accused right to a fair trial and the interpretation of this right, the Court in **S v Thilo**⁶⁹ held:

“[A]n accused’s right to a fair trial under s 35(3) of the Constitution is a comprehensive right and ‘embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force’..... It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops.....At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done.....An important aim of the right to a fair criminal trial is to ensure adequately that innocent people

⁶² Currie & De Waal *The Bill of Rights Handbook* 658-659.

⁶³ **S v Ngcobo** 1998 (10) BCLR 1248 (N).

⁶⁴ **S v Sesame** 2000 (2) SACR 225 (O).

⁶⁵ **S v Soci** 1998 (2) SACR 275 (E) at 293j-294b Erasmus J held as follows: “[P]rejudice to the accused... becomes relevant under the requirement in [s 35(5)] that the evidence must be excluded ‘if the admission of that evidence would render the trial unfair’... The question of prejudice is... inseparable from the question of fairness, in that a trial cannot be completely fair where the accused is in any way prejudiced; but, on the other hand, the trial can hardly be unfair where there is no prejudice. I find therefore that the presence or absence of prejudice is relevant to the question of a fair trial.”

⁶⁶ **S v Cloete** 1999 (2) SACR 137 (C) 146c. In this case Davis J, after having excluded impugned evidence, commented as follows (at 150h-i): “This is a difficult case. It is particularly problematic because the burden of the crime wave and the need for crime control weighs very heavily. It is wrong to conclude that an attempt to preserve the Constitution is necessary a nod in the direction of criminals. The Constitution is not the cause of crime in this country. The court’s task is to uphold the Constitution in such a manner that gives it its proper effect which I consider is to attempt to achieve some balance between the models of crime control and due process.”

⁶⁷ **S v Soci** 1998 (2) SACR 275 (E) at 397f-g.

⁶⁸ Schwikkard, Van Der Merwe: *Principles of Evidence* (3ed) 2009 228.

⁶⁹ 2000 (2) SACR 443 (CC) at [9] and [11].

are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possible other) interests in the accused.

Therefore evidence obtained contrary or in violation of the accused rights guaranteed to him or her in the Bill of Rights, must be excluded and rendered inadmissible. However the Court has discretion to declare unconstitutionally obtained evidence admissible if the evidence would not render the trial unfair, or be detrimental to the administration of justice⁷⁰.

3. Section 36 – Limitation of rights

It is submitted that the rights contained in the Bill of Rights are not absolute. These rights may be limited. The limitation of these rights is governed by section 36, which is known as the limitation clause. Therefore it is essential that we discuss section 36 and what this section entails in detail.

As stated above constitutional rights are subject to limitation by section 36. Only rights contained in the Bill of Rights are subject to limitation.⁷¹ Section 36 contains specific criteria for the limitation of rights contained in the Bill of Rights. By restricting a right in the Bill of rights, We in fact infringe upon that right. However this infringement will not be unconstitutional if this infringement is accepted as it is justified in an open society based on human dignity, equality and freedom.⁷² Therefore a restriction that can be justified in accordance with the criteria set out in section 36 will be constitutionally valid. This however doesn't mean that the rights contained in the Bill of Rights can be limited for any reason. Only under exceptional circumstances can a right be limited by section 36, and only if the restriction is justifiable.⁷³ The restriction placed on the right needs to serve an important purpose.⁷⁴ If the purpose can be achieved without limiting the right, the right may not be restricted. Therefore, the purpose is important to calculate if the restriction is justifiable. A restriction is justifiable if the restriction would achieve the purpose it is designed to achieve, and there is no other the 'realistically available' way to achieve this purpose without the right being restricted.⁷⁵

⁷⁰ **S v Thilo** 2000 (2) SACR 443 (CC).

⁷¹ **Van Rooyen v S** (*General Council of the Bar of South Africa Intervening*) 2002 (5) SA 246 (CC) para 35, where it was held that judicial independence was not subject to limitation.

⁷² Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 164.

⁷³ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 164.

⁷⁴ Meyerson D *Rights Limited* (1997) 36-43.

⁷⁵ **S v Manamela** 2000 (3) SA 1 (CC) par 32.

Section 36 is general limitation clause, as it applies to all the rights contained in the Bill of Rights. The Court will follow a two-stage approach to identify the infringement of rights and evaluation of the justifications for the infringement. The court will first have to determine if a right contained in the Bill of rights have been infringed, and secondly, whether such an infringement is justifiable as a permissible limitation to the infringed right.⁷⁶ Therefore if a right has been infringed by law or conduct, it must be shown that the infringement is permissible according to the criteria for a legitimate limitation in terms of section 36.

3.1 Criteria justifying the limitation of rights

(i) *Authorized by law*

A right in the Bill of Rights may only be limited by 'law of general application'. Therefore the limitation of the right must be authorized by law, and this law must be of general application.⁷⁷ The 'Law of General Application' is derived from the principal that the government gains power from the law, as government must have lawful authority for its actions. All forms of legislation and common law will qualify as 'law' if created and implemented by a lawful government.⁷⁸ It should be noted that the courts have the power to develop limitations by virtue of their power to develop the common law.⁷⁹

(ii) *General application*

The second component relating to the 'law of general application', relates to the character of the law that authorises a particular action.⁸⁰ This means that the law must be sufficiently clear, accessible and precise that those affected can ascertain the extent of their rights and obligations,⁸¹ it must apply equally to all and it must not be arbitrary in its application.⁸² The 'law of general application' requirement in s36 therefore prevents laws that have personal, unequal or arbitrary application from

⁷⁶ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 166.

⁷⁷ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 168.

⁷⁸ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 169.

⁷⁹ Section 8(3)(b) specifically authorises the courts, in cases involving the direct horizontal application of the Bill of Rights to common law, to 'develop rules of the common law to limit... [rights], provided that the limitation is in accordance with s 36'.

⁸⁰ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 169.

⁸¹ **Dawood v Minister of Home Affairs** 2000 (3) SA 936 (CC) par 46.

⁸² Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 169.

qualifying as legitimate limitations of rights.⁸³ Ackermann J has explained why there can be no room for such laws in a constitutional state:

'In reaction to our past, the concept and values of the constitutional state, of the 'regstaat' and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble [to the interim Constitution]. We have moved from the past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the perceptions or principles of the Constitution. Arbitrariness must also, by its very nature, lead to unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing rational explanation as to why similarly placed persons are treated in a substantially different way. Without such rational justification mechanism, unequal treatment must follow⁸⁴.

(iii) *Administrative action*

It is submitted that administrative action under the authority of law does not in itself qualify as law of general application.⁸⁵ However, it may qualify as law of general application if that law authorising an administrator to exercise a discretionary power has the effect of limiting rights. The empowering law lacks the quality of general application, if it grants the administrator a wide discretion to limit rights whom must abide to guidelines set down for the proper exercise of the discretion.⁸⁶

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

(i) *Proportionality*

The Constitutional Court adopted the following approach to the application of the general limitation clause⁸⁷:

⁸³ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 171.

⁸⁴ **S v Makwanyane** 1995 (3) SA 391 (CC) para 156.

⁸⁵ **Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of Sate- Aided Schools: Eastern Transvaal** 1999 (2) SA 91 (CC) par 41; Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 175.

⁸⁶ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 175.

⁸⁷ **S v Makwanyane** 1995 (3) SA 391 (CC) par 156.

'The limitation of the constitutional right for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) [IC]. The fact that different rights have different implications for democracy, and in our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) [IC], and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.⁸⁸

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

The proportionality enquiry vested in s 36 involves the weighing up of rights. It requires the Court to weigh the harm caused by a law and the infringement of the fundamental right, against the benefit the law is striving to achieve contained in its reasons or purpose for that law. The burden placed on the court is a difficult one, as the court needs to establish the importance of a particular right in the overall constitutional scheme. Therefore a right of importance within the constitutional sphere will attract more weight and less inclined to be justified for their infringement⁸⁹.

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

Limiting a right must be reasonable and justifiable. Reasonableness requires that the limitation of a right must serve a purpose. This goal it wishes to achieve will bring about the consequence of rights being infringed. Justifiability requires that the goal set to be achieved must be noteworthy and of importance in an constitutional democracy. Limiting a right for a purpose that does not contribute to an open and democratic society can never be justifiable.⁹⁰

⁸⁸ **S v Makwanyane** 1995 (3) SA 391 (CC) par 104.

⁸⁹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 178.

⁹⁰ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 178.

A limiting measure must serve a purpose that all reasonable citizens would agree to be compellingly important. The following has been considered by the constitutional court as legitimate purposes in the context of limitation analysis⁹¹:

- 1) Protecting the administration of justice at its broadest;⁹²
- 2) The prevention, detection, investigation and prosecution of crime generally;⁹³
- 3) Reduction of unemployment among South African citizens;⁹⁴
- 4) Inspection and regulation of the multiple health undertaking in modern society which impact on the welfare and general well-being of the community;⁹⁵
- 5) Protection of the rights of others;⁹⁶
- 6) Compliance with constitutional obligations;⁹⁷
- 7) Promoting healing of the divisions of the past and the building of a united society;⁹⁸
- 8) Complying with South Africa's international obligations;⁹⁹
- 9) Preventing people from gaining entry to the country illegally.¹⁰⁰

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

The Court is required under this factor to assess the way in which the limitation imputes the right concerned. This is an essential part of the proportionality enquiry

⁹¹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 180.

⁹² **S v Singo 2002** (4) SA 858 (CC) para 33: 'essential that courts be equipped with the power to deal effectively with any conduct that threatens the smooth running of the administration of justice'.

⁹³ **S v Mbatha** 1996 (2) SA 464 (CC) para 16; **S v Manamela** 2000 (3) SA 1 (CC) par 27, **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd** 2001 (1) SA 545 (CC) par 53.

⁹⁴ **Larbi-Odam v MEC for Education (North- West Province)** 1998 (1) SA 745 (CC) par 30.

⁹⁵ **Mistry v Interim National Medical and Dental Council of South Africa** 1998 (4) SA 1127 (CC).

⁹⁶ **De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)** 2004 (1) SA 406 (CC).

⁹⁷ **South African National Defence Force Union v Minister of Defence** 1999 (4) SA 469 (CC).

⁹⁸ **Islamic Unity Convention v Independent Broadcasting Authority** 2002 (4) SA 294 (CC) par 45.

⁹⁹ **Prince v President, Cape Law Society 2002 (2) SA 794** (CC) par 52 and 72.

¹⁰⁰ **Lawyers for Human Rights v Minister of Home Affairs** 2004 (4) SA 125 (CC) par 37.

because proportionality dictates that the infringement of rights should not be more severe than is required by the purpose it wishes to achieve. The Court will therefore have to assess how extensive the infringement is.¹⁰¹

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

As stated above, a legitimate limitation of a right must be reasonable and justifiable. Therefore there must be a legitimate reason or goal for the infringement. It also means that the harm caused by the infringement must be proportional to the beneficial purpose the law seeks to achieve. Therefore logically deduced, this requires a casual connection between the law and its purpose. The law must tend to serve the purpose that it is designed to serve.¹⁰²

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

The purpose to be achieved should be more beneficial than the cost of the limitation. Therefore if alternative means exist whereby the same purpose can be achieved by less restrictive means, then the less restrictive method must be preferred.¹⁰³

In conclusion it can be said, then, that where a law of general application infringes a right contained and protected by the Bill of Rights, the party relying on that law must argue that the infringement constitutes a reasonable limitation to that right. By implication this means that rights are not absolute and may be infringed if a compellingly good reason exists for the limitation. This reason must serve a purpose considered by all reasonable citizens as legitimate in the constitutional scheme. Finally, the infringement must be proportional to benefits gained by the limitation. If less restrictive means exist to achieve the same goal, then the less restrictive method must be preferred.¹⁰⁴

We will discuss the ascertainment of bodily features infringes constitutional rights and whether the infringement constitutes a reasonable limitation to those rights.

4. Section 35 of the Constitution and fingerprint evidence

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

¹⁰¹ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 181.

¹⁰² Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 182.

¹⁰³ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 183-184.

¹⁰⁴ Currie & De Waal *The Bill of Rights Handbook* (5th ed) 2005 185.

a blood sample of each of the accused “in order to ascertain whether such sample(s) has any mark, characteristic or distinguishing feature by means of DNA analysis”¹⁰⁵. The state brought this application after the accused’s refusal to furnish blood samples in response to an informal request therefore. The accused opposed the application and argued that being subjected to such blood tests for the purpose of compiling a DNA profile will infringe the accuseds’ fundamental rights to dignity, to freedom and security of the person, the right to bodily integrity, the right to privacy and the right to be presumed innocent and not to have to assist the prosecution in proving its case (section 10; 12(1); 12(2); 14(a); 35(3)(h) and 35(3)(j) of the Constitution). The Court held in this regard:

*“There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the suspect’s right to privacy and an infringement, albeit slight, of the right to bodily security and integrity. To the extent, however, that the involuntary taking of a blood sample from an accused for the purposes of compiling a DNA profile for the use in criminal proceedings infringes his or her right to privacy, dignity and bodily integrity. I am of the view that the limitation clause of the Constitution permits the limitation of these rights, through the medium of section 37 of the Criminal Procedure Act. I consider that, taking into account the factors set out in section 36(1)(a)-(e) of the Constitution, such a limitation is necessary and justifiable in a open and democratic society based on human dignity, equality and freedom. Put differently, the taking of blood samples of DNA testing for the purposes of a criminal investigation is a reasonable and necessary step to ensure that justice is done and is reasonable and necessary in balancing the interests of justice against those of individual dignity”.*¹⁰⁶

In ***Levack and Others v Regional Magistrate, Wynberg, and Another***¹⁰⁷, the application of section 37 of the Criminal Procedure Act was broadened to include voice recognition. The Court held that although the section does not expressly mention the voice it does form part of the innumerable bodily features that the wording of the section expressly contemplates. It was again confirmed by Cameron JA, that “*autoptic evidence*”, evidence derived from the accused’s own bodily features, does not infringe the right to silence or the right to be compelled to give evidence¹⁰⁸. Cameron JA held in this regard as follows:

*“Differently put, it is wrong to suppose that requiring the appellants to submit voice samples infringes their right either to remain silent in court proceedings against them or not to give self-incriminating evidence.”*¹⁰⁹

Therefore Cameron JA reaffirmed the findings of courts in the cases of ***S v Huma and Another***¹¹⁰ and ***S v Maphumulo***¹¹¹ Cameron JA relied heavily on the findings of

¹⁰⁵ ***S v Orrie and Another*** 2004 (1) SACR 162(C).

¹⁰⁶ At par 20.

¹⁰⁷ 2004 (5) SA 573 (SCA).

¹⁰⁸ At par 19.

¹⁰⁹ At par 17.

the court in ***Ex parte Minister of Justice: In R v Matemba***¹¹², where Watermeyer JA held as follows:

“Now, where a palm print is being taken from an accused person he is, as pointed out by Innes CJ in R V Camane 1925 AD at 575, entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in Court”.¹¹³

In ***S v Maphumulo***, Combrink J held:

“I have concluded, accordingly, that the taking of the accuseds’ fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in section 37(1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their rights as contained in section 25(2)(c), or 25(3)(d) of the [Interim] Constitution. Nor does it appear to be a violation of the accused’s rights as contained in section 10 of the [Interim] Constitution, which reads: “Every person shall have the right to respect for and protection of his or her dignity”.¹¹⁴

In ***S v Huma and Another***,¹¹⁵ the accused objected to having his fingerprints taken on two grounds. The first is that taking of impairs the dignity of a person and is therefore a contravention of the constitutional right to dignity contained in sections 10 and 11 of the Interim Constitution. The second ground of objection was based on the constitutional right to remain silent as contained in section 25 (3)(c) and (d) of the Interim Constitution. In colloquial terms this is called the privilege against self-incrimination. Claassen J held as follows in regard to the question as to whether or not the taking of fingerprints constitutes inhuman or degrading treatment¹¹⁶:

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

- (1) The taking of fingerprints is accepted worldwide as a proper form of individual identification. It is throughout the world used for the issuing of identity documents and passports. The same holds true for South Africa. The act of making one’s fingerprints available for the purposes of issuing an identity document or a passport can never be regarded as inhuman or degrading treatment.*

¹¹⁰ 1996 (1) SA 232 (W).

¹¹¹ 1996 (2) SACR 84 (N).

¹¹² 1941 AD 75.

¹¹³ At 80-83.

¹¹⁴ At 90 c-d.

¹¹⁵ (2) 1995 (2) SACR 411 (W).

¹¹⁶ See page 416.

(2) *The taking of fingerprints per se in private and not in court or a public place (see S v Mkize 1962 (2) SA 457 (N) at 460) can in no way lower a person's self-esteem or bring him into dishonour or contempt, or lower his character or debase him. The definition of 'inhuman' or 'degrading' as referred to above in the judgement of Mahomed AJA therefore cannot, in my view, apply to the mere act of taking one's fingerprints.*

(3) *The process of taking one's fingerprints does not, in my view, constitute an intrusion into a person's physical integrity. No physical pain of any kind accompanies this process. By comparison, the taking of a blood sample constitutes more than an intrusion into a person's physical integrity than the mere taking of one's fingerprints. When a blood sample is taken the skin is ruptured and it is accompanied by a small element of pain. Pain and violation of a person's physical integrity are also associated with corporal punishment and other forms of punishment. By comparison, in my judgement, the taking of fingerprints is on par with the mere taking of a photograph, which does not, in my view, violate the physical integrity of a person.*

(4) *When fingerprints are taken pursuant to the provisions of section 37 it has to be borne in mind that those fingerprints will be destroyed in the event of the accused being found not guilty. There is therefore an additional safeguard built into the application of the provisions of this section.*

(5) *The taking of fingerprints can potentially be a helpful procedure to the benefit of the accused in proving his innocence. If, after the fingerprints have been taken, a comparative chart is made and it is found that the necessary requirements for the purposes of comparison are lacking, then the whole process of taking fingerprints would actually have redounded to the accused's benefit.*

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

With regard to the privilege against self-incrimination, Claassen J held that the "privilege against self-incrimination does not apply to procedures relating to the ascertainment of bodily features such as the procedures involved in identification parades, the taking of finger- and footprints, blood samples and the showing of bodily scars...[t]hese procedures relate to the furnishing of what has been termed

“real” evidence, as opposed to the furnishing of oral or testimonial evidence by the accused”.¹¹⁷

It is clear from the above that the ascertainment of a bodily feature such as a fingerprint or DNA sample does not violate or infringe upon the fundamental rights of an accused not to be compelled to give evidence, or to give self-incriminating evidence. Where compulsion is used to ascertain a bodily feature such as a fingerprint or DNA sample the accused right to privacy is infringed, however this right is limited through the Criminal Procedure Act. This limitation is a necessary one, and justifiable in an open democratic society such as ours. Fingerprint evidence fall within the same category as DNA evidence. It can be argued that the taking of fingerprints is less evasive than drawing of an accused blood. If a DNA sample does not infringe upon the fundamental rights of an accused not to be compelled to give evidence, or to give self-incriminating evidence, the same can be said about fingerprint evidence.

5. Comparative overview

5.1 Introduction

Up to this point we have discussed the new legislation regarding the taking of fingerprints and the creation of a fingerprint database where these fingerprints will be retained. We have concluded that the taking of an accused fingerprints may infringe a right afforded to the accused contained in the Bill of Rights. These rights may be limited by the limitation clause infested in section 36. Section 36 clearly states the criteria that have to be met before a right maybe limited. We have also established that the taking of fingerprints of an accused is a justifiable limitation on the rights of the accused. The only avenue left for uncertainty regarding the research question is the issue of retaining fingerprints of an accused and the creation of a fingerprint database. In this regard it may be useful to consider other legal systems that have already adopted similar legislation.

Section 39(1)(b) of the South African Constitution provides that, when interpreting a provision in the Bill of Rights, a court must consider international law and that it may consider the use of foreign law for this purpose. In addition the Constitution provides that courts interpreting legislation must prefer any reasonable interpretation which is consistent with international law over an interpretation which is inconsistent with international law¹¹⁸.

¹¹⁷ At page 417

¹¹⁸ Section 233 of the Constitution.

These two sections create a comparative frame work that may be used by our courts. This comparative methodology can aid our courts in the interpretation of the rights afforded to an accused. Therefore our courts may consider international law to establish if the retaining of the accused fingerprints and the creation of a database will infringe on the rights of an accused and whether these rights may be limited. In the investigating of the research question it is submitted that the use of jurisprudence of other legal systems who share the same values as our constitution, and who have enacted similar legislation would be invaluable to determine how our courts may interpret the new legislation.

South Africa is not the first country to adopt legislation that governs the collection of fingerprint profiles and storing them in a fingerprint database. Several other countries have adopted legislation to strengthen their crime detection tools, and therefore created means by which real evidence can be obtained, retained and compared to crime scenes of the past and future. We need to consider legislation from other democracies in an effort to establish how foreign jurisprudence has interpreted similar legislation, the impact on possible right infringements and the limitation of these rights. We will now discuss the foreign legal systems of England and Wales, Canada, Australia and Scotland, countries that have adopted similar legislation.

5.2 United Kingdom

(a) England and Wales

The United Kingdom uses a two-folded system. The first is the National Automated Fingerprint identification System (NAFIS) also known as IDENT1. The second system, known as Livescan, which enables the police to take fingerprints electronically and send them to IDENT1. The DNA Expanding Programme was also allocated funding towards the back record conversion of fingerprint records. This created the means by which paper-held fingerprints can be transferred to IDENT1. Furthermore it enabled the reinstatement of the fingerprint records of acquitted persons.¹¹⁹

Fingerprint technology used in the United Kingdom is two-folded, firstly use is made of the National Automated Fingerprint Identification System (NAFIS), known as IDENT1 and secondly Livescan technology is used to enable the police to take fingerprints electronically and send them to IDENT1. Funding was given towards the back record conversion of fingerprint records. The exercise enabled the transfer of paper-held fingerprint marks to IDENT1 and the reinstatement of the fingerprint records of acquitted persons. Back record conversion of palm prints has also been

¹¹⁹ National Policing Improvement Agency report (January 2007) available at www.npia.police.uk/en/5969.htm.

completed and IDENT1 now provides the capacity to capture palm prints and to store them.¹²⁰

Section 64 of the Police and Criminal Evidence Act 1984 (PACE) states that where a person has been acquitted of an offence or the charges have been dropped, any DNA sample and data derived from the sample had to be destroyed. Section 82 of the Criminal Justice and Police Act 2001 (CJPA) amended the Police and Criminal Evidence Act 1984 so as to remove these requirements placed on the police.¹²¹ Section 82 reads as follows:

“Where-

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

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

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

(b) Scotland

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

- 1) DNA maybe retained permanently, following a criminal conviction;

¹²⁰ Ad Hoc Committee’s Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 26.

¹²¹ Id.

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

DNA data and fingerprint records, may be retained only in the first and third of the above mentioned circumstances. With regards to children, DNA and fingerprint records must be destroyed if it is decided not to institute criminal proceedings regardless of the type of offence they have committed.¹²²

5.3 Canada

The Identification of Criminals Act¹²³ in section 2 authorises the taking of fingerprints upon arrest or conviction for an indictable offence. The Act provides for the taking of fingerprints of an accused who is charged with an indictable offence and is in lawful custody, or has been convicted of an indictable offence. Fingerprints may also be taken from an accused charged or convicted of an offence under the Security of Information Act. If consent is not given, the Act authorises that such force as may be necessary needed to obtain the fingerprints may be used. The Act remains silent with regards to the destruction of fingerprints upon acquittal or when the charges are dropped.¹²⁴

In *Regina v Dore* (2002) 96 CRR (2ND) 49 the appellant appealed to the Appeal Court that his conviction should be set aside since the police were led to him through his fingerprints, which were retained in the system as a result of a previous charge on which he was acquitted. The Appeal Court held that the retention of fingerprints taken in accordance with the Act is implicitly authorized by the Act, and that there is no constitutional duty placed upon the police to inform an acquitted person that he can apply to have his fingerprints removed from the system. Therefore the appeal was dismissed.¹²⁵

¹²²See “Review to strengthen forensics power to fight crime” at <http://www.scotland.gov.uk/news/Releases/2007/09/24105858>.

¹²³ R.S., c. I-1

¹²⁴ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at page 30.

¹²⁵ Id.

10. Australia

In Australia legislation is subject to commonwealth principles across all states. Constitutional law in the Commonwealth of Australia consists mostly of that body of doctrine which interprets the Commonwealth Constitution. The Constitution itself is embodied in clause 9 of the Commonwealth of Australia Constitution Act, which was passed by the British parliament in 1900 after its text had been negotiated in Australian Constitutional Conventions in the 1890s and approved by the voters in each of the Australian colonies.

The Commonwealth Crimes Act of 1914 (as amended up to July 2008) regulates the taking, use and destruction of fingerprints.¹²⁶

With regards to fingerprints-

- (1) Section 3ZJ of the Act provides that fingerprints may be taken from a person in lawful custody with or without that person's consent.
- (2) Restrictions are stipulated with regards to children under the age of 10 and with regards to children aged 10-18.
- (3) Section 3Z of the Act deals with the destruction of fingerprints after the lapse of 12 months if prosecution was not instituted, or if the accused was acquitted of the charges. However an application can be brought to extend the 12 month period.¹²⁷

11. Conclusion

It is clear that South-Africa will not be the first country to venture down the path of fingerprint database legislation. From statutes of other countries that currently have legislation regulating fingerprint databases, it is clear that fingerprint databases are a valuable forensic tool to combat crime. There are aspects in the legislation of these countries that correspond with each other and should be duplicated if South Africa wants to adopt similar legislation. The first would be to empower the South African Police Service with the means to collect fingerprint samples and store them electronically in a database. Secondly, strict guidelines should be placed on the South African Police Service governing the collection and storage of these fingerprint profiles. Guidelines should also be put in place regarding when such fingerprint records must be destroyed.

¹²⁶ CE White (June 2008) Study of International Statute Requirements for the Management of DNA databases, at 6.

¹²⁷ Ad Hoc Committee's Submission on the Criminal Law (Forensic Procedures) Amendment Bill, (2009), at 31.

The Criminal Procedure (Forensic Procedure) Act 6 of 2010 regulates the compulsory taking of fingerprints of certain categories of persons, to provide the taking of fingerprints for investigation purposes, the creation of a fingerprint databases and to allow for comparative searches against these databases. It is submitted that South Africa has adopted similar legislation used in foreign democracies that share the same values as our legal system. In this chapter it has been indicated how jurisprudence of these legal systems may be used to determine how our courts may interpret the new legislation.

Chapter 4: Conclusion

1. Introduction

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

It is therefore submitted that in order to combat crime effectively, investigators and prosecutors need to use all possible means and methods available to ensure effective investigation of crimes that would secure convictions. Scientific means of investigating crime can not only link offenders to the commission of a criminal offence but can exclude suspects from the investigation.

2. Fingerprints as an investigative tool

Real evidence is a term used to cover the production of material objects for inspection by court, and include fingerprints and DNA profiles. The value of real evidence in securing a conviction is well documented in sources of South African law of evidence. Every person has a unique DNA profile and also a unique fingerprint profile. This means that linking a suspect to a crime scene by using his DNA profile or fingerprint profile in most cases is a strong indication that the suspect committed the offence. Fingerprints that were found at the scene of the crime or on a particular object are, “often of strong probative value in linking the accused with the commission of the crime”.¹²⁸ Therefore every suspect that comes into contact with any object by a scene of a crime has the potential to leave valuable evidence behind by which the suspect can be identified and be linked to the commission of the crime.

¹²⁸ Schwikkard, Skeen and Van Der Merwe: *Principles of Evidence* (3ed) 2009 257

However obtaining this valuable evidence from the scene in most cases is useless if a suspect is never arrested. Our current system makes no provision for comparative searches in this regard. The investigator first has to link the suspect by other means such as an eye witness and only after arrest the scientific methods come into play. Therefore it is submitted that in our country the use of DNA profiles and in most cases fingerprint profiles are not used to identify the suspect, but rather in order to confirm existing links between the offender and crime scene or victim.

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

3. Criminal Law (Forensic Procedures) Amendment Act

It would seem that the legislator has realised that these scientific means to improve investigations exist and that our system is lacking the necessary legislation to empower the investigator with the powerful tool known as the database. The Criminal Law (Forensic Procedures) Amendment Act is a step forward in right direction in the effort to combat crime effectively. It gives the relevant authorities the power to take the fingerprints upon arrest of the suspect and to do a comparative search. Even more important it allows upon conviction of the accused that his or her fingerprint profile be retained and stored in a fingerprint database. This means that every fingerprint found at a scene of a crime can now be cross referenced against this convicted person's finger print profile. Furthermore if this person commits further criminal offences and leaves his fingerprint on the scene and the investigator reads this fingerprint into the database he will receive an instant match. There can be no doubt that the database increases the investigators ambit to solve crime and to ensure effective prosecution.

However it must be stated that the database will be of no value if the role players such as the police collecting the fingerprints and the relevant authority maintaining the database are not doing their work properly. It all starts with the collection and lifting of the fingerprints from the scene of crime by the investigator. This would be the fragile pillar this piece of legislation stands on. Secondly, the capture and storing

of these fingerprint profiles are cause for concern. Improper capturing of fingerprint profiles could easily lead to faulty identification of a suspect and unlawful arrest of an innocent person. This in effect will bring the whole system in disrepute. It is therefore of utmost importance that all police should receive sufficient training and guidelines regarding all aspects governing fingerprints and the fingerprint database. Mismanagement of the information in the database is also a worrying aspect that should be considered. The legislator did foresee this possibility and created a safeguard in the form of criminal liability for anyone that misuses this database for any purpose other than what it was intended for¹²⁹. It is submitted that a further safeguard should be implemented where every match should be confirmed with independent testing.

4. Criminal Law (Forensic Procedures) Amendment Act and the Constitution

All legislation must comply with the requirements set out in the Constitution, and therefore the Criminal Law (Forensic Procedures) Amendment Act needs to adhere to this constitutional scrutiny. We need to consider the constitutional impact on section 37, section 225 of the Criminal Procedure Act and the possible rights infringement caused by the general application of these sections. The Bill of Rights is embodied in chapter 2 of the Constitution, and it sets out fundamental rights that are guaranteed to all citizens of the republic including accused persons. The question now arises if the Criminal Law (Forensic Procedures) Amendment Act which now governs the collection and retaining of fingerprints will infringe any right contained in the Bill of Rights.

Section 37 makes serious inroads upon the bodily integrity of the accused. But these inroads should be seen in the light of the fact that the ascertainment of the bodily features and 'prints' of an accused often forms an essential component of the investigation of crime and is in many respects a prerequisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial.¹³⁰ In **S v Orrie & another**¹³¹ the court held that the taking of blood samples '*has long been... a vital tool in the administration of criminal justice system*'. It is therefore clear that the ascertainment of an accused's bodily features infringes the accused's constitutional rights. Therefore section 37 must be read and applied subject to certain constitutional rights. These constitutional rights are the right to dignity¹³²,

¹²⁹ Section 36B of the Criminal Procedure Act 51 of 1977.

¹³⁰ Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 3-1.

¹³¹ 2004 (1) SACR 162 (C) at [15]

¹³² Section 10 of the Constitution.

the right not to be treated in a cruel, inhuman or degrading way¹³³, and the right to bodily and psychological integrity¹³⁴. However these constitutional rights are subject to the limitation clause set out in Section 36 of the Constitution. Therefore constitutional rights¹³⁵ may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable.

The accused furthermore, has the guaranteed constitutional right not to be compelled to make any confession or admission that could be used in evidence against him¹³⁶, and not be compelled to give self-incriminating evidence¹³⁷. It must be considered if taking of the accused bodily features amounts to self-incriminating evidence, or compelling the accused to make an admission that could be used against him at trial. At common Law the privilege of an accused against self-incrimination is embodied in the maxim '*nemo tenetur ipsum accusare*'. The common Law ambit of the privilege of against self-incrimination is confined to communications, whereas section 37 deals with the ascertainment of an accused bodily or physical feature or conditions which are not as a result of a communication emanating from the accused.¹³⁸ Wigmore¹³⁹ explains that an inspection or ascertainment of bodily features does not violate the privilege against self-incrimination:

*'...because it does not call on the accused as a witness--- ie, upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action--- as when he is required to take off his shoes or roll up his sleeve--- is immaterial, unless all bodily action were synonymous with testimonial utterance... not compulsion alone is the component of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself... Unless some attempt is made to secure a communication--- written, oral or otherwise---... the demand upon him is not a testimonial one.'*¹⁴⁰

¹³³ Section 12 (1)(e) of the Constitution.

¹³⁴ Section 12 (2) of the Constitution.

¹³⁵ Set out in Chapter 2: Bill of Rights.

¹³⁶ Section 35(1)(c) of the Constitution.

¹³⁷ Section 35 (3)(j) of the Constitution.

¹³⁸ Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 3-6.

¹³⁹ *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) at par 2265.

¹⁴⁰ This approach was approved in **Nkosi v Barlow** 1984 (3) SA 148 (T) and **S v Duma** 1984 (2) SA 591 (C) 595 G-H and 596B.

In **S v Binta**¹⁴¹ Akerman J stated as follows:

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

It has been held that the common-law distinction has not been affected by constitutional provisions. In **S v Huma & another**¹⁴² and **S v Maphumalo**¹⁴³ in the latter case Combrick J held that:

‘the taking of the accuseds’ fingerprints, whether it be voluntarily given by them, or taken under compulsion in terms of the empowerment thereto provided in s 37 (1), would not constitute evidence given by the accused in the form of testimony emanating from them, and as such would not violate their right as contained in s 25 (20)(c), or 25 (3)(d) of the Constitution. Nor does it appear to be a violation of the accuseds’ rights as contained in s10 of the Constitution, which reads: “Every person shall have the right to respect for and protection of his or her dignity.”’¹⁴⁴

Even though this judgement was decided in terms of the interim Constitution, it is submitted in terms of the present Constitution the position is exactly the same.¹⁴⁵

In **S v Huma & another** 1995 (2) SACR 411(W) the court further held that the taking of fingerprints in terms of ss37 and 225 does not constitute an impairment of the accused’s right to dignity in terms of ss 10 and 11 of the Constitution Act 200 of 1993 and is also not an infringement of the right to remain silent in terms of ss 25(3)(c) and 25(3)(d) of the Constitution.¹⁴⁶ In **Msomi v Attorney-General of Natal** 1996 (8) BCLR 1109 (W) 1120B it was also stated:

‘...an accused submits to fingerprinting under compulsion, he does not thereby proffer testimonial evidence against himself. All he is being required to do is to make available specimens of a bodily feature... In this entire process there is no communicative act by the accused, either orally or in writing. In other words, the mere giving of fingerprint specimens does not in itself amount to the accused making himself a compellable witness against himself.’

¹⁴¹ 1993 (2) SACR 553 (C) at 562 d-e.

¹⁴² (2) 1995 (2) SACR 411 (W).

¹⁴³ 1996 (2) SACR 84 (N).

¹⁴⁴ Para 90c-d.

¹⁴⁵ Du Toit et al. The Commentary on the Criminal Procedure Act (Revision Service 45, 2010) 3-6..

¹⁴⁶ Currie & De waal *The Bill of Rights Handbook* 5 ed (2005) 764-7.

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

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

In **S v Maphumulo**, Combrink J held:

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

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

Therefore it is submitted that on face value the Criminal Law (Forensic Procedures) Amendment Act with the creation of a database containing fingerprint profiles of convicted persons will not infringe any right contained in the Bill of Rights. It is submitted that rights contained may be infringed, if such an infringement is justifiable in an open and democratic society based on human dignity and equality. It is further submitted that the ascertainment of bodily features such as fingerprints forms an essential component of investigation of crime and in many respects a prerequisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial. It is therefore submitted that if the taking and retaining of a fingerprint profile infringes upon a right contained in the Bill of Rights; it would pass the scrutiny of the limitation clause. In a country rife with criminal activity such infringement will be justifiable in an open and democratic society based on human dignity and equality as it is required for proper administration of our criminal justice system.

5. Conclusion

It is therefore submitted that South Africa will benefit immensely from placing a fingerprint database at the disposal of investigators. This will ensure effective investigation and prosecution of criminal matters. On face value a fingerprint database will not infringe on any right contained in the Bill of Rights. It can be said that to ensure sufficient and effective use of the fingerprint database, strict guidelines will have to be put in place with strict ethical guidelines regulating the use of the database. Furthermore legislation has to ensure there are build in safeguards regulating the use of the fingerprint database to insure the integrity of the system. Criminal liability should follow any misconduct regarding the use or tampering of the fingerprint profiles in the database. For reliability issues every match should be confirmed by subsequent test for confirmation. It is clear that it will take some time before a fingerprint database will be operational; however the time span may be, it will still be an invaluable tool to the investigator in the fight against crime.

Bibliography

B

- Bekker PM & Geldenhuis T & Swanpoel JP & Terblanche & Van der Merwe E & Joubert JJ(ed) (2009) *Criminal Procedure Handbook*: Cape Town: Juta

C

- Child Justice Act 75 of 2008
- Commonwealth Crimes Act of 1914
- Constitution of South Africa Act 108 of 1996
- Criminal Justice and Police Act 2001
- Criminal Procedure Act 51 of 1977
- Criminal Law (Forensic Procedures) Amendment Act 6 of 2010
- Currie I & De Waal J (2005) *The Bill of Rights Handbook* Cape Town: Juta

D

- *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)
- *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC)
- Du Toit E & De Jager F & Piazes A & Skeen A & Van Der Merwe S (ed) (Revision Service 45, 2010) *Commentary on the Criminal Procedure* Cape Town: Juta

E

- *Ex parte Minister of Justice: In R v Matemba* 1941 AD 75
- Explosives Act 15 of 2003
- European Convention on Human Rights

F

- Firearms Control Act 6 of 2000

I

- Identification of Criminals Act 1985
- *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC)
- *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC)

L

- *Larbi-Odam v MEC for Education (North- West Province)* 1998 (1) SA 745 (CC)
- *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)
- *Levack and Others v Regional Magistrate, Wynberg, and Another* 2004 (5) SA 573 (SCA)

M

- Meyerson D (1997) *Rights Limited* Cape Town: Juta
- *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC)
- *Msomi v Attorney-General of Natal* 1996 (8) BCLR 1109 (W)

N

- National Policing Improvement Agency report (January 2007) available at www.npia.police.uk/en/5969.htm.
- *Nkosi v Barlow* 1984 (3) SA 148 (T)

P

- Police and Criminal Evidence Act 1984
- *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State- Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC)
- *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC)

R

- Regina v Dore (2002) 96 CRR (2ND) 49
- “Review to strengthen forensics power to fight crime”
<<http://www.scotland.gov.uk/news/Releases/2007/09/24105858>>
- *R v Blom* 1939 AD 188
- *R v Camane & others* 1925 AD 570
- *R v Chief Constable of South Yorkshire* (ex parte S and Marper)
- *R v Du Plessis* 1944 AD 314
- *R v Kuruma Son of Kaniu* [1955] AC 197
- *R v Plaatjes* 1939 EDL 1
- *R v Mabuya* 1927 CPD 181.
- *R v Morela* 1947 (3) SA 147 (A)

S

- Schwikkard PJ & Van Der Merwe SE (2009) *Principles of Evidence* Cape Town: Juta
- Security of Information Act 1985
- South Africa Ad Hoc Select Committee on the Criminal Law (Forensic Procedures) Amendment Bill (2009)-
<<http://www.pmg.org.za/report/20090120-criminal-law-forensic-procedure-amendment-bill-briefing>>
- South African Police Service Act 68 of 1995
- *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC)
- *S v Binta* 1993 (2) SACR 553 (C)
- *S v Blom* 1992 (1) SACR 649 (E)
- *S v Cloete* 1999 (2) SACR 137 (C)

- *S v Duma* 1984 (2) SA 591 (C)
- *S v Gumede & another* 1982 (4) SA 561 (T)
- *S v Huma and Another* 1996 (1) SA 232 (W)
- *S v Huma & another* (2) 1995 (2) SACR 411 (W)
- *S v Kimimbi* 1963 (3) SA 250 (C)
- *S v M* 2002 (2) SACR 411 (SCA)
- *S v Makwanyane* 1995 (3) SA 391 (CC)
- *S v Malindi* 1983 (4) SA 99 (T)
- *S v Manamela* 2000 (3) SA 1 (CC)
- *S v Maphumalo* 1996 (2) SACR 84 (N)
- *S v Mbatha* 1996 (2) SA 464 (CC)
- *S v Mkize* 1962 (2) SA 457 (N)
- *S v Mkhabela* 1984 (1) SA 556 (A)
- *S v Nala* 1965 (4) SA 360 (A)
- *S v Ngcobo* 1998 (10) BCLR 1248 (N)
- *S v Orrie and Another* 2004 (1) SACR 162(C)
- *S v Sesame* 2000 (2) SACR 225 (O)
- *S v Singo* 2002 (4) SA 858 (CC)
- *S v Soci* 1998 (2) SACR 275 (E)
- *S v Thilo* 2000 (2) SACR 443 (CC)

V

- *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC)

W

- White CE: Study of International Statute Requirements for the Management of DNA databases (2008).
- Wigmore JH: *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940)