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1.1 CONTEXTUAL BACKGROUND

The Interim Constitution¹ commenced² against the background of a criminal procedure system that is derived from the common law, as amplified, modified, and supplemented by extensive statutory enactment, presently contained in the Criminal Procedure Act.³ That this transition had an effect on the criminal justice system and that everybody concerned was confronted with a new environment, cannot be refuted. In many ways the chapter on fundamental rights codified the common law criminal procedure rights, and in other ways the common law was changed or added to.⁴ One of the rights specifically enshrined was the right to bail in section 25(2)(d).

¹ Constitution of the Republic of South Africa, 1993 Act 200 of 1993, which includes chapter 3 under the heading "Fundamental Rights Provisions" (referred to as the Interim Constitution or IC).

² On 27 April 1994.

³ 51 of 1977 as amended. The basic system is derived from English law and is thus adversarial in nature and character. However, over the years the South African system of criminal procedure, particularly as regards pre-trial procedures, has acquired certain distinctive features of inquisitorial systems such as the Italian and Dutch systems. This convergence of the principles of adversarial and inquisitorial systems is not unique to South Africa. Jörg, Field & Brants in Fennel, Harding, Jörg & Swart (1995) 41 point out that the inquisitorial and adversarial criminal justice systems in Europe are also acquiring features of one another.

⁴ The Bill of Rights entrenched basic norms such as the duty on the state to prove the guilt of an accused beyond a reasonable doubt and the duty on the state to make out a case against the accused before he needs to respond (see section 25(3)(c) IC) along with some "new" rights. An example of such a "new" right was the right to information in terms of section 23 IC. Although the common law afforded some protection to the basic norms that existed prior to the advent of the Interim Constitution, Parliament could pass legislation amending the common law as it deemed fit. Since the advent of the Interim Constitution the courts were empowered to declare invalid laws and conduct inconsistent with the Bill of Rights. The Bill of Rights therefore

Although the right to liberty is not absolute in any jurisdiction, and all states recognize the need for the curtailment of personal freedom where a person has been arrested and awaits trial,⁵ the public in the wake of a massive crime wave with the advent of the new dispensation seemed to (and to a lesser extent still seems to) have a perception that bail is granted injudiciously.⁶ From time to time voices were and are still heard admonishing the authorities for releasing persons accused of serious crimes, and instances are quoted of persons who commit further offences while on bail.⁷ It is also

did not replace the ordinary rules and principles of criminal procedure but provided how they should be applied. See also par 2.6.1, 7.3.3.1.a and Steytler (1998) 1 - 6.

⁵ Provided the period between arrest and trial is not unreasonably long.

⁶ See also South African Law Commission (1994) 98.

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 6 described the situation as follows:

Some Judges and a number of spokespersons of provincial attorneys-general, police liaison officers and unions as well as influential national non-governmental organisations publicly expressed concern about the perceived laxness in the granting of bail. Indeed, a rise in the rate of crime in general and violent crime in particular became the subject of ongoing public debate and political contention in and outside Parliament. Regrettably the product was often heat rather than light.

(Because all the cases concerned certain constitutional challenges to specific sections of the Criminal Procedure Act regarding bail, the cases were considered together for judgment (see par 1 of the judgment).)

⁷ See for example "Mufamadi hits out at early bail" (translation) *Beeld* 20 September 1994 page 4:

(T)he Minister for Safety and Security, Mr Sidney Mufamadi, ... said he and the Government were extremely concerned about the tendency of suspects out on bail to commit further violent crimes,

the perception of a large section of the public that the fundamental rights in both the Constitutions that impact on the criminal process tend to favour the accused and disregard the rights of victims.⁸

It was against this background and in the context of serious debates on the question of bail among courts and legal scholars⁹ that the Final Constitution¹⁰

since this could only have a negative effect on Police morale and motivation to combat crime.

If this trend was not halted it would undermine the efforts of the Government and Police to combat crime and violence, as it would the public's faith in the legal system.

⁸ See for example "Bailing out criminals" *The Star* 6 September 1994 page 10:

There is a well-founded perception that bail is being granted too easily to suspects. It arises because people are more conscious of their vulnerability than ever. Police also claim that they are hopeless when 'known perpetrators' are seen on the street a day after their arrest, even after bail has been opposed. ...

It is tempting to call for rigid guidelines, but that is not the answer. South African justice, to its detriment, has previously limited the discretion of the courts. What is needed now is for judicial officers to apply their minds more vigorously to the doctrine of 'what is required by justice'.

Justice is surely not served when murder accused and people identified by the community as gangsters are set free for little more than petty cash. The public needs assurances; the police need to be able to function effectively. And it is up to the courts to play a greater role in this regard.

The perception is growing that criminals under the new dispensation are being favoured to the detriment of society. We cannot thrive in a country where the balance of citizen *versus* criminal is loaded in favour of the latter.

⁹ The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 6, seemingly unimpressed, described the situation as follows:

and amendments to the Criminal Procedure Act were introduced.¹¹ These amendments were also to a large extent in reaction to the factors mentioned, in that the legislature made the granting of bail more difficult in certain cases. The legislative amendments also intended to clarify but sadly brought with it more questions than answers.¹² Many have raised the view that aspects of these amendments were and are not in line with constitutional rights.¹³

Although there was a steady stream of new and stimulating insights from legal academics, their views were inherently prospective, sometimes speculative and seldom harmonious. At the same time, judicial pronouncements by the high courts on the interaction between constitutionality and criminal justice were relatively few and uncoordinated, arising as they do on a case-by-case basis. For historical and jurisdictional reasons, judgments by the high courts were seldom constitutionally based. Under both constitutions cases are resolved only where it is necessary to do so and, under the interim Constitution, provincial and local divisions of the Supreme Court had limited constitutional jurisdiction while the Appellate Division had none at all.

¹⁰ Constitution of the Republic of South Africa, 1996 Act 108 of 1996 (referred to as the Final Constitution or FC). The Final Constitution commenced on 4 February 1997.

¹¹ Notably the Criminal Procedure Second Amendment Act 75 of 1995 which commenced before the Final Constitution on 21 September 1995, and the Criminal Procedure Second Amendment Act 85 of 1997 which commenced after the Final Constitution on 1 August 1998.

¹² See for example:

- Par 7.3.5 below, where the problems in interpreting the term “in the interests of justice” as used in section 35(1)(f) of the Final Constitution and section 60 of the Criminal Procedure Act are discussed.
- Chapter 8 below, where the problems in determining the exact nature and incidence of the onus in bail proceedings are discussed.

¹³ See for example:

- Par 7.3.5 below, where the requirement that an applicant for bail falling under section 60(11)(a) must prove “exceptional circumstances” is discussed.

But one does not get a clear understanding of the exact content of a right in the Bill of Rights by simply reading it. The rights have been framed in “broad” and “ample” terms¹⁴ and are subject to constitutional analysis. The written constitution does therefore not reflect how the courts have interpreted and applied these principles.

Soon after the advent of the fundamental rights era the Constitutional Court of South Africa committed itself to a method of interpretation which is value-based.¹⁵ Inherent in this approach is an understanding that an assessment of

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- Chapter 9 below, where section 60(11B)(c) CPA, which provides for the admission of evidence tendered at a bail hearing at the subsequent trial, is discussed.

¹⁴ See the judgments and my discussion in par 10.3.4.

¹⁵ See *S v Makwanyane* 1995 (3) SA 391 (CC) par 262 per Mahomed DP concurring and par 303 per Mokgoro J concurring; *S v Zuma* 1995 (2) SA 642 (CC) par 15 per Kentridge AJ. The Constitutional Court was quick to recognise the similarity between value-based and the “purposive” interpretation applied under Canadian law with the dictum by Dickson J in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC) 395 - 6 becoming a primary referent for purposive interpretation.

However, other approaches to constitutional interpretation have been formulated by legal scholars. One approach seeks the meaning of the Constitution in the intention of its drafters. This approach seems to be fundamentally flawed. While the text remains important, the meaning of the Constitution can also not be found by simply decoding the written text. However, the written document remains the starting point for interpretation and to that extent exercises its limiting, containing and ultimately disciplinary function upon interpretation. See par 10.3.4.

It is submitted that value-based interpretation is the soundest in principle and practice and lends coherence in procedure. See Kentridge & Spitz in Chaskalson *et al* (1996) chapter 11.

a constitution must not be made in a vacuum, but in the historical context of the developments in a country.¹⁶

In accordance with the approach by the Constitutional Court in interpreting the Interim Constitution, the Final Constitution requires that the Bill of Rights be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.¹⁷ However, these values are not self-evident. In the interpretation reference may be had to foreign law.¹⁸ Yet the use of foreign precedent requires “careful management” in light of the differences in the criminal justice system and society that might present itself.¹⁹ One must be careful not to import

¹⁶ See *City Council Of Pretoria v Walker* 1998 (3) BCLR 257 (CC) par 26 per Langa DP; *Shabalala v The Attorney-General of the Transvaal* 1996 (1) SA 725 (CC) par 26 per Mahomed DP. Consideration of the political context of a constitutional provision is therefore essential for a court to make the value judgments required. When interpreting South Africa’s Constitution proper weight must be given to the fact that it is not a foreign or international instrument that needs to be construed. The lack of local judicial precedents upholding human rights means that international and foreign law will at least for the time being provide important guidance. In addition section 39(1) of the Final Constitution prescribes that international law must be considered and foreign law may be considered.

It furthermore does not mean that constitutional rights should be cut down by reading restrictions into them so as to bring them in line with the common law. What is defensible from the past will be kept but that which is not in line with a “democratic, universalistic, caring and aspirationally egalitarian ethos” must be rejected. See *S v Makwanyane* 1995 (3) SA 391 (CC) par 262.

¹⁷ Section 39 FC.

¹⁸ See section 39(1)(c) FC.

¹⁹ See *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) par 26.

doctrines associated with foreign constitutions into an inappropriate South African setting.²⁰

My investigations confirm that, in one's quest to assess the right to bail under South African law, it is of great practical and theoretical value to have regard to the equivalent right to bail under the Canadian Charter of Rights and Freedoms.²¹ Canada is an excellent example of a society where the values that underlie that society are based on openness, democracy, human dignity, equality and freedom. Legal practitioners, the courts and other legal scholars have also since the introduction of the fundamental rights provisions, treated Canadian Charter jurisprudence as perhaps the most authoritative guidance from abroad when dealing with fundamental rights issues.²² In addition, the Canadian Charter was an important source of

²⁰ See the dictum by Cloete J in *Shabalala v The Attorney-General of the Transvaal* 1994 (6) BCLR 85 (T) 119 quoting Froneman J in *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E) 633F - G.

²¹ Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11 hereafter referred to as the "Canadian Charter" or "Charter".

The Canadian Charter and Charter jurisprudence is an excellent source of reference for human rights, and the right to bail in particular, in South Africa. This view is confirmed by my discussion on the historical context of human rights in Canada (chapter 3) and the principles of comparative law (see par 11.2).

²² It seems reasonable to surmise that Canadian Charter jurisprudence has been the most consistently quoted foreign guidance by legal academics, practitioners and the South African courts dealing with fundamental rights issues. In many instances Canadian Charter authority is the sole foreign authority quoted. See for example the chapter on "Arrested, Detained and Accused persons" in De Waal, Currie & Erasmus (1998), the decisions by the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) and *Ferreira v Levin NO; Vreyenhoek v Powell NO (No 2)* 1996 (4) BCLR 441 (CC) and the supreme court in *S v Strauss* 1995 (5) BCLR 623 (O). Steytler (1998) 7 confirms the view that Canadian Charter jurisprudence has been the most influential foreign guidance in the South African courts.

reference when the fundamental rights provisions in our Constitution were constructed.²³ The general limitation clause in the Interim Constitution was adopted from predominantly Canadian law.²⁴ This determined the structure of fundamental rights analysis and is therefore on its own an important influence. Many even regard the role of the Canadian Charter when the Bill of Rights was drafted as so pivotal that they consider the South African Bill of Rights to be largely based on the Canadian Charter.²⁵

²³ See Steytler (1998) 7, *S v Nortje* 1996 (2) SACR 308 (C) 319b-c, *S v Agnew* 1996 (2) SACR 535 (C) 542d and *S v Lavhengwa* 1996 (2) SACR 453 (W) 494f.

²⁴ It also has a German flavour. See Du Plessis & Corder (1994) 47.

²⁵ See for example *S v Shongwe* 1998 (9) BCLR 1170 (T) 1186I and *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) footnote 6. In *Key* the Constitutional Court per Kriegler J held that the resemblance of the Canadian Charter to the Bill of Rights in the Interim Constitution does not require discussion.

However, Du Plessis & Corder (1994) 46 indicate that in constructing the fundamental rights, the technical committee dealing with fundamental rights for the transitional constitution, also took into account the bills previously drafted by the negotiating parties. The SA Law Commission also submitted an annotated version of its unpublished third (draft) Bill of Rights as a discussion document. Other "less official" drafts such as the Charter for Social Justice was also examined.

Du Plessis & Corder (1994) 46 further indicate that the committee also looked at other sources from abroad. Long standing international human rights documents such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), and the European Convention on Human Rights (1950) were examined. In the second instance Bills of Rights of other countries were looked at, for example the German Basic Law (1949), the Canadian Charter (1982) and the chapter on Fundamental Rights and Freedoms in the Constitution of the Republic of Namibia (1990).

The approach to interpretation adopted by the South African Constitutional Court finds an antecedent in that of the Canadian Supreme Court. The Supreme Court of Canada has similarly held that the rights and freedoms guaranteed by the Charter must be ascertained by an analysis of the purpose of such guarantee.²⁶ This may be ascertained by reference to the character and the larger objects of the Charter itself, the language used to articulate the specific right or freedom, to the historical origin of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

When sections of the Canadian Charter are in issue, for example the right to life, liberty and security of the person,²⁷ the Canadian courts try to determine the thinking behind these provisions and what purposes these rights are intended to serve in the larger society. Understanding the “purpose” of any given constitutional provision requires a thoughtful study of history, political and constitutional theory, and the circumstances of the case in the context of current affairs in society. It is obviously not an exact science, and conclusions are frequently not unanimously accepted.

1.2 AIM OF THE STUDY

The aim of this study, which is titled “Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and

²⁶ *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321. This judgment has been quoted with approval by the Constitutional Court on many occasions. See for example *S v Zuma* 1995 (2) SA 642 (CC) par 15 per Kentridge AJ and *S v Makwanyane* 1995 (3) SA 391 (CC) par 9 per Chaskalson P.

²⁷ Section 7.

Proposals for Reform”, is to research whether there is merit in the contention that bail is not granted according to sound judgment under South African law.

This is done by considering and comparing the relevant principles regarding bail under Canadian and South African law and the circumstances under which the principles function in each system. The study also takes note of the principles that have been applied, and the balance between the individual’s right to freedom and security, and the interests of society that has been struck at different times in history.²⁸ The question can then be addressed whether an equitable balance has been achieved between the individual’s right to freedom and security, and the interests of society under present South African law.²⁹ Integral to this process is the correct

²⁸ Under the previous South African government individual freedom in some instances probably contested with the interests of the state. See par 2.5.2.1 - 2.5.2.2.

²⁹ It has been suggested that it may be an oversimplification to draw a distinction between the interests of the accused on the one hand, and the interests of society on the other. Not only the accused in this equation might have an interest in his freedom and security. See the decision by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 79. However, the court did not think it necessary to resolve the issue and elsewhere in the judgment referred to the conventional interests of society *versus* the interests of the accused (see for example par 101.15). Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen (1999) 11 indicate that what is at stake is not the community *versus* the individual, but rather two competing community interests. The community is said to have an interest in crime control and in the fair treatment of its members. The community is therefore interested in less crime and the protection of human rights. See also *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) par 13 per Kriegler J. However, I have decided to refer to this equation in the conventional manner supported *inter alia* by the acceptance of a triad of sentencing interests, the third of which is “the interests of society” by the Appellate Division in *S v Zinn* 1969 (2) SA 537 (A). See also for example the acceptance of this equation by the Constitutional Court in *S v Makwanyane* 1995 6 BCLR (CC) at par 250 per Madala J: it “calls for a balancing of the interests of society against those of the individual”.

interpretation and application of principles. Many of the concepts, for example the presumption of innocence and the right against self-incrimination, are the product of years of accumulated wisdom and have been designed to ensure a fair contest between the state and the individual exposed to the criminal justice system. The correct interpretation and application of these principles is therefore integral to an equitable system.

The study researches the presumption of innocence as the underlying principle for the existence of the right to bail and its role in bail proceedings. It investigates the constitutional structure within which the right to bail operates. Close attention is paid to the constitutional guarantees to bail, as being the primary provisions under both systems.

It researches and compares certain problematic aspects of bail, where the battle to find a balance has been very contentious recently under South African law.

The study also considers whether the Canadian Charter and Charter jurisprudence is indeed a suitable model for human rights in South Africa.

It draws conclusions and makes proposals for the protection of the individual's right to bail, which would be in balance with the interests of society.

1.3 IMPORTANCE OF THIS TOPIC

The rules of criminal procedure play a crucial role in the South African legal order and with the inclusion of some of these rights in a Bill of Rights they

have an even more important social function.³⁰ However, there has been widespread disillusionment with the criminal justice system in South Africa. It is hardly necessary to mention the seriousness of crime in South Africa and the impact it has on almost every aspect of our lives. Many South Africans live in fear, if not panic, because of the random acts of violence which assault our sense of security and repose. It is of paramount importance for the well-being of this country (as that of any other country) and its citizens to have in place an effective and equitable criminal justice system.

The principles of bail have caused much of this disillusionment. On the one hand one finds those, which seem to include the majority of the public, who advocate the crime-control approach to the granting of bail. They propose that severe restrictions be placed on the rights of an applicant to bail. Proponents of the crime-control approach stress that the dominant purpose of the criminal justice system is to prevent and prosecute crime effectively.³¹

³⁰ The FC directs that the rights in the Bill of Rights must be protected and promoted (section 7(2)) in order to improve the quality of life of all its citizens (Preamble). Along with the other rights in the Bill of Rights, the criminal procedure rights therefore have a role to play in reconstructing South African society. In this exercise the criminal procedure rights (section 35) in the Bill of Rights must be balanced out against the duty that has been cast on the state to protect individuals against criminal violence (section 12(1)(c)).

³¹ See Viljoen in the *Bill of Rights Compendium* (1996) 5B - 5 and 5B - 6. It is a moot question whether the setting of strict conditions of bail will in the first instance inhibit criminal conduct. The comments of at least two prominent judges have played down the usefulness of the setting of strict conditions of bail in deterring crime. In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the Constitutional Court per Chaskalson J held that "[t]he greatest deterrent of crime is the likelihood that offenders will be apprehended, convicted and punished" (par 122). Cameron J then of the Transvaal High Court in his Alan Paton Memorial Address indicated that what inhibits crime is rather the prospect of certain pursuit, apprehension and punishment. In the absence of pursuit, apprehension and punishment harsher bail conditions will remain at best a distraction (see (1997) 114 SALJ 504 509).

On the other hand one finds those who favour the due process model. Proponents of the due process model of criminal justice require that the rights and freedoms of the accused be strictly observed at every step of the proceedings. In doing so, they try to ensure that the accused spends as little time as possible in custody pending the outcome of the criminal trial.³² While the criminal justice system without a doubt has to be effective, those who encourage the crime-control approach might have forgotten the dangers in bestowing too much power on the government of the day and the dire social consequences caused by unnecessary incarceration.

While it is therefore of obvious importance to determine whether bail is indeed not granted according to sound discretion, or as it is popularly said "too easily", the study also seeks the cause of the muddle that the bail system finds itself in. It points to the acceptable principles of such a system, and proposes amendments for an effective and equitable dispensation.

1.4 OVERVIEW OF CHAPTERS

Excluding the first chapter, this study is presented in the following ten chapters:

Chapter 2 examines the origins and development of the principles of bail under South African law up to the present position. The Roman, Roman-Dutch and English law heritage as a precursor of the South African

³² The term "due process" is derived from American law. Other rights-based democracies which provide procedural safeguards against executive abuse of power are Australia, New-Zealand and the states of western Europe. See Neveling & Bezuidenhout in Nel & Bezuidenhout (1997) chapter 20 ("Summary") and par 20.1 and Viljoen *ibid.* See Gora (1978) and Tribe (1988) 663 - 768 for discussions on due process.

legislation is researched and the developments on South African soil are briefly shown along with a description of the position as at 30 June 1999.

Chapter 3 gives a general overview of the origins and development of constitutionally protected rights in Canada in historical context. It describes the court structure so that the importance and relative weight of a specific decision can be ascertained.

Chapter 4 provides a brief survey of bail under Canadian law before the Bail Reform Act.³³ It shows the changed attitude towards pre-trial release with the Bail Reform Act and states the position as at 30 June 1999. To provide a proper picture, aspects of arrest are also mentioned. It compares the general position under Canadian law with the general position under South African law as at 30 June 1999.

Chapter 5 investigates the presumption of innocence, which is the cornerstone of the criminal law under Canadian and South African law. It investigates the operation of the presumption of innocence and its role in bail proceedings under both systems. It determines whether this presumption protects the security and freedom of an individual when application is made for bail at the different stages of the criminal process. It compares the position under Canadian and South African law.

Chapter 6 investigates whether section 7 of the Canadian Charter or section 12 of the Final Constitution affords an applicant protection at the bail hearing. It considers whether an applicant in bail proceedings under Canadian and South African law can rely on a residual right to procedural fairness in

³³ 1970 - 71 - 72 (Can) c 37.

terms of section 7 of the Canadian Charter, and section 12 of the Bill of Rights respectively.

Chapter 7 examines and compares the scope of the right to bail in terms of section 11(e) of the Canadian Charter and section 35(1)(f) of the Bill of Rights.

Chapter 8 investigates and compares the incidence of the onus in bail proceedings under Canadian and South African law.

Chapter 9 determines whether the evidence tendered for purposes of bail proceedings and derivative evidence is admissible at the subsequent criminal trial under present Canadian and South African law. It also indicates whether it should be permissible.

Chapter 10 examines whether access is allowed to the information held by the state for purposes of a bail application under present Canadian and South African law. It also examines if and when it should be available.

Chapter 11 provides a holistic overview. It draws together the issues that have been pursued and the conclusions that have been reached. It indicates whether the Canadian model is an appropriate one to learn from. It compares the individual's right to bail under Canadian and South African law and takes note of the principles that have been applied over time. It indicates whether the correct balance between the individual's right to freedom and security, and the interests of society has been reached. It makes recommendations to attain an equitable system.

1.5 DIFFICULTIES AND LIMITATIONS OF THIS STUDY

1.5.1 General

The development of the principles in respect of bail under South African law has had a very unfortunate history, all of which contributes to the lack of credibility, uncertainty and complexity facing anybody who wishes to study these principles. The principles in respect of bail under South African law are generally vague, even at the “elemental level”.³⁴ The constitutional right to bail was due to a misconception drafted into a structure that led to serious difficulties.³⁵ Unclear, and sometimes questionable, legislation in recent times has made matters worse. Disharmony between, and uncertainty and foundational confusion by some South African courts in applying the human rights principles have caused further problems.³⁶

This murkiness is worsened by the lack of consensus under South African jurists as to the contents and scope of the common-law presumption of

³⁴ See the comments by the court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 3:

The origins of bail are ‘obscured in the mists of Anglo-Saxon history’ and its modern dimensions remain ‘an incoherent amalgam of old and new ideas serving more to defeat than to achieve the aims of the criminal process.’ In South Africa, judicial pronouncements on the topic have been called ‘labyrinthine’. There is murkiness even at the elemental level of the source(s) of South African power to grant bail, i.e. whether the power derives exclusively from - and is circumscribed by - chapter 9 of the Criminal Procedure Act (the CPA) or whether there is a parallel reservoir of ‘inherent’ or ‘common law’ power on which a judge can draw.

³⁵ See chapter 6 in general and specifically par 6.3.2 including footnote 45.

³⁶ See especially chapters 5 - 10.

innocence as a principle of fundamental justice, let alone its application in the fundamental rights era.

1.5.2 Difficulty in determining principles fuelled in some instances by South African legislature

The task to determine and understand, and in the instance of the courts also to apply, the constitutionally based principles of bail, was in many instances not made any easier by unclear and sometimes questionable legislation. It is the more the pity as our policy makers had tried and tested systems, for example the relevant provisions of the Canadian Criminal Code, to refer to. This in itself has led to much debate and contributed to the “labyrinthine” build-up of court pronouncements.

For example, while the use of the term “in the interests of justice” in many subparagraphs of section 60 the Criminal Procedure Act³⁷ has now been confirmed as incorrect by the Constitutional Court, many hours were spent in trying to harmonise these principles. Where the legislature supposedly wanted to give demarcated guidelines and set a structure to determine the crucial norm, “in the interests of justice”, in section 35(1)(f) of the Final Constitution, it rather created immense problems for those who wished to understand the principles.

The problem was exacerbated by the unfortunate wording of section 60(4) of the Criminal Procedure Act which seems to be a deeming provision in conflict with the Bill of Rights. Section 60(4) does not seem to permit other factors to be taken into account.³⁸ The court is therefore directed to come to

³⁷ 51 of 1977.

³⁸ See my conclusions par 11.3.4.8

a factual conclusion, that might differ from that to which an objective evaluation might lead. However, the section was unconvincingly saved through some legal gymnastics by the Constitutional Court, on 3 June 1999.³⁹

1.5.3 Foundational confusion

The South African courts in general have had difficulties in imposing the human rights principles on a system that had evolved under a totally different system. In addition the disharmony between the courts and on many occasions between members of the same court, and foundational confusion by some concerning human rights principles, caused further problems for this study.

The Constitutional Court even seems to have changed its mind on a crucial issue without indicating it as such. On six occasions the court denied conceptual similarity in the analytical process when it built up a conceptual wall between sections (11) IC; 12 FC and 25 IC; 35 FC. However, when the same court was faced with certain issues concerning bail in *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*⁴⁰, the unanimous court, some of whom were instrumental in erecting the wall, and all the parties concerned, seemed to accept that section 35(1)(f) is part of, or is a specific instance of, the right enumerated in section 12. Meanwhile many high court decisions tested bail problems as a liberty issue in terms of section 12. The applicability of section 12 is of course crucial for the bail process because it guarantees due process, and, as will be indicated, allows for the transplantation of

³⁹ See par 7.3.5.

⁴⁰ 1999 (7) BCLR 771 (CC).

persuasive doctrines and principles leaving little scope for foundational confusion.⁴¹

It is a pity that the substantial jurisprudence under Canadian law did not point the way. The relationship between section 7 and sections 10 and 11 of the Canadian Charter were clearly spelt out and apparent for all who would wish to study it.⁴²

Confusion concerning the basic structure of the fundamental protection of the individual's right to freedom and security, coupled with obvious disagreement between the members of the court when it dealt with sections 11 and 12, does not instil confidence in the Constitutional Court's ability to decide issues pertaining to bail.

To make matters worse, it seems that the policy makers closely follow the decisions of the Constitutional Court when drafting legislation. The factors mentioned in section 36 of the Bill of Rights is a point in issue.⁴³ On its part the Constitutional Court on occasion, even when it points out a provision to be imperfect, does not strike it down, leaving a precarious position.⁴⁴ It can even be argued that the judgments of some courts, in the first instance due to lack of experience in upholding fundamental rights, follow the arguments by the prosecution too closely, and are unduly influenced by the outcry of

⁴¹ See chapter 6.

⁴² *Ibid.*

⁴³ The factors were copied almost verbatim from Chaskalson P's discussion of proportionality in *S v Makwanyane* 1995 (6) BCLR 665 (CC) 708E - F.

⁴⁴ For example section 60(4) of the CPA. See *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (7) BCLR 771 (CC).

society. This whole sequence of events, sometimes starting from the court accepting the prosecution's argument, of course ends in the contentions of the state carrying the day.

One is therefore forced to unravel the decisions and provisions dictating bail very closely.

1.5.4 Difficulty in comparative approach

The application of a comparative approach also led to some difficulties. While the principles are much clearer under Canadian law, it proved a challenge to trace some of the relevant sources. Many of the numerous different sets of law reports reported under Canadian law are for example simply not available in South Africa or on the Internet.⁴⁵ If I therefore obtained a case reference to one of these sets of reports I was forced to find the case in the reports available in South Africa or on the Internet. However, the case names frequently differ from the one case report to the other. Sometimes the change is subtle, sometimes the case is reported under a completely different name. This situation is worsened by the fact that many Canadian authors and law reports use their own style when referring to case law. In addition it takes some months for the latest information regarding Canadian law to be placed on the Internet and for the other sources to filter through. As an example the Internet during October 1999 still only reflected the Criminal Code of Canada as at 30 April 1999. Notwithstanding, every effort was made to secure all available information up to the cut-off mark.⁴⁶

⁴⁵ For example the Saskatchewan Reports, the Weekly Criminal Bulletin and the Western Weekly Law Reports.

⁴⁶ Par 1.5.5.2 states the cut-off date as 30 June 1999.

1.5.5 Limitations

1.5.5.1 Scope

The study by its nature has to be selective. It is not possible to properly research and compare all the aspects concerning bail under South African and Canadian law in a study of this scope. The study does not therefore pretend to cover all the aspects regarding bail. A choice was made of the topics that I thought would be most helpful to show whether bail is granted injudiciously, and which has been the most contentious under present South African law.

1.5.5.2 Time frame

The study is also limited by the fact that the South African law is in flux. While the principles under Canadian law concerning bail seem to be infinitely more settled, the protection of fundamental rights in South Africa is in its infancy, and many changes to the present position are sure to follow. The development therefore has to be “frozen” at some point. It is accordingly inevitable that the study be subject to time frames. I had originally planned to make the cut-off date earlier, but because of the importance for this study of the Constitutional Court’s decision in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,⁴⁷ I decided to wait for the decision until the end of June 1999. When the decision was delivered on 3 June 1999 I managed to obtain an unreported copy soon thereafter and decided to stay with 30 June 1999 as cut-off date. Consequently developments such as the publishing of the

⁴⁷ 1999 (7) BCLR 771 (CC).

Promotion of Access to Information Act⁴⁸ were not taken into account.⁴⁹ I therefore state the position as at the end of June 1999.

1.5.5.3 Limitation in comparative approach

The two societies that I compare are very different and there are some differences in the respective criminal justice systems. One cannot therefore simply take cognisance of the principles on bail under Canadian law outside these contexts.⁵⁰ As with any other comparative legal study, this study might therefore be inherently limited as one might not be able to adequately appreciate all these differences when conclusions are reached and recommendations are made.⁵¹ However, in doing a study like this, one is exposed to the Canadian criminal justice system and the sociological factors in Canada as they appear from the case law and other writings of Canadian scholars over an extended period of time. This knowledge was applied when conclusions were reached and recommendations were made. To a large extent these risks have therefore been minimised.

⁴⁸ Act 2, 2000 which was published on 3 February 2000 by way of Government Gazette 20852 (General Notice 95 of 2000). See chapter 10.

⁴⁹ As I have included some remarks by politicians after 30 June 1999 and referred to the United Nations Human Development Report 2000 there is in a sense no specific cut-off mark. However, legal developments after 30 June 1999 have not been included.

⁵⁰ See my *caveat* in par 1.1.

⁵¹ The high court has warned of the danger of relying on foreign law outside these contexts. In *Nortje v Attorney-General, Cape* 1995 1 SACR 446 (C) 450a - i Marais J elaborated on the difficulties in assessing foreign law due to the difference in the criminal justice systems and sociological factors prevailing between South Africa and the foreign country. In *Berg v Prokureur-Generaal, Gauteng* 1995 (11) BCLR 1441 (T) 1445G - H the court per Eloff JP refused to take foreign case law into consideration without having full information on the criminal justice systems and constitutions of those countries.

1.6 MODUS OPERANDI AND RESEARCH METHODOLOGY

1.6.1 *Modus operandi*

The approach of this study is partly comparative and partly historical. The main focus is a description and comparison of contemporary South African and Canadian law with limited reference to other foreign and international law. In addition, historical balances and principles are identified in an overview of the origins and development of the principles of bail. The suitability of Canadian law as a source of reference is also investigated. After each section conclusions are reached. In the end the lines that have been followed and the conclusions that have been reached are drawn together to give a complete view of the subject matter.

The study is also prescriptive in that it does not only describe whether bail is indeed granted injudiciously under present South African law, but it identifies the shortcomings of the system and makes proposals for an equitable balance between the interests of society and an applicant for bail. The study also tries to secure consensus by proposing the correct interpretation and application of principles.

1.6.2 Research methodology

The following are some of the sources that were consulted and avenues that were explored:

1.6.2.1 Interviews

Interviews were held with members of the legal profession who participated in the drafting of the fundamental rights provisions of the Interim and the Final Constitution.

1.6.2.2 Literature review

The following literature was reviewed:

- The reports of the “Technical Committee on Fundamental Rights during the transition” were consulted.
- The “Draft Minutes of the Combined Meetings of the Ad Hoc Committee and the Technical Committee on Fundamental Rights during the transition” were consulted.
- Under South African law all the information available on the web-site with address <<http://www.constitution.org.za>> was canvassed.
- A thorough literature search was conducted including books, journals and CD’s.
- The data base Lexis-Nexis assisted me with some foreign sources that proved elusive. Beyond Lexis-Nexis the Internet could only provide limited assistance as to the literary search.
- Many Canadian web-sites, for example the web-site of the Canadian Justice Network at <<http://www.acjnet.org>> and the web-site of the Centre for Research into Public Law at <<http://www.lexum.umontreal.ca>>, were canvassed.
- I also referred some issues to the Department of Justice of Canada *via* the information desk at the Canadian High Commission. However, I was

informed that the Department does not supply legal advice or information through its web-site.⁵²

1.7 WORK ALREADY DONE IN THIS FIELD

Because the question of bail has been a contentious issue for some time, a relatively substantial number of publications on various aspects of bail have appeared in South African legal journals over the last two decades. It is especially the advent of the fundamental rights provisions, and developments and pronouncements of the last few years, that have urged many to reach for the pen.

As far as research projects are concerned, two court studies, and three projects mainly on the principles of bail in general, were undertaken and completed in the pre-constitutional era. Another project of the South African Law Commission, although mostly carried out in the pre-constitutional era, was finished after 27 April 1994 and took into account constitutional principles.

The results of the first of these court studies by NC Steytler was published in 1982 as "Deciding on liberty - a bail study of the Durban magistrates' courts".⁵³ The study analysed the bail process in a few selected magistrates' courts.

⁵² My personal experience as commissioner, court martial president, prosecutor, magistrate and advocate in private practice also proved valuable.

⁵³ (1982) 6 SACC 3.

The results of the second court study by LD Fernandez was published as “Bail: an aspect of justice” in the same year.⁵⁴ The study was aimed at establishing the functional role of certain factors, for example race and sex, in the criminal justice process.

The first work on the principles of bail in general, an unpublicised LLM dissertation by TJ Nel with the title *Borgtog in die Suid-Afrikaanse strafprosesregl Bail in the South African law of criminal procedure* was submitted at the University of Stellenbosch in 1985. TJ Nel followed up the dissertation in 1987 with a guide titled *Borgtoghandleiding* that was mainly based on his dissertation.

At around the same time J van der Berg published a guide for practitioners titled *Bail - a practitioner's guide*. It stated the law as at 31 July 1986.

In November 1990 JH Du Plessis submitted an LLD thesis with the title *Aspekte van borgtog: 'n Regsvergelykende studie* at the University of South Africa. In this study Du Plessis investigated and compared the development of the English and South African law of bail and set out the principles involved. This seems to be the only other LLD study on the subject-matter under South African law.

In March 1986 TJ Nel initiated a process which culminated in a report under the title *Project 66 - Reform of the South African law of bail* by the South African Law Commission in December 1994. The Commission researched and made recommendations concerning perceived defects in the South African law on bail.

⁵⁴ (1982) 6 SACC 72.

It is to be noted that these research projects, except to a limited extent the study by the Law Commission, did not research and deal with the question and principles of bail in a constitutional dispensation with protected rights, including *inter alia* the right to bail and freedom and security of the person. The contribution of these sources for my study was therefore mainly limited to the study of the history and development of the principles of bail up to 1994, which forms a small part of this study.

In the fundamental rights era, two “mini-dissertations” have been completed under the leadership of professor NC Steytler at the University of the Western Cape.⁵⁵ The first of these dissertations by JO Wells deals with the admissibility of evidence in bail proceedings against an accused at his⁵⁶ later trial and was submitted before the commencement of section 60(11B)(c) of the Criminal Procedure Act on 1 August 1998. The second dissertation by ZCN Madotyeni investigates an accused’s right of access to police dockets for purposes of the bail hearing.⁵⁷

⁵⁵ The dissertations weigh one fifth towards obtaining examination-based LLM degrees.

⁵⁶ In writing this thesis I endeavoured to use gender-neutral language where appropriate. Perhaps illogically and understandably offensive to some, the masculine pronoun is used where neutral language is inappropriate. This was done not due to a lack of sensitivity but because of the provision in section 6 of the Interpretation Act 33 of 1957. Section 6 provides that in every law unless the contrary intention appears, words imputing the masculine gender include females.

⁵⁷ From the table of results of the Division for Social Sciences & Humanities at the Human Sciences Research Council, it seems that there are two further research projects towards obtaining Masters degrees under way under the auspices of the University of South Africa. But it is not known whether these are full-length dissertations or also “mini-dissertations” as part of examination-based courses. The author, title and year of commencement given by the data base is:

- MB Ndokweni, The meaning of the phrase “in the interests of justice” in the context of the right to bail in section 25(2)(d) of the

It appears that no comprehensive comparative study of the principles of bail in the new era of protected rights has been done under South African law. It is hoped that this comparison with mainly Canadian law, a system on which South African scholars rely extensively for guidance when dealing with human rights issues, will help to fill this vacuum and provide information or answers in the ongoing debate on the question of bail. The study also researches many aspects that have not been researched under South African law before and updates the research by those mentioned above.

constitution of the Republic of South Africa, 1993 (Act no 200 of 1993), 1995.

- TM Ngutshane, The application for bail in South Africa, 1997.



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