

# PROBLEMATIC ASPECTS WITH REGARD TO BAIL UNDER SOUTH AFRICAN LAW: THE REVERSE ONUS PROVISIONS AND THE ADMISSION OF THE EVIDENCE OF THE APPLICANT FOR BAIL AT THE LATER CRIMINAL TRIAL REVISITED.

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## INTRODUCTION AND BACKGROUND

With the Interim Constitution<sup>1</sup> a new constitutional democracy with protected fundamental rights came into force in South Africa in 1994. The Interim Constitution, and the Constitution of South Africa, 1996<sup>2</sup> that replaced the Interim Constitution, were universally applauded as representing a break from the past.

In the area of pre-trial release and detention, South African history before 1994 had caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or “political offences”, effectively removing the decision from the discretion of the court.<sup>3</sup> Because history had taught its citizens the value of freedom and security (or liberty), including the right to bail, it was not surprising that the right to freedom and security,<sup>4</sup> and right to bail,<sup>5</sup> were taken up as fundamental rights provisions in the Interim Constitution.

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<sup>1</sup> Constitution of the Republic of South Africa, Act 200 of 1993 (referred to as the Interim Constitution).

<sup>2</sup> Constitution of the Republic of South Africa, Act 108 of 1996 (referred to as the Constitution of South Africa, 1996 or the Constitution).

<sup>3</sup> See § 61 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Criminal Procedure Act) with regard to certain serious offences and § 30 of the Internal Security Act 74 of 1982 with regard to “political offences”. § 61 provided that if no evidence was led against the accused within ninety days, the accused could apply to the court to be released on bail. § 61 was repealed by the Criminal Procedure Second Amendment Act 75 of 1995. See also JOHN DUGARD, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE: INTRODUCTION TO CRIMINAL PROCEDURE*, 76 (vol iv. 1977) and FRANS VILJOEN *The law of criminal procedure and the Bill of Rights* in *BILL OF RIGHTS COMPENDIUM* 5B-46 (loose-leaf updated to November 2013). In the instance of § 30 there was no limitation with regard to time on the attorney-generals’ order. § 30 was preceded by a similar provision in § 12A of the Internal Security Act 44 of 1950. § 30 was repealed by the Criminal Procedure Second Amendment Act 126 of 1992. Fortunately the vast majority of bail applications were not influenced by these provisions.

<sup>4</sup> § 11(1) provided that: “Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial”.

<sup>5</sup> § 25(2)(d) provided that: “Every person arrested for the alleged commission of an offence shall have the right to be released from detention with or without bail, unless the interests of justice require otherwise”.

However, memories soon faded and against the background of a massive crime wave under the new dispensation,<sup>6</sup> public perception that bail was being granted too easily,<sup>7</sup> serious debates among legal scholars and uncoordinated pronouncements by the high courts,<sup>8</sup> a watered down “right” to bail in the Constitution, 1996,<sup>9</sup> and amendments to the Criminal Procedure Act were introduced.<sup>10</sup> In these provisions the policy-makers pushed the limits in tightening up the conditions under which bail may be granted.<sup>11</sup>

In my thesis *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* (1999),<sup>12</sup> I *inter alia* found that policy makers had neglected due process to some extent and opted for the crime control approach with regard to bail. I also held the opinion that policy makers had overstepped the mark in combatting crime. While being aware of the underlying problems and emotions created by the unprecedented wave of crime in South Africa

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<sup>6</sup> Apart from the various other crimes that were committed the official crime statistics compiled by the South African Police Service show that during 1994-5 25 965 murders, 44 751 rapes, 26 806 attempted murders and 231 355 burglaries at residential premises were committed. During 1995-6 26 877 murders, 49 813 rapes, 26 876 attempted murders and 248 903 burglaries at residential premises were committed. During 1996-7 25 470 murders, 51 435 rapes, 28 576 attempted murders and 251 579 burglaries at residential premises were committed. See *Crime in the RSA for the period April to March 1994/1995 to 2003/2004*, [www.nicro.org.za/wp-content/uploads/2011/05/1994-2004-crime-stats.pdf](http://www.nicro.org.za/wp-content/uploads/2011/05/1994-2004-crime-stats.pdf) (last visited on 24 May 2014). This equated to 66,7 recorded murders per 1000 000 of the population during 1994-5 and earned South Africa the reputation of the murder capital of the world. However, even then society had a far worse perception of crime and the figures compiled by other agencies showed an even more serious picture. As an example Interpol in their international crime statistics claimed that more than double the murders were perpetrated during the period 1995-6 in South Africa. Many interested parties ascribed the under-reporting to the embarrassment that the high numbers caused the government desperate to live up to the image of the new liberated South Africa. Rampant crime was also a deterrent to potential investors. See eg Rob Mc Cafferty, *Murder in South Africa: A comparison of past and present, first edition*, [www.frontline.org.za/files/PDF/murder\\_South Africa%20\(5\).pdf](http://www.frontline.org.za/files/PDF/murder_South%20Africa%20(5).pdf) (last visited 24 May 2014).

<sup>7</sup> See South African Law Commission (1994) Report on bail reform in South Africa Project 66 Pretoria.

<sup>8</sup> See *S v Dhlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 7 BCLR 771 at note 6 where Kriegler J seemingly unimpressed described the situation.

<sup>9</sup> In terms § 35(1)(f) “[e]veryone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions”. The qualifying reservation “unless” of the Interim Constitution was therefore substituted with the word “if” in § 35(1)(f). Under the Interim Constitution an applicant for bail had the right to be released on bail, unless the interests of justice required otherwise. Release from detention under § 35(1)(f) depends on whether the interests of justice permit. See also NICO STEYTLER, CONSTITUTIONAL CRIMINAL PROCEDURE: A COMMENTARY ON THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 131, 136 (1998). The Constitutional Court *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 7 BCLR 771 (CC) accordingly indicated that § 35(1)(f) did not bestow an unqualified right to personal freedom. It rather created a circumscribed one.

<sup>10</sup> By way of the Criminal Procedure Second Amendment Act 75 of 1995 and the Criminal Procedure Second Amendment Act 85 of 1997.

<sup>11</sup> See also ALBERT KRUGER, HIEMSTRA’S CRIMINAL PROCEDURE 9-2 (loose-leaf updated to May 2013).

<sup>12</sup> Available at <http://upetd.up.ac.za/thesis/available/etd-03202006-154631/> (last visited 16 September 2013).

I found that some provisions tended to indicate that the authorities had fallen back on the old way of thinking. Instead of creating new mechanisms to ensure the protection of human rights, they acted in conflict with the requirements of a human rights culture. In doing so the government threatened rather than served the values of an open democratic society based on freedom, security and equality. This is unfortunately still the position today.

While the many problematic aspects remain some 15 years later I only revisit two aspects in this article. The first aspect is the burden bestowed on the applicant for bail with regard to certain serious offences to convince the court that the interests of justice permit his release. The second aspect is the fact that the testimony of the applicant for bail is admissible as evidence at his later criminal trial. While each of these aspects gives reason for concern on their own, I also allude to the fact that the cumulative effect of the two aspects, and the exploitation thereof by the prosecution under South African law, are of even more concern.

Because it is of theoretical and practical value to see how other “proven” democracies deal with the issues, I consider and compare the South African position with that of Canada, the United States of America and the Australian states of Queensland and New South Wales. I also investigate whether the domestic jurisdictions are in line with two prominent international human rights instruments, to wit, The European Convention on Human Rights,<sup>13</sup> and the International Covenant on Civil and Political Rights.<sup>14</sup>

The domestic jurisdictions that I have selected are apposite for comparison in light of the fact that the law of criminal procedure and evidence in these jurisdictions and in South Africa are premised on the same English common law principles. The systems are therefore based on the same fundamental principles, and the underlying rationale or reasoning for their existence similar. Because the Australian federal courts do not hear serious crimes, and the reverse onus provisions with regard to

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<sup>13</sup> An international treaty to protect human rights and fundamental freedoms in Europe. It came into force in 1953. Any person who is of the opinion that one of his rights in the treaty has been violated may take the member country to the European Court of Human Rights. See *European Convention on Human Rights*, Wikipedia, [http://en.wikipedia.org/wiki/European\\_Convention\\_on\\_Human\\_Rights](http://en.wikipedia.org/wiki/European_Convention_on_Human_Rights) (last visited 12 July 2013).

<sup>14</sup> The ICCPR is a multilateral treaty adopted by the United Nations General assembly in 1966. It has been in force since 23 March 1976. See *International Covenant on Civil and Political Rights*, Wikipedia, [http://en.wikipedia.org/wiki/International\\_Convention\\_on\\_Civil\\_and\\_Political\\_Rights](http://en.wikipedia.org/wiki/International_Convention_on_Civil_and_Political_Rights) (last visited on 12 July 2013).

bail are typically bestowed on the applicant for bail for serious crimes, I have chosen the states of Queensland and New South Wales for comparative purposes.

All of these societies also profess to constitutional liberalism that value the principles including openness, democracy, human dignity, equality and freedom that are protected in the South African Constitution.

With regard to the reverse onus provisions I show that the provisions are not in line with the values and principles that have long been held by the international community to be necessary in an effective democratic society based on the rule of law. I submit that this restraint on individual liberty is misplaced under South African law and not justified in the other jurisdictions discussed. I argue that the applicant for bail in South Africa should not be burdened with an onus. I point out that in respect of the admissibility of incriminating evidence from the bail hearing at trial, the South African government does not share the same appreciation for due process than the inherited English common law, the other proven jurisdictions or the international paradigms that are discussed. I argue that it was unwise for the South African legislator to impose a broad and radical inclusionary policy to something that should be treated selectively. I submit that where an applicant for bail is required to incriminate himself directly or indirectly in pursuance of his quest to obtain bail, he must be protected against the use thereof at trial. I point out that none of the proven democratic jurisdictions and international paradigms that have been discussed provide for a reverse onus when adjudicating bail, and the blanket admission of the evidence at the criminal trial. I submit that the cumulative effect of these provisions, and especially so the exploitation thereof by the South African prosecution, is a failure of liberal democracy. I argue that the situation must be corrected to reflect an adequate concern for the welfare and autonomy of the accused.

## **1. THE REVERSE ONUS PROVISIONS**

Section 60(11)<sup>15</sup> provides that:

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -  
(a) in Schedule 6,<sup>16</sup> the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused,

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<sup>15</sup> Of the Criminal Procedure Act.

- having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
- (b) in Schedule 5,<sup>17</sup> but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

The *locus classicus* with regard to the constitutionality of many of the issues regarding bail under South African law is the 1999 decision by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.<sup>18</sup> In the case none of the defence counsel for the various parties suggested that the imposition of a reverse onus on an applicant for bail was constitutionally objectionable. Kriegler J in delivering the judgement on behalf of the unanimous court indicated that such a contention would in any case not have been sustained. Referring to section 35(1)(f) of the Constitution, Kriegler J indicated that section 60(11)(a) did not create something with regards to onus, that did not already exist. The court held that section 35(1)(f) established that unless the equilibrium is displaced, an arrested person is not entitled to be released. Section 35(1)(f) therefore inherently sanctioned the loss of liberty required to bring a person suspected of an offence before a court of law. If one accepts the court's view, one may argue that the reverse onus provisions in section 60(11) survive constitutional scrutiny on this basis alone.<sup>19</sup>

However, this position must not just be accepted at face value. The first question that arises is whether the watered down version of the right to bail in section 35(1)(f) against which the reverse onus provisions are measured, is not a cause for concern.

Some may argue that the right to bail is not a universally accepted fundamental right, and that where a constitutional right to bail exists, the right is not universally formulated,<sup>20</sup> nor does it always provide for a basic entitlement to bail.<sup>21</sup>

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<sup>16</sup> Schedule 6 contains a list of extremely serious offences. It also includes a schedule 5 offence where the accused has previously been convicted of a schedule 5 offence, or where the offence was allegedly committed while he was released on bail in respect of a schedule 5 offence.

<sup>17</sup> Schedule 5 contains a list of serious offences.

<sup>18</sup> See *supra* note 8.

<sup>19</sup> See also IAN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 781 (6<sup>th</sup> ed. 2013).

<sup>20</sup> This was the position taken by the Constitutional Court in South Africa in its first certification judgement in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) at [88]. Bassiouni, in his seminal comparative study of national constitutions also make no mention of the right to bail or pre-trial release. See Cherif M Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying*

The South African Constitution does therefore not have to provide for a right to bail, and if it provides for such a right, it does not have to confer a basic entitlement to bail.

Yet, it is accepted that bail or pre-trial release plays a role in all common law jurisdictions and it is recognised at international level. It has also widely been held that there is a close connection between the presumption of innocence and the other criminal procedure rights, including the right to bail.<sup>22</sup> In terms of this view the presumption of innocence has benefitted accused persons for a long time by acting as an animating principle throughout the whole criminal justice process.

In a fundamental rights dispensation the presumption of innocence is discounted in every provision impacting on the criminal justice process, and its operation at the different stages of the criminal process is described by the different protected rights.<sup>23</sup> Seeing that section 35(1)(f) applies to “[e]veryone who is arrested for allegedly committing an offence”, and the accused has therefore not been convicted, one would expect that the due process embodiment of the presumption of innocence would require that one have at least a basic entitlement to bail.<sup>24</sup>

A “right” to bail that does not entitle one to bail but rather sanctions the loss of liberty also does not make structural sense. I suggest that the approach taken by the Supreme Court of Canada in *Reference re. s. 94(2) of the Motor Vehicle Act (British Columbia)*<sup>25</sup> is the correct one. The right to freedom and security in section 12 is at the core of the criminal procedure rights of arrested, detained and accused persons

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*International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L. L. 235, 285 (1993).

<sup>21</sup> The Eight Amendment of the U.S.A. Constitution merely provides that “[e]xcessive bail shall not be required.” See also *United States v. Salerno*, 481 U.S. 739, 752 (1987).

<sup>22</sup> See for example Myles F McLellan, *Bail and the Diminishing Presumption of Innocence* 15 CAN. CRIM. L. REV. 57 (2010). Under South African law there has been disagreement whether the presumption of innocence has application outside the narrow trial context. The establishment of a protected right to be presumed innocent in § 35(3)(h) of the Constitution brought even more uncertainty as to the correct application and scope of the presumption of innocence. A discussion of this aspect falls outside the scope of this article. See chapter 5 of my thesis (*supra* note 12) for a discussion. In view of the fact that it is only the effect of the presumption of innocence at trial that has been entrenched in § 35(3)(h), it is the common law presumption of innocence that would have to find application to the right to bail in § 35(1)(f), and the other entrenched criminal procedure rights outside the trial context.

<sup>23</sup> See e.g. the decision by the Canadian Supreme Court in *R v Pearson* (1992), 12 CRR (2d) 1, 17. The Court held that § 11(e) entrenched and defined the procedural content of the presumption of innocence at the bail stage of the criminal process.

<sup>24</sup> See also FRANK SNYCKERS AND JOLANDI LE ROUX *Criminal procedure: Rights of arrested, detained and accused persons* in CONSTITUTIONAL LAW OF SOUTH AFRICA 51-93 (2<sup>nd</sup> ed. loose-leaf updated to January 2013). After conviction it may well be, that the residual content of the presumption of innocence is so depleted, that an applicant for bail should not have a basic entitlement to bail.

<sup>25</sup> [1985], 2 SCR 486.

in section 35 of the South African Bill of Rights,<sup>26</sup> including the right to bail. The criminal procedure rights in section 35 are therefore merely illustrative of the right to freedom and security entrenched in section 12. As such one would expect the right to bail to confer at least a basic entitlement to bail. As a result section 35(1)(f) in its present guise is a deplorable inversion of the right to freedom and security of the individual, and should have no place alongside the right to freedom and security, and the other criminal procedure rights in the Bill of Rights.

The second question that arises is whether the South African reverse onus provisions are in line with liberal minded reform founded upon principles such as the presumption of innocence, the right to liberty, the rule of law and a belief in the dignity and worth of the human being.

At first blush one is immediately reminded of some noteworthy domestic jurisdictions that allow for a reverse onus when adjudicating pre-trial release. Canada is one such example where an accused charged with one of the offences referred to in sections 515(6) and 522(2) must show cause why his detention in custody is not justified within the meaning of section 515(10).<sup>27</sup> Significantly, there were no reverse onus provisions at the time of the introduction of the Bail Reform Act<sup>28</sup> in 1972. The first reverse onus provisions were introduced some 4 years later<sup>29</sup> and in 2008<sup>30</sup> and 2009<sup>31</sup> virtually every indictable offence where a weapon or firearm was present was added to the list of offences in section 515(6).

Under American law two rebuttable presumptions against release may arise due to such factors as the type of offence with which the accused is charged, whether the offence was committed while on pre-trial release, and the criminal history of the accused.<sup>32</sup> In terms of these provisions it is incumbent on the applicant for release to convince the court that a condition, or a combination of conditions will reasonable assure “the safety of any other person and the community”<sup>33</sup> or “the

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<sup>26</sup> Chapter 2 of the Constitution.

<sup>27</sup> The Criminal Code of Canada RSC 1985, c C-46 as amended.

<sup>28</sup> 1970-71-72 (can) c 37.

<sup>29</sup> By way of the Criminal Law Amendment Act 1974-75-76 (Can) c 93.

<sup>30</sup> By way of the *Tackling Violent Crime Act* SC 2008, c 6.

<sup>31</sup> By way of *An Act to Amend the Criminal Code (organized crime and protection of justice system participants)* SC 2009, c 22.

<sup>32</sup> 18 United States Code, §§ 3142(e)(2) and 3142(e)(3).

<sup>33</sup> 3142(e)(2).

appearance of the person as required and the safety of the community”,<sup>34</sup> as the case may be.

Some Australian Bail Acts provide for similar provisions. In terms of section 16(3) of the Queensland Bail Act<sup>35</sup> an adult defendant charged with certain specified offences shall be refused bail unless he shows cause why his detention is not justified. In New South Wales there is a presumption against bail in terms of subsections 8A to 8F for certain offences or offenders.<sup>36</sup> In all the instances the accused person is not be granted bail unless the person satisfies the authorised officer or court that bail should not be refused.

However, the fact that these reverse onus provisions occur in these jurisdictions do not mean that they are in line with the values and principles that have long been held by the international community to be necessary in an effective democratic society based on the rule of law.

The European Convention on Human Rights<sup>37</sup> is a good example of these values held by the international community. In terms of Article 5(1) everyone has the right to liberty and security of the person, and that liberty may only be deprived in certain prescribed instances and in accordance with a procedure prescribed by law. Article 5(1)(c) read with article 5(3) provides that a person arrested or detained on the reasonable suspicion of having committed an offence is entitled to release pending trial. It cannot be expected of a person who is entitled to be released, to convince the court that he should be released. The Article properly construed and applied, accordingly requires that the prosecution justify remand in custody.

This view is also in line with the decision taken by the European Court of Human Rights in *Hutchinson-Reid v United Kingdom*<sup>38</sup> where the court made it clear that any imposition of a burden on a detained person to show why he should be released should be rejected as incompatible with Article 5(4).<sup>39</sup>

Another example of the values held by the international community in the context of pre-trial detention is Article 9 of the International Covenant on Civil and

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<sup>34</sup> 3142(e)(3).

<sup>35</sup> 1980.

<sup>36</sup> Bail Act 1978.

<sup>37</sup> See *supra* note 13.

<sup>38</sup> (2003), 37 EHRR 211.

<sup>39</sup> Article 5(4) ECHR provides that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily [to] a court and his release ordered if the detention is not lawful”.



Political Rights.<sup>40</sup> In terms of Article 9(1) 1) everyone has the right to liberty and security of the person; 2) no one shall be subjected to arbitrary arrest or detention; and 3) liberty shall also only be deprived on such grounds and in accordance with such procedure as are established by law. Article 9(3) provides that pre-trial detention shall not be the general rule, but rather the exception.<sup>41</sup> Here too, I submit that the Article properly construed and applied, require that the prosecution justify remand in custody. Logic dictates that the prosecution would have to prove that the circumstances of the accused are exceptional, justifying continued detention.

What then, may be asked, happened in the domestic jurisdictions that allow for reverse onus provisions for certain offences or offenders with regard to the pre-trial release? In South Africa rampant crime and a criminal justice system which is not up to the task of effective crime management led to the widespread criticism and disillusionment with the criminal justice system. In reaction to the criticism and in an attempt to make the system work individual civil liberties were eroded by government. In the other domestic jurisdictions discussed above the instances where a reverse onus is mandated also seems to indicate that concerns about collective security played an important role in the restraining of individual liberties.

Proponents for the reverse onus will remind that fundamental rights are not absolute and must be weighed against the legitimate needs of society (for security). However, I submit that this restraint on individual liberty is misplaced under South African law, and not justified in the other jurisdictions discussed above.

In South Africa the police force and prosecution are severely constrained by corruption and a lack of expertise.<sup>42</sup> One of the main contributors to this state of affairs is unrealistic employment policies. This leaves little room to afford individuals confronted by the criminal justice system with proper protection while the system still

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<sup>40</sup> See *supra* note 14.

<sup>41</sup> See also the Office of the High Commissioner for Human Rights *General Comment No. 8: Right to liberty and security of persons (Art. 9): 1982/06/30. CCPR General Comment No. 8 (General Comments)*.

<sup>42</sup> See e.g. *General: Corruption getting worse-poll*, Legalbrief Today, [www.legalbrief.co.za](http://www.legalbrief.co.za) (last visited on 11 July 2013); Zeldá Venter, *Judge acquits four over cop killing*, IOL News, (Aug. 15, 2013), [www.iol.co.za/news/crime-courts/judge-acquits-four-over-cop-killing-1.1561401#.UgtIX9Kmiz4](http://www.iol.co.za/news/crime-courts/judge-acquits-four-over-cop-killing-1.1561401#.UgtIX9Kmiz4). The judge held as follows: "It is with astonished dismay that I have beheld the slapdash, unprofessional, indeed amateurish, so-called investigation of the assassination of a police officer."; Wyndham Hartley, *Most criminal cops are from officer corps, SAPS audit shows*, BDLive, (Aug. 15 2013), [www.bdlive.co.za/national/2013/08/14/most-criminal-cops-are-from-officer-corps-saps-audit-shows?service=print](http://www.bdlive.co.za/national/2013/08/14/most-criminal-cops-are-from-officer-corps-saps-audit-shows?service=print); *General: Dire crisis in NPA reflected in cases- Casac*, Legalbrief Today, [www.legalbrief.co.za](http://www.legalbrief.co.za) (last visited on 11 July 2013); Botho Molosankwe, *Shock as strong cases lost by incompetence*, IOLnews, (July 5, 2013) [www.iol.co.za/news/crime-courts/shock-as-strong-cases-lost-by-incompetence-1.1542125#.UdZsl Tumiz4](http://www.iol.co.za/news/crime-courts/shock-as-strong-cases-lost-by-incompetence-1.1542125#.UdZsl Tumiz4).

remains effective. Yet, instead of dealing with the real issues the South African government react to criticism of the defective criminal justice system by eroding individual rights. This makes a mockery of a democratic rights-based society. South Africa will never have a society where liberty and dignity can flourish if the real causes of the problems are not addressed. The police force and the prosecution in South Africa must therefore first and foremost be brought up to a first world standard. This will forge a playing field where there would be no need to weaken individual rights to make the system work.

With regard to the other domestic jurisdictions discussed above, there is simply no need for reverse onus provisions to ensure an acceptable level of security.<sup>43</sup> These jurisdictions have effective systems of policing and prosecutors which give the prosecution a powerful advantage over the accused. Burdening the prosecution with the onus of justifying continued detention for all applicants for bail will not disturb the balance to such an extent that the system will be ineffective. It is reasonable to theorise that in these jurisdictions other considerations also play a role. Confirming this, some observers have indicated that the rights of accused persons have been side-lined in the Canada and the USA to curry favour with the voting public.<sup>44</sup>

Nonetheless, the biggest concern with a reverse onus provision is probably the real risk of a lack of meaningful judicial review when pre-trial release is adjudicated. It is therefore an issue about fairness. In this regard the judicial control brought about by the presumption of innocence where the guilt or innocence of an accused is decided is informative. The presumption of innocence ensures that the prosecution must prove the guilt of the accused. In this process the prosecution, with access to the resources and machinery of the state, must take care that justice is done.<sup>45</sup> There is clear authority that this minimises the risk that the accused will be convicted despite the existence of a reasonable doubt as to his guilt.

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<sup>43</sup> See also McLellan *supra* note 22 and Martin L Friedland, *The Bail Reform Act Revisited* 315 16 CAN. CRIM. L. REV. (2012) with regard to Canada.

<sup>44</sup> *E.g.* McLellan *id.* at 74.

<sup>45</sup> The prosecution has a unique and special role of seeking justice, doing justice, protecting the innocent and convicting the guilty. These accepted norms are embedded in South African law (see *e.g.* *Shaik v Minister of Justice and Constitutional Development* 2008 1 SACR (CC) at [67] and in numerous other legal systems, including Canadian (see *e.g.* *Boucher v the Queen* [1995] SCR 16 (110) CCC 263 at [23]-[24] and American law (see *e.g.* *State v Warren* 195 P.3d 940 Wash. (2008)).

Based on the same reasoning it follows that where the accused is burdened with the onus to justify pre-trial release, the lack of input by the prosecution and/or the inability of the accused to properly present or illicit the necessary material for consideration, may lead to the accused being erroneously detained pending his trial.<sup>46</sup> In view of the gravity of being detained, this lack of judicial control amounts to an unjustified lack of respect for the individuals' liberty.

In South Africa this situation is exacerbated by the fact that the vast majority of individuals who appear before the criminal courts do not have the means to afford legal representation. The state-funded system of counsel also does not adequately protect accused against injustice.<sup>47</sup> In many instances the state appointed attorney only sees the client for the first time minutes before the trial starts.<sup>48</sup> To make matters worse the law regarding bail is complex, and with regard to many aspects, unclear under South African law.<sup>49</sup> Under such conditions a reverse onus is discriminatory and unfair against the poor, with the unintended consequence that the poor are more likely to remain in custody pending the finalisation of the criminal process.

The South African government will argue that the lack of, or inadequate representation is compensated for by the active inquisitorial role<sup>50</sup> that have been conferred upon the court in bail proceedings by section 60.<sup>51</sup> In terms of this section, if the question of bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether bail should be considered by the court.<sup>52</sup> The

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<sup>46</sup> It is clear that where the onus of proof rests on the accused, the testimony by the state and the role of the investigating officer will be of secondary importance. All that is needed is for the state to oppose the granting of bail. If the state opposes bail it is up to the accused to satisfy the court on a balance of probabilities that he should be released on bail. It is presumable because of exactly this that some courts have been creative in applying the onus in terms of § 60(11). In *Sv Branco* 2002 1 SACR 531 (W) at 532f the court held that the fact that the accused was saddled with the onus did not mean that the state can remain passive and not adduce evidence, or sufficient rebutting evidence, in the hope that the applicant will not discharge his onus. However, if an accused, taking into account what is already on record, does not make out a *prima facie* case, there is no duty on the prosecution to present evidence in rebuttal. Also see *S v Mathebula* 2010 1 SACR 55 (SCA) at [12] and *S v Viljoen* 2002 2 SACR 550 (SCA) at [25].

<sup>47</sup> With regard to bail § 35(2)(c) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to him by the state and at state expense if substantial injustice would otherwise result.

<sup>48</sup> See e.g. the insert *Know Your Rights* in the Carte Blanche investigative journalism program on M-Net that was broadcast on 10 June 2012. See also *Know Your Rights*, Carte Blanche (2012), <http://beta.mnet.co.za/carteblanche/> (last visited on 7 November 2012).

<sup>49</sup> See e.g. *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat supra* note 8 at [3].

<sup>50</sup> Consisting of obligations and powers.

<sup>51</sup> Of the Criminal Procedure Act.

<sup>52</sup> § 60(1)(c).

court may in respect of matters that are not in dispute obtain in an informal manner the information that is needed to make a decision or order.<sup>53</sup> The court may in respect of matters that are in dispute require of the prosecutor or the accused, as the case may be, that evidence be adduced.<sup>54</sup> Where the reverse onus applies and the prosecutor does not oppose bail, the court must require the prosecutor to state the reasons for not opposing bail.<sup>55</sup> If the court is of the opinion that it lacks the necessary information or evidence to reach a decision on the bail application, it must order that such information or evidence be placed before court.<sup>56</sup>

However, I am of the opinion that the inquisitorial role of the court cannot adequately redress the scales for an unrepresented accused. The value of proper legal representation is clear. It gives the legal representative advance notice of the facts and the legal issues that may be relevant and concomitantly adequate time and opportunity to prepare. It enables the accused to have his case presented in the best possible way. More specifically, it gives the accused the opportunity to decide about and arrange for supporting witnesses. It provides the accused the opportunity to have a sworn affidavit drafted for purposes of the application, and if the decision is made to give oral evidence, the chance to state his case and to be examined by his own legal representative. It ensures that any oral evidence of a state witness will be properly tested by cross-examination. It minimises the risk that relevant issues may be overlooked.

The value of conferring an inquisitorial role on the court is furthermore hamstrung by the fact that the lack of expertise and integrity has due to the same unrealistic employment policies also found its way to the bench.<sup>57</sup> Given the lack of expertise and integrity, the inquisitorial elements in the bail process do not provide the safety net that the legislator had probably hoped for.

My argument against this lack of judicial control is furthermore strengthened by the fact that for those who have been refused release, the period of incarceration

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<sup>53</sup> § 60(2)(b).

<sup>54</sup> § 60(2)(c).

<sup>55</sup> § 60(2)(d).

<sup>56</sup> § 60(3).

<sup>57</sup> The criminal courts in South Africa have to a large extent lost public support and institutional legitimacy. See for example *General: People losing faith in courts-survey*, Legalbrief Today, [www.legalbrief.co.za](http://www.legalbrief.co.za) (last visited on 12 July 2013); *General: Many magistrates accused of serious misconduct*, Legalbrief Today, [www.legalbrief.co.za](http://www.legalbrief.co.za) (last visited on 2 September 2013); SAPA, *Lack of confidence worrying – Mogoeng* (Chief Justice), News24, [www.news24.com/SouthAfrica/News/Lack-of-confidence-worrying-Mogoeng-20131113](http://www.news24.com/SouthAfrica/News/Lack-of-confidence-worrying-Mogoeng-20131113) (last visited on 18 November 2013).

pending trial is frequently excessive in South Africa. Such is the problem that it is not uncommon for an accused to remain in custody for many years pending the finalisation of the criminal proceedings.<sup>58</sup>

The argument is also strengthened by the fact that the prisons in South Africa are notoriously unsafe,<sup>59</sup> overcrowded and the conditions deplorable.<sup>60</sup> Hence, incarceration pending the determination of guilt should only be ordered if absolutely necessary.

In light of the above-mentioned it is important that there should be meaningful judicial review when deciding pre-trial release. An accused should not have to convince the court that the interests of justice permit his release.

## **2. THE ADMISSION OF THE EVIDENCE OF THE APPLICANT FOR BAIL AT THE LATER CRIMINAL TRIAL**

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<sup>58</sup> See e.g. Jeremy Gordon and Ingrid Cloete, *Imprisoned before being found guilty: Remand detainees in South Africa* 80 U. Cin. L. Rev. 1167 (2012). In June 2013 2700 trial awaiting detainees had been incarcerated for more than two years. See Ruth Hopkins and Nooshin Erfani-Ghadimi, *Full prisons not just due to effective NPA*, IOL News, (June. 8, 2013) [www.iol.co.za/saturday-star/full-prisons-not-just-due-to-effective-npa-1.1529382](http://www.iol.co.za/saturday-star/full-prisons-not-just-due-to-effective-npa-1.1529382). In recognition of the problem § 49G of the Correctional Matters Amendment Act 5 of 2011 came into operation on 1 July 2013 by way of Government Gazette No 36621 of 1 July 2013 (No 21). In terms of § 49G(2) the Head of the remand detention facility must report to the relevant Director of Public Prosecutions the cases of remand detainees who are being detained for a successive six-month period. A remand detainee must not be detained for more than two years without the matter being brought to an appropriate court to determine the continued detention or release of the accused on suitable conditions (§ 49G(3)). If the detainee appeared before a court within three months of the expiry of the two year period, and the appropriate court considered the continued detention of the accused, the accused does not have to be brought before court (§ 49G(1)). If the finalisation of the matter is further delayed after the court appearance, the Head of the remand detention facility must refer the case back to the court on a yearly basis to determine the continued detention, or release of the accused on suitable conditions (§ 49G(4)).

<sup>59</sup> See e.g. Zeldi Venter, *Six Pretoria Central Prison inmates, mostly serving short-term prison sentences for offences such as theft and fraud, were due to turn to the Pretoria High Court today in an urgent bid to have their prison conditions improved and to seek protection from dangerous inmates*, Pretoria News, (July 26, 2013) <http://www.iol.co.za/pretoria-news/six-pretoria-central-prison-inmates-mostly-serving-short-term-prison-sentences-for-offences-such-as-theft-and-fraud-were-due-to-turn-to-the-pretoria-high-court-today-in-an-urgent-bid-to-have-their-prison-conditions-improved-and-to-seek-protection-from-dangerous-inmates-1.1462671>.

<sup>60</sup> This has been acknowledged by the legislature by the insertion of § 63A in the Criminal Procedure Act during 2001. § 63A provides that if the head of a prison is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused, the head of the prison may apply to the relevant court to release the accused on warning instead of bail, or to amend the conditions of bail so that he may be released. See also ETIENNE DU TOIT *ET AL*, COMMENTARY ON THE CRIMINAL PROCEDURE ACT 9-2 (loose-leaf updated to 31 July 2013); *Report slams prison conditions*. news24archives (2007), [http://www.news24.com/SouthAfrica/ Politics/Report-slams-prison-conditions-20071106](http://www.news24.com/SouthAfrica/Politics/Report-slams-prison-conditions-20071106) (last visited on 25 July 2013); *South Africa: MPs Warn of Inhumane Prison Conditions*, sapa (2012.) <http://allafrica.com /stories /201210241164.html> (last visited on 25 July 2013) and the annual report for the period April 2012 to 31 March 2013 of the inspecting judge, Judicial Inspectorate of Prisons at <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf>.

In contrast to the passive reception of the reverse onus provisions with regard to bail under South African law, the provision allowing the evidence of the applicant for bail at the later criminal trial has been severely criticised from various legal quarters since its inception in 1998.<sup>61</sup> Central to this discussion is the right against self-incrimination. In terms of section 35(3)(j) of the Constitution “every accused person has the right to a fair trial, which includes the right not to be compelled to give self-incriminating answers.”<sup>62</sup>

Under South African law, legislation with regards to bail has fallen short of this provision. Section 60(11B)(c) provides that:<sup>63</sup>

The record of the bail proceedings, excluding the information in paragraph (a),<sup>64</sup> shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

Critics of the section point out that the accused has a constitutional right to remain silent<sup>65</sup> and a constitutional right against self-incrimination. He also has a constitutional right to bail.<sup>66</sup> The applicant for bail is now faced with a dilemma. If he fails to give evidence, or refuses to answer incriminating questions at the bail application he may be refused bail. In the instance of the more serious offences where he has the burden of proof, he will be refused bail if he does not give evidence or answer incriminating questions.<sup>67</sup> In view of the fact that the record of the bail proceedings form part of the record at trial, the applicant for bail is therefore forced to

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<sup>61</sup> Introduced by way of the Criminal Procedure Amendment Act 85 of 1997.

<sup>62</sup> This is somewhat narrower than the privilege inherited from English common law which provided that an accused may not be conscripted (in any given procedure) to give evidence (and not only to provide an answer) that may be used to incriminate him at trial.

<sup>63</sup> Criminal Procedure Act. The section commenced on 1 August 1998 by way of the Criminal Procedure Amendment Act 85 of 1997.

<sup>64</sup> “(11B)(a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether—(i) the accused has previously been convicted of any offence; and (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.”

<sup>65</sup> § 35(3)(h) of the Constitution.

<sup>66</sup> § 35(1)(f) *id.*

<sup>67</sup> He may elect to submit evidence by affidavit. However, because the evidence in the affidavit cannot be tested by cross-examination the probative value is less than that of oral evidence, placing the applicant at a disadvantage.

give up his constitutional right not to incriminate himself, in order to exercise his constitutional right to bail.<sup>68</sup>

Despite the criticism the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*<sup>69</sup> found that section 60(11B)(c) passed constitutional muster. The court explained that litigation in a predominantly adversary system of justice inevitably presented the accused with a minefield of choices. An accused has to make many decisions whether to speak or to keep silent. Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral or written evidence, and if so by whom? The court explained that the choice remained that of the accused and could not be forced on him.

However, the reasoning and the conclusion reached by the Constitutional court cannot be supported. The examples given by the Constitutional Court are not comparable to the situation under discussion. One would not in one of the examples given by the Court have to forego one constitutional right in order to exercise the other. It is but the choice that the accused would have to make within one fundamental principle, that is, his right to be heard. The accused can obtain the legal remedy he pursues by taking the one route or the other. It is merely a question of tactics dictating what would be appropriate in a specific circumstance. He is not forced to do the one or the other, at pain of not receiving legal assistance, should he refuse.

Paradoxically, the Constitutional Court also found that there may be particular circumstances where the trial court should disallow such evidence, for example where the applicant for bail did not know of his right not answer incriminatory questions.

In my thesis I argued that evidence given at the bail hearing is not voluntary, if it is done under pain of not receiving bail. I concluded that section 60(11B)(c) offended the right against self-incrimination and that it could also not be saved by the limitation clause provided for in section 36(1) of the Constitution.<sup>70</sup>

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<sup>68</sup> In my view the criticism loses sight of the fact that an important purpose of the right to silence is to protect the accused against self-incrimination, and that the applicant for bail does not always have to divulge facts of the case to obtain bail. See my discussion of the principles below. The applicant for bail of course also has another option. He may choose to lie at the bail application. However, he then risks conviction and punishment for perjury.

<sup>69</sup> See *supra* note 8.

<sup>70</sup> It is beyond the scope of this article to give a detailed discussion of the Constitutional Court judgement or all the provisions and principles that have to be considered under South African law when deciding whether § 60(11B)(c) passes constitutional muster. See chapter 9 of my thesis (*supra*

Nevertheless, the Constitutional Court has endorsed the approach of the legislator. Consequently, all the evidence presented by an applicant informed of his right against self-incrimination, and pursuing his right to bail, may be used to incriminate or to test the credibility of an accused who elects to testify at his trial under South African law.

Under Canadian law the approach and application of these rights have been very different to that taken by the South African government and the Constitutional Court.

In terms of section 13 of the Canadian Charter,<sup>71</sup> prior incriminating evidence<sup>72</sup> of an applicant for bail, may not be used to incriminate<sup>73</sup> that witness at the later criminal trial. It does not matter whether the evidence was given freely or under compulsion.<sup>74</sup> The prohibited evidence includes oral testimony, whether under oath or not, documentary evidence introduced and other acts performed while testifying.

In addition section 5(2) of the Canada Evidence Act<sup>75</sup> protects an accused at the criminal trial from an answer given at the bail hearing, where he objected to answer the question on the grounds that the testimony might tend to incriminate or establish his liability in a civil proceeding. In terms of this section the answer may therefore also not be used to test the credibility of the accused during cross-examination at trial. It does not cover the testimony which the applicant voluntarily chooses to submit in order to obtain bail, whether he is saddled with the burden of proof or not.

In American society the right against self-incrimination has also been regarded as worthy enough to be protected in the United States Constitution. The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. Relying mainly on the Amendment, many defendants have challenged the admission of their bail evidence at the criminal trial on the basis

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note 12) for a discussion and analysis of the Constitutional Court judgement and the relevant provisions and principles.

<sup>71</sup> Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

<sup>72</sup> It does not include all manner of evidence given at the prior proceedings. See *R v Henry*, 2005 SCC 76 (CanLII), [2005] 3 SCR 609; *R v Nedelcu*, 2012 SCC 59, [2012] 3 SCR.

<sup>73</sup> It has been argued that once it has been decided that the evidence from the bail application is incriminating evidence, the crown should not be able to use it for any purpose at the later criminal trial. See also *R v Henry id.* at [50]; *R v Nedelcu id.* at [15].

<sup>74</sup> The doctrine has therefore been extended beyond the common law principle which requires the element of compulsion.

<sup>75</sup> RSC 1985, c C – 5.



that they were compelled to choose between their Eight Amendment Right to Bail, and their Fifth Amendment Privilege against self-incrimination.<sup>76</sup>

However, in many of these challenges the courts have for different reasons found that an applicant for bail who made incriminating statements at a bail hearing, was not “compelled” within the meaning of the Fifth Amendment to do so.<sup>77</sup> In *Raffield v State*<sup>78</sup> and *Cowards v State*<sup>79</sup> the courts found that in the absence of objections based on the Fifth Amendment at the bail hearing, that evidence was not precluded from the trial.<sup>80</sup> In *Padgett v State*<sup>81</sup> the court held that if an unrepresented defendant made an unsolicited incriminating statement in the course of his evidence at the bail hearing, it will be admissible at the trial if it is voluntary. In *United States v Dohm*<sup>82</sup> the Court of Appeals, Fifth Circuit found that for a defendant to receive the benefits of his Eighth Amendment right to bail, he did not have to divulge the facts of his case.<sup>83</sup> The court added that evidence voluntary given by the defendant at the bail hearing, was admissible against him at the trial.<sup>84</sup> In *Porretto v Stalder*<sup>85</sup> the same court found that the Louisiana statute may have placed the onus on the applicant for bail, but it did not require him to personally testify in order to satisfy his burden. The court also found that *Porretto* did not testify involuntarily as he was represented by counsel at the bail hearing, and it was counsel who called him to the stand.<sup>86</sup> In other cases the challenges were rejected based on harmless error, in that

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<sup>76</sup> See e.g. *State v Williams* 343 A.2d 29 (NH 1975); *United States v Perry* 788 F.2d 100 (3<sup>rd</sup> Cir), cert. denied 479 U.S. 864 (1986) (onus on applicant for bail ito § 3142(e) 18 USC); *Fenner v State of Maryland* 2004 WL 1958824 (Md); *United States v Schwartz* 315 Fed. Appx. 412, 2009 WL 532796 (C.A. 3 (Pa)).

<sup>77</sup> Regardless whether the defendant had legal representation or not.

<sup>78</sup> 333 So.2d 534, 537 (Fla. App. 1976).

<sup>79</sup> 465 SE.2d 677, 679 Ga. (1996).

<sup>80</sup> The U.S. Supreme Court has held that the witness does not have to be warned of his privilege against self-incrimination (*Minnesota v Murphy* 465 U.S. 420 (1984)). The highest court has also pointed out that a witness who answers questions is not compelled within the meaning of the Fifth Amendment to answer, unless he is required to answer over his valid claim of privilege (*Minnesota v Murphy* 465 U.S. 420 (1984) 427, quoting *Garner v United States* 424 U.S. 648, 654 (1976); *Ohio Adult Parole Authority* 523 U.S. 272, 285-287 (1998) 424; *Berghuis v Thompkins* U.S.S.C. delivered on June 1 2010, <http://law.cornell.edu/supct/html/08-1470.ZO.html>). *Law.cornell.edu*, (last visited on 14 July 2013).

<sup>81</sup> 590 P.2d 432, 436 (Alaska 1979).

<sup>82</sup> 618 F.2d 1169 (5<sup>th</sup> Cir. 1980) (C.A. Fla.).

<sup>83</sup> At 1174.

<sup>84</sup> At 1175.

<sup>85</sup> 834 F.2d 461, 466 (1987).

<sup>86</sup> At 466. The United States Court of Appeals, Sixth Circuit in *United States v Dean* 927 F.2d 605, 1991 WL 29197 (C.A. 6 (Mich) (onus on applicant for bail ito § 3142(e) 18 USC) in general agreed with the observations of the court in *Porretto*. See also the decision by the Maryland Court of Appeals in *Fenner v State of Maryland supra* note 71.

even if the admission of the prior evidence was an error, it did not prejudice the defendant at trial.<sup>87</sup>

In Australia the privilege against self-incrimination has been described as a “fundamental ... bulwark of liberty”,<sup>88</sup> “no rule more established in equity”,<sup>89</sup> “more than a mere rule of evidence” and “deeply ingrained in the common law”,<sup>90</sup> and it is protected in federal<sup>91</sup> and several state Acts. Even so, the privilege is not guaranteed by the Australian Constitution and it has been abrogated or restricted in its application in certain circumscribed contexts by legislation.<sup>92</sup> Significant for present purposes is the fact that in Queensland and New South Wales, the respective Law Reform Commissions have fairly recently reviewed the right against self-incrimination and did not recommend that the privilege be revoked with regards to the admission of evidence from the bail application at trial.<sup>93</sup> The respective legislators have also not deemed it fit to revoke the privilege in this context.

In Queensland section 10(1) of the Queensland Evidence Act<sup>94</sup> provides that “[n]othing in this act shall render any person compellable to answer any question tending to incriminate the person.”<sup>95</sup> While it is clear that the section protects an accused against the compulsion to answer a question that may tend to incriminate him, it is not as clear whether the accused can still find protection under the wider common law privilege where he is conscripted against himself, other than in response to a question. This is very relevant in the present context where the applicant burdened with the onus has limited options but to testify, in order to show cause why he should be released from detention.

It has been held that due to the significance of the privilege as a substantive right, the policy of law favours immunity from self-incrimination.<sup>96</sup> It has also been held that the courts will only interpret legislation to have abrogated the privilege if the

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<sup>87</sup> See e.g. *United States v Dean* id. item 3; *United States v Schwartz* supra note 71.

<sup>88</sup> *Reid v Howard* (1995) 184 CLR 1 at [11].

<sup>89</sup> *Id.* at [12].

<sup>90</sup> See e.g. *id.* 309; *R v Hicks and Another* 210 A Crim R 158 at [7] (2010 QSC).

<sup>91</sup> Section 128 of the New South Wales Act discussed hereunder is premised on § 128 of the Commonwealth Act.

<sup>92</sup> See also *Sorby v Commonwealth* [1983] 152 CLR 281, 298.

<sup>93</sup> See *The Abrogation of the Privilege against Self-Incrimination*, Report 59 (OLRC Dec. 2004) and *The Right to Silence*, Report 95 (NSWLRC July 2000) respectively.

<sup>94</sup> 1977

<sup>95</sup> Evidence tendered by an accused at trial is governed by § 15 of the same Act.

<sup>96</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

intention to do so is clearly apparent from the legislation.<sup>97</sup> Even if applying this approach, the Act was probably intended to act as the complete code with regard to the rules of evidence in Queensland, and section 10 ostensibly limits the application of the privilege against self-incrimination to questions asked.

Unfortunately there is no case law to indicate how the courts have applied section 10 with regards to the admission of incriminating evidence from the bail hearing at trial. However, where the answer to a question at the bail application might tend to incriminate, the applicant for bail will clearly be faced with the same dilemma of having to choose between refusing to provide information and risk being refused release, and providing evidence of guilt and risk conviction. In such event the trial court has the power to exclude the incriminating evidence,<sup>98</sup> if the court is satisfied that it would be unfair to the person charged to admit the evidence.<sup>99</sup>

In New South Wales section 128 of the Evidence Act 1995<sup>100</sup> provides for a “[p]rivilege in respect of self-incrimination in other proceedings”.<sup>101</sup> The first five subsections provide for a step by step process. A witness may object<sup>102</sup> to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty.<sup>103</sup> The court must then determine whether there are reasonable grounds for the objection.<sup>104</sup>

If the court determines that there are reasonable grounds for the objection, the court shall not require the witness to give evidence.<sup>105</sup> In such event the court must inform the witness that he need not give evidence, and that if he willingly gives

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<sup>97</sup> *Sorby v Commonwealth supra* note 92 at 289-290.

<sup>98</sup> Direct, indirect or derivative evidence. See *R v Hicks and Another* 210 A Crim R 158 at [7] (2010 QSC).

<sup>99</sup> § 130 Evidence Act *supra* note 86 read with the common law discretion of the court to exclude evidence that might result in an unfair trial. See also JOHN ANDERSON & PETER BAYNE, UNIFORM EVIDENCE LAW: TEXT AND ESSENTIAL CASES 97 (2<sup>nd</sup> ed. 2009).

<sup>100</sup> Of New South Wales, as amended by the Evidence Amendment Act 2007 (NSW).

<sup>101</sup> See the heading.

<sup>102</sup> As per Florida and Georgia state case law, the right is only enlivened where the witness objects to giving particular evidence. See also *Cornwell v The Queen* (2007) 231 CLR 260 at [106]; *Bates trading as Riot Wetsuits v Omareef Pty Ltd* [1998] FCA 1472.

<sup>103</sup> § 128(1).

<sup>104</sup> § 128(2). If it appears that a witness may have grounds for making an application under § 128, the court must satisfy itself that the witness is aware of the effect of the provision (§ 132). See also *R v Parkes* (2003) 147 A Crim R 450 at [94]-[99].

<sup>105</sup> § 128(3).

evidence, the court will issue a certificate under section 128.<sup>106</sup> The court must also inform the witness of the effect of the certificate.<sup>107</sup>

If the court is satisfied that the evidence does not tend to prove that the witness has committed an offence or is liable to a civil penalty, under a law of a foreign country, and that the interests of justice require that the witness give the evidence, the court may require the witness to give the evidence.<sup>108</sup>

In both instances the court must cause the witness to be issued a certificate.<sup>109</sup> The court must also issue the witness with a certificate if the objection has been overruled, and after the evidence has been given, the court finds that there were reasonable grounds for the objection.<sup>110</sup>

Evidence given by a person in respect of which a certificate is issued, and evidence of any information, document or thing obtained as a direct or indirect consequence of the person giving evidence, cannot be used against the person.<sup>111</sup> This applies despite any challenge, review, quashing, or calling into question on any ground the decision to issue a certificate, or the validity of the certificate.<sup>112</sup>

Despite the wording of section 128(1) it appears from the case law that section 128 protection only extends to answers that are elicited. It also appears that it only extends to answers elicited by someone other than the witnesses' counsel. In *Song v Ying*<sup>113</sup> the New South Wales Court of Appeal explained that when a witness who is party to a proceedings is asked questions by his own counsel, whether in chief or in re-examination, there would "rarely if ever be a question" that that evidence is given under compulsion. The court also held that a witness who wishes to give evidence in response to questions from his own counsel, but is not willing to do so, except under the protection of a section 128 certificate, does not "object" within the meaning of section 128(1). The court indicated that only questions from anybody else than his own legal representative makes sense of the word "objects" in section 128, and "require" in section 128(4).<sup>114</sup>

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<sup>106</sup> § 128(3)(a) & (b).

<sup>107</sup> § 128(3)(c).

<sup>108</sup> § 128(4).

<sup>109</sup> S 128(5).

<sup>110</sup> § 128(6).

<sup>111</sup> S 128(7).

<sup>112</sup> § 128(8).

<sup>113</sup> [2010] NSWCA 237. Confirming earlier remarks in *Cornwell v The Queen supra* note 102.

<sup>114</sup> At [24], [27]-[29].

Unfortunately there is also no case law to indicate how the New South Wales courts have applied section 128 with regard to the admission of incriminating evidence from the bail hearing at trial. However, the practical operation of section 128 in the context of bail can be illustrated by using three examples. Assume for each example that the applicant at the bail application objects to answer a question emanating from someone else than his own legal counsel on the basis that the answer might incriminate him.

In the first example the court upholds the objection by determining that there are reasonable grounds for the objection. The court informs the applicant for bail that he can choose to give evidence but need not do so. The applicant answers the question because he wants to be released on bail. The court must give the applicant a certificate and explain its effect. The evidence, as well as any evidence derived from the evidence, cannot be used against the accused at trial.

In the second example the court rejects the objection. The applicant must answer the question. A certificate is not issued and the applicant does not enjoy any protection.

In the third example the court upholds the objection and finds that the evidence would not incriminate the applicant under foreign law and that the interests of justice require that the applicant give the evidence. The court may require the applicant to answer the question. If the court directs the applicant to answer the question the court must give the applicant a certificate which protects the applicant against the use, or derivative use, of the evidence at trial.

The Evidence Act<sup>115</sup> does not provide any guidelines as what may constitute reasonable grounds for purposes of section 128(2). However, in *R v Bikic*<sup>116</sup> Giles JA held that “it seems .. to be a matter of common sense that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence.” The courts have also long held that the mere fact that the witness swears that the answer will incriminate him is not sufficient, the court must be satisfied from the circumstances of the case, and the nature of the evidence

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<sup>115</sup> See *supra* note 100.

<sup>116</sup> [2001] NSWCCA, 537 at [15].

that the witness is asked to give, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer.<sup>117</sup>

As far as international human rights instruments are concerned, the right to silence and the right against self-incrimination were surprisingly not expressly taken up in the European Convention on Human Rights. However, the European Court of Human Rights has in a number of decisions interpreted Article 6, which guarantees the right to a fair trial, to include both these rights describing them as “generally recognised international standards lying at the heart of the notion of a fair procedure.”<sup>118</sup>

Article 14 of the International Covenant on Civil and Political Rights similarly recognises and protects the right to justice and a fair trial. In terms of Article 14.3 everyone shall in the determination of a criminal charge, be entitled “[n]ot to be compelled to testify against himself or to confess guilt.”

When comparing the South African approach to that of the English common law that was inherited, the foreign jurisdictions and the international human rights paradigms, it is immediately apparent that the South African approach with regard to incriminating statements made by an applicant for bail falls far short of the mark.

In terms of English common law an accused may not be conscripted (in any given procedure) to give evidence that may be used to incriminate him at trial. Canadian law provides even better protection in that incriminating evidence given freely or under compulsion at the bail hearing may not be used to incriminate that witness at the later criminal trial. Under American law the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. Even though state courts have for different reasons found that that the applicant for bail was not compelled within the meaning of the Fifth Amendment to give incriminating evidence, the option remains for the courts to disallow the evidence at trial if there is a valid objection on the facts of the case.

In Queensland no person may be compelled to answer any question tending to incriminate the person. If the person provides the incriminating evidence to secure bail, the trial court has the power to exclude the evidence, if the court is satisfied that it would be unfair to allow the evidence. In New South Wales legislation provides for

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<sup>117</sup> *Ex parte Reynolds; In re Reynolds* [1882] 20 ChD 294; *Jackson v Gamble* [1983] 1 VR 552, 555-556. See also *Pyneboard Pty Ltd v Trade Commission and Another* (1983) 152 CLR 328 at [9].

<sup>118</sup> *Funke v France* (1993) 16 EHRR 297; *Murray v United Kingdom* (1996) 22 EHRR 29; *Saunders v United Kingdom* (1997) 23 EHRR 313.

a “privilege in respect of self-incrimination in other proceedings.” If the applicant for bail objects to answering a question from someone else than his own legal representative the court will consider whether there are reasonable grounds for the objection. If the court determines there are reasonable grounds the applicant may elect to answer the question in order to obtain bail. If the applicant elects to answer, the court will issue a certificate protecting the accused from the use of the evidence, or derivative evidence, at the criminal trial.

As far as the European Convention on Human rights is concerned, the European Court of Human Rights has in a number of decisions interpreted Article 6 to include the privilege against self-incrimination and described the privilege as a generally recognised international standard lying at the heart of the notion of a fair procedure. The International Covenant on Civil and Political Rights affords similar protection to the English common law by providing that everyone shall in in the determination of a criminal charge be entitled “[n]ot to be compelled to testify against himself or to confess guilt.”

In contradistinction with this South African legislation has taken away the right against self-incrimination completely in the context of evidence given at the bail application. Even though the Constitutional Court has ruled that the evidence may be excluded from trial in the interests of justice, the interests of justice are not seen to require exclusion where the applicant for bail elected to testify having been informed of his right against self-incrimination.

It is therefore clear that with regard to the admissibility of incriminating evidence from the bail hearing at trial, the South African government does not share the same appreciation for due process than the inherited English common law, the other “proven” jurisdictions or the international paradigms discussed above.

This abrogation of generally vaunted standards and principles is not acceptable in a constitutional state based on respect for our common humanity and commitment to the rule of law. In my view there is also very little difference (if any) in principle between being compelled to incriminate oneself at the bail application, and allowing the evidence against one at the trial, and being compelled to incriminate oneself during the actual criminal trial. In both instances the accused is obliged to assist the state in proving the case against him. Yet, the privilege is treated as

sacrosanct with regards to evidence emanating from the accused at trial under South African law.<sup>119</sup>

I suggest that in the present context the following are the realities and the correct application of the principles. It is not uncommon for the facts of the case to come up for discussion during the bail application. In the majority of these instances the apparent strength of the state case becomes a factor to be considered by the presiding officer in deciding whether to release the applicant on bail. The prosecution in opposing bail may try to show that on the face of the material before court, it has a strong case. A strong case makes a conviction likely, and if a substantial prison sentence is probable upon conviction, this may sway the court to come to the conclusion that the accused may flee rather than stand his trial.<sup>120</sup> To counter this, the applicant for bail must point out the weaknesses in the state case.

At the other end of the spectrum, if the state case is weak, it is incumbent on the applicant, especially where he is burdened with the onus, to show that the state case is weak, making conviction improbable, and absconding for that reason unlikely.<sup>121</sup>

It is furthermore evident, that in a specific case, the circumstances may be such that only the applicant personally, will be able to provide such proof.

Another problem is that the applicant for bail may not be fully aware of all the allegations of fact that will be made against him at trial.<sup>122</sup> The charge sheet will in most instances not have been drawn up, or the indictment and summary of the facts will not have been served,<sup>123</sup> and the accused will not have had access to the police docket. The applicant may therefore unknowingly testify about issues at the bail application, that later become relevant at trial.

In both instances the situation is complicated by the fact that it is not only the issues about the facts that constitute the elements of the crime that may later incriminate at trial, but also issues about facts, relevant to facts in issue.

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<sup>119</sup> Also see § 203 of the Criminal Procedure Act; *Magmoed v Janse van Rensburg and Others* 1993 1 SACR 67 (A); *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powel NO and Others* 1996 1 BCLR 1 (CC); ALBERT KRUGER, HIEMSTRA'S CRIMINAL PROCEDURE *supra* note 11 at 23-45. ETIENNE DU TOIT *ET AL*, COMMENTARY ON THE CRIMINAL PROCEDURE ACT *supra* note 60 at 23-47.

<sup>120</sup> See e.g. *R v Christodoulou* [2005] NSWSC 1362 at [6] - [7].

<sup>121</sup> See eg *S v Mathebula* 2010 1 SACR 55 (SCA) at [12].

<sup>122</sup> Or for that matter, all the charges that will be levelled against him.

<sup>123</sup> Under South African law a charge sheet is utilised in the Lower Courts to inform the accused of the charge or charges against him. In the High Court an indictment is used. The form and substance of the documents are the same.



It was accordingly unwise for the South African legislator to impose a broad and radical inclusionary policy to something that should be treated selectively. As far as the principles are concerned, I am of the view that the underlying rationales<sup>124</sup> for the right to silence is not imperilled by the requirement that an applicant for bail should speak. However, where the applicant for bail is required to incriminate himself directly or indirectly in pursuance of his quest to obtain bail, he must be protected against the use of this evidence, or derivative evidence, at trial. The proper time for determining whether the evidence given at the bail hearing can be characterised as incriminating evidence, is when the prosecution seeks to use it at trial.<sup>125</sup> In this way the other evidence against which no objection can be levelled is available for use at the trial.

Yet, of even more concern are the cumulative effect of the reverse onus and the blanket admission of the bail evidence at trial, and the exploitation thereof by the South African prosecution.

### **3. THE CUMULATIVE EFFECT AND EXPLOITATION BY THE SOUTH AFRICAN PROSECUTION**

As explained earlier, it is not uncommon for the strength of the prosecution case to become relevant during the bail application. When the applicant for bail is burdened with the onus, it is up to the applicant to finally satisfy the court on a balance of probabilities that he should be released on bail. His testimony or evidence on all issues, including the apparent strength of the prosecution case, is accordingly of primary importance. All that is needed is for the state to oppose the granting of bail.<sup>126</sup>

Under South African law this evidence, including anything which may incriminate, may then be used against the accused at trial.<sup>127</sup> This is unacceptable in a jurisdiction that professes to be a liberal democracy which is concerned with the

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<sup>124</sup> The rationales are: concern for reliability, by deterring proper investigation which relates to the truth seeking function of the court; a belief in the dignity and privacy of the individual, while not absolute, may not be lightly eroded; to give effect to the privilege against self-incrimination and the presumption of innocence. See IAN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 758 (6<sup>th</sup> ed. 2013).

<sup>125</sup> See e.g. *Dubois v The Queen*, 1985 CanLII 10 (SCC), [1985] 2 SCR 350 at 363-364.

<sup>126</sup> See also Michael G Cowling, *Bail reform: An assessment of the Criminal Procedure Second Amendment Act 75 of 1995* 9 SACJ 50 53 (1996).

<sup>127</sup> When the applicant for bail had been warned of his privilege against self-incrimination.

manner in which the verdict is reached and notions of human rights, including the dignity and personal autonomy of the accused. It is inter alia in recognition of the autonomy of the individual that we do not force him to incriminate himself or to participate at the trial.<sup>128</sup> Confirming this, none of the proven democratic jurisdictions and international paradigms that have been discussed, provide for a reverse onus when adjudicating bail, and the blanket admission of the evidence at the criminal trial.

Unfortunately, the South African prosecution has exacerbated this retrogressive legislative step by exploiting the situation as part of their litigation tactics. It is fair to say that since the introduction of the reverse onus provisions and section 60(11B)(c), not only the factors relevant to pre-trial release have been taken into account by the prosecution when deciding whether to oppose bail. In many instances the real possibility that the accused will be forced to reveal his defence in exposing the weaknesses in the state case during the bail application has swayed the prosecution to oppose bail.

The prosecution is well aware that it is especially with regards to the very serious offences targeted by section 60(11)(a)<sup>129</sup> that the offender is in a tight situation. The applicant is not only burdened with the onus, but must satisfy the court that exceptional circumstances exist, which in the interests of justice permit his release.<sup>130</sup> In this regard the South African courts have held that the weakness of the state case alone,<sup>131</sup> or in conjunction with other factors,<sup>132</sup> may establish such exceptional circumstance(s). Due to this the prosecution oppose these applications even though it is unlikely that the accused will not stand his trial, or that one of the other grounds in section 60(4)<sup>133</sup> which do not permit release, will be established.<sup>134</sup>

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<sup>128</sup> See also Ho Hock Lai, *Liberalism and the Criminal Trial* 32 SIDNEY L. REV. 243 (2010).

<sup>129</sup> See item 1 "THE REVERSE ONUS PROVISIONS" *supra*.

<sup>130</sup> Even though the Constitutional Court in *S v Dhlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat supra* note 8 at [64] accepted that this requirement departed from the constitutional standard set by § 35(1)(f) of the Constitution by making bail more difficult to obtain, the court in view of the prevailing circumstances found the provision to be reasonable and justifiable in terms of the limitation clause [65]. For a critical discussion of this requirement see Jeremy Sarkin *et al The Constitutional Court's bail decision: Individual liberty in crisis? S v Dhlamini* 16 2000 SAJHR 292 at 301-5. This burden has been described by South African courts as a "heavy onus". See e.g. *S v Vanqa* 2000 2 SACR 371 (Tk) at 372j.

<sup>131</sup> *S v Botha en 'n ander* 2002 1 SACR 222 (SCA) at [21]; *S v Viljoen* 2002 2 SACR 550 (SCA) at [11]; *S v Najoe* 2012 (2) SACR 395 (ECP) at [8].

<sup>132</sup> *S v Jonas* 1998 (2) SACR 673 (SEC), *S v Siwela* 1999 (2) SACR 685 (W); *Mooi v S* [2012] ZASCA 79 (unreported, SCA case no 162/12, 30 May 2012).

<sup>133</sup> Of the Criminal Procedure Act.

I have no doubt that this practice amounts to the abuse of the process of the courts. It may even be argued that the legislator must have foreseen the scope for abuse of the provisions, and still passed the legislation. In such event it would clearly also be misuse of state power by government. In a country where the vast majority of its citizens cannot afford legal representation for the trial alone, the accused cannot be forced to incur the expenditure of a formal contested bail application that may last several days, and need not have been held in the first place. This may lead to an accused having to forgo his right to legal representation, or choice of counsel, at a later stage of the process due to lack of funds. Again it is the poor and the destitute that will be the most affected.

It is also unacceptable for an accused to have to suffer the rigours of a formal bail application, and run the risk of being incarcerated pending trial, for the very selfish ulterior objective of the prosecution, to get a tactical advantage for trial.

I accordingly submit that the cumulative effect of these provisions, and especially so the exploitation thereof by the South African prosecution, is a failure of liberal democracy. It offends our collective sense of justice and must be corrected to reflect an adequate concern for the welfare and autonomy of the accused. In this exercise, repealing or striking down section 60(11B)(c), which provides for the blanket admission of bail evidence at trial, and an understanding that in specific circumstances an applicant for bail may be forced to provide evidence on the merits of the case in order to secure bail, will go a long way in redressing democratic ideals.

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<sup>134</sup> In view of the facts that were readily available at the time of the bail application it is very likely that this is also what happened in the instance of the highly publicised Oscar Pistorius case.