South African Law Reform Commission

DISCUSSION PAPER 177

THE RIGHT TO LEGAL REPRESENTATION

PROJECT 151: THE REVIEW OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (A SUB-PROJECT OF THE REVIEW OF THE CRIMINAL JUSTICE SYSTEM)

Closing date for comments: 02 October 2026

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REQUEST FOR COMMENTS

This discussion paper forms part of a series of discussion papers that have been developed to seek to address any perceived gaps in the Criminal Procedure Act 51 of 1977 (CPA). The investigation is intended to result in the enactment of new criminal procedure legislation that will address the extensive challenges facing the criminal justice system.

The Criminal Procedure Reform Investigation (the CPR Investigation) was borne out of the request by the then Minister of Justice and Correctional Services in 2020 that the SALRC include, in its investigation programme, the Review of the Criminal Justice System, inclusive of the review of the CPA.

This discussion paper, along with other discussion papers, forms part of the comprehensive reform of the criminal procedure law that is envisaged to culminate in the extensive reform of the current law of criminal procedure.

The views, conclusions and recommendations in this paper are not the final views of the SALRC. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting or referring to comments and attributing comments to respondents unless representations are marked “confidential”. Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act, 2000 (Act No.3 of 2000), to release information contained in representations.

Respondents are requested to submit written comments or representations on the discussion paper to the SALRC by no later than 02 October 2026. Comments can be sent by email or post. However, comments by email are preferred.

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ABBREVIATIONS AND ACRONYMS

CJA	Child Justice Act, 2008 (Act No.75 of 2008)
CJS	Criminal Justice System
CPA	Criminal Procedure Act, 1977 (Act No.51 of 1977)
CSA	Correctional Services Act, 1998 (Act No.111 of 1998)
Constitution	Constitution of the Republic of South Africa, 1996
DPP	Director of Public Prosecutions
LASA	Legal Aid South Africa
LPA	Legal Practice Act, 2014 (Act No.28 of 2014)
LPC	Legal Practice Council
NDPP	National Director of Public Prosecutions
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal

EXECUTIVE SUMMARY

A Right to legal representation for arrested, detained and accused persons

1 As a Constitutional democracy, South Africa relies on the Constitution for the protection of the rights of arrested, accused and detained persons. The point of departure in all criminal matters is the Constitution and its subordinate legislation. Section 35 of the Constitution gives every accused and detained person the right to have access to a legal representative. The right to consult a legal practitioner predates the Constitution. In *Mandela v Minister of Prisons*,[1] this right was described as a common-law right closely related to the right of access to courts. Thus, the Constitution has extended the right to legal representation at State expense to the indigent where substantial injustice would otherwise result. Sections 35(2)(c) and 35(3)(g) of the Constitution provide that everyone who is detained, including every sentenced prisoner, and every accused person, has the right to a fair trial which includes the right "to have a legal practitioner assigned to the detained and accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

2 As such, the wording of sections 35(2)(c) and 35(3)(g) presupposes that the right to legal representation at State expense is qualified. Only when substantial injustice would result should a right to a legal practitioner be made available to an accused person.

3 Given that the right to counsel has been defined in concrete terms, it may not be a sound constitutional practice to allow the right to be constrained by considerations of feasibility.[2] The first question is how broadly the right to counsel should be interpreted. According to Huber, the language of the new Constitution clearly emphasises that constitutional principles are to be supreme, with declarations such as "This Constitution

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1 1983 (1) SA 938 (A).

2 Huber supra, 439.

is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[3]

4 Second, the right to have a legal practitioner assigned to a detained and an accused person is not described in absolute terms. Legal representation is to be provided at State expense if substantial injustice would otherwise result. Accordingly, it will be up to the courts to determine where that line should be drawn.[4] Ntontela points out that the Constitution does not elaborate on the circumstances that would constitute substantial injustice, nor do the provisions of section 35 of the Constitution allude to what the word may refer to. Moreover, the Constitution does not provide information on who determines whether substantial injustice would result in any given circumstances, although section 4(1)(f) of the Legal Aid Act, 2014 provides that the Board has the power to provide legal services where substantial injustice as envisaged in the Constitution and the Act would result.[5]

5 The CPA does not provide for the right to counsel in absolute terms, nor does the Act address the question of whether or not the legal adviser referred to must be hired by the accused. Nonetheless, the Act is sufficient to establish the existence of a right of an accused to obtain legal advice and representation.[6]

6 Section 73(2A) of the CPA provides as follows:

> **Section 73(2A)**: Every accused shall-
> (a) at the time of his or her arrest;
> (b) when he or she is served with a summons in terms of section 54;
> (c) when a written notice is handed to him or her in terms of section 56;
> (d) when an indictment is served on him or her in terms of section 144 (4) (a);
> (e) at his or her first appearance in court,
> be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

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3 *Ibid*, 440.

4 Ibid, 440.

5 Ntontela (De Rebus) supra.

6 Huber *supra*, 427.

7 Section 35(1) of the Constitution does not explicitly mention the right to legal representation of arrested persons at the time of their arrest, save for the right of arrested persons to remain silent and not to make any confession or admission that could be used against them in court. Section 73(2A) of the CPA is intended to cure this gap identified in the Constitution. In addition, section 73(2A) of the CPA affords indigent persons the right to legal representation at State expense "at the time of their arrest."

8 Section 73(1) of the CPA provides as follows:

> (**1)**: An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

9 It is not clear why section 73(1) was retained in the statute book when section 73(2A) was inserted by section 2 of the Criminal Procedure Amendment Act, 1996 (Act No.86 of 1996) with effect from 28 June 2002. Save for the phrase: *whether with or without warrant, shall, subject to any law relating to the management of prisons,* it is submitted that section 73(1) and section 73(2A) of the CPA make provision for more or less the same thing, that is, the right of an arrested/ accused person to legal representation. The only difference is that the latter section provides for legal representation at State expense.

10 It is submitted that section 73(1) be repealed and section 73(2A) of the CPA be amended to read as follows:

> **Section 73(2A)**: Every accused shall, subject to any law relating to the management of prisons, -
> (a) at the time of his or her arrest, *whether with or without warra*nt;
> (b) when he or she is served with a summons in terms of section 54;
> (c) when a written notice is handed to him or her in terms of section 56;
> (d) when an indictment is served on him or her in terms of section 144 (4) (a);
> (e) at his or her first appearance in court,
> be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

11 Section 73(2) of the CPA provides as follows:

> (2): An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

12 It is submitted that section 73(2) of the CPA be repealed on the grounds that section 25 of the Legal Practice Act, 2014 deals with the right of appearance of legal practitioners and candidate legal practitioners in any court in the Republic, or before any board, tribunal or similar institution.

1 Questions for comment and input

13 Given that section 73(2A) of the CPA provides that an accused person has a right to legal representation at State expense as at the time of his or her arrest, the new CPA must give guidance on the following issues, among others:

(a) What should the content and scope of the right to legal representation at State expense be if substantial injustice would result?
(b) Who should determine the question of substantial injustice and at what stage, given that the court comes in at a later stage?
(c) Is it practical to extend the right to legal representation at State expense to an accused person at the time of the arrest? If not, would the limitation of this right be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors?
(d) Whether the language of sections 35(2)(c) and 35(3)(g) of the Constitution can be construed to mean that the right to legal representation at State expense is available only to those who cannot afford legal representation at their own expense?

B Right to legal representation for private prosecutors

14 Section 8 of the CPA acknowledges that the power to prosecute some offences may be specifically conferred upon a corporate body or an individual; where that has been done, section 8 regulates the exercise of such power. In the first place, the provision subjects the exercise of that power to the decision by a Director of Public Prosecutions (DPP). If the DPP declines to prosecute the case himself or herself, the private prosecutor cannot insist on exercising his or her statutory power. There can be no parallel prosecutions of the same offence. Therefore, this means that the general power of the DPP trumps the specific power of a private prosecutor.

15 Although section 7 of the CPA does not expressly say that the accused in a private prosecution is entitled to legal representation, it goes without saying that such accused is entitled to be so represented. The challenge arises where the accused cannot afford legal representation. It cannot be disputed that such an accused is also entitled to a fair trial equivalent to the one that applies to a prosecution by the State. At any rate, a private prosecution may culminate in a conviction and sentence, just as a prosecution by the State may do. Therefore, all the rights guaranteed by section 35(3) of the Constitution extend to an accused in a private prosecution, including the right to legal representation at State expense if substantial injustice would result.

16 However, the State is not obliged to provide legal representation for an accused in a private prosecution where it cannot be shown that a substantial injustice will ensue. Nor is it bound to pay for legal representation of a private prosecutor with no means to hire a lawyer. In this regard, the CPA creates an irregularity of means to pursue justice for the victims of crime. The question is whether such inequality withstands constitutional scrutiny.

17 Even before 1994, the exercise of the power to prosecute crimes and the performance of the functions of prosecuting those crimes was vested in the prosecuting authorities. Private prosecutions have always been regarded as an exception to the rule and were permitted only where the requirements of the enabling legislation have been met. Thus, in *Ellis v Visser*,[7] the court held:

> This provision of the Code can be traced to the Cape Ordinance 40 of 1828 and was in force in both of the Republics. It shows that contrary to the practice prevailing in England where any person apparently may institute a private prosecution, the right to prosecute in criminal matters in South Africa is jealously guarded by the Crown and is granted to private individuals only where the Crown has refused to prosecute and the special circumstances I have mentioned have been shown to exist.

18 It is common knowledge that even where the necessary requirements are met and the permission to prosecute is exercised, the State can at any stage stop the private prosecution and take over the prosecution. This is a clear acknowledgement of the

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7 1954 (2) SA 431 (T).

position that prosecuting crime is the preserve of the State. What needs to be considered is whether the exceptions to this rule are consistent with the Constitution.

19 Section 179(2) of the Constitution confers the power to prosecute and perform the related public functions on the National Prosecuting Authority consisting of a National Director of Public Prosecutions (NDPP); DPPs and prosecutors. The provision reads:

> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.

20 Accordingly, under the Constitution it is only the prosecuting authority which is given the power to conduct criminal prosecutions. In the eyes of the Constitution, no entity or functionary other than the prosecuting authority possesses the power to institute criminal proceedings. Consequently, if legislation is to give that power to a different functionary of State, that legislation, it seems, would be inconsistent with section 179(2) of the Constitution.

21 It is by now axiomatic that the principle of legality demands that public functionaries should exercise only powers and perform only functions conferred on them by law. In this regard, the issue that arises for consideration is whether Parliament may pass legislation giving the power to prosecute crime to a different entity. If done, this appears to be inconsistent with the Constitution. If the drafters of the Constitution intended this, they would have framed section 179(2) differently, to show that the same power may be given to a different functionary by means of legislation. It is clear from section 179 as a whole that the drafters were aware that there are matters relating to the exercise of the power which should be addressed in legislation.

22 If Parliament is forbidden to change what the Constitution proclaims, it seems that any legislation which purports to do so cannot be in conformity with the Constitution. But here we are dealing with the CPA, which was enacted long before the Constitution. At that time, Parliament was supreme and could pass legislation on any subject and such legislation was immune from review by the courts. Now the supremacy lies in the Constitution and the law that is inconsistent with it is invalid, regardless of whether it predates the Constitution or it was promulgated afterwards. With regard to legislation like the CPA, the invalidity occurred on the date the Constitution came into force.

23 Moreover, Chapter 1 of the CPA does not appear to be consistent with section 179(2) only. It is also at variance with the structure of the Constitution, which gives rise to the principle of separation of powers. In its structure, the Constitution draws a bright line between rights and public powers. In the main, it deals with rights in Chapter 2, which contains the Bill of Rights. The entire Chapter is devoted to conferring rights on individuals and private corporate entities. No individual is granted public power. The issue of public power is addressed elsewhere in the Constitution when addressing the issue of structures it creates. Therefore, the notion that private persons and individuals may exercise public power is inimical to the Constitution. Ordinary people may not intrude into the doctrine of government and perform public functions.

24 When all said and done, the interests of the victims of crime who wish to see justice served must be catered for, where the prosecuting authority has declined to prosecute. Private prosecution plugs the gap created by a refusal to prosecute by the authorities. However, there are other means of preventing irrational refusals to prosecute. When a prosecutor refuses to prosecute, he or she is declining to perform a constitutional function imposed on him or her by the Constitution. Therefore, it can only be acceptable if such refusal is reasonably justified.

25 A failure to perform a constitutional function must be subjected to judicial oversight. But since the majority of the people in this country are poor and cannot afford legal expenses, many such decisions may escape judicial scrutiny. This may be avoided by legislation that forces automatic review of such decisions. It may also obligate the review of such decisions by the NDPP. Then the decision of the NDPP which endorses a refusal must be subject to an automatic review by a judge in chambers. In this way oversight of a prosecutorial refusal to prosecute a matter where crime was committed, and the victim suffered harm, would be guaranteed.

1 Questions for input and comment

26 In the present circumstances, commentators and persons interested in the subject are requested to address the following questions, namely:

(a) whether Chapter 1of the CPA[8] is consistent with the Constitution, to the extent that it permits private prosecution, and if private prosecution is to be retained, whether legal representation at State expense should be extended to victims of crime and accused persons who cannot afford legal expenses? and

(b) whether the wording in section 179(2) of the Constitution to the effect that "the prosecuting authority has the power to institute criminal proceedings on behalf of the State" (emphasis) does not sanction private prosecutions by corporate bodies and private persons, and if so, whether private prosecutions by corporate bodies and private persons is thus inconsistent with the Constitution?

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[8] That is, sections 7 to 17 of the CPA.

CHAPTER 1: INTRODUCTION

A Introduction

1.1 The right to be heard would be of little value if it did not comprehend the right to be heard by counsel.[1] The South African criminal justice system (CJS), similar to some of the common law systems, has inherited the British adversarial system, which is to a large extent party-driven. Legal practitioners for both the State and defence play a pivotal role in the pursuit of procedural and substantive justice. Common law recognises, as essential, the right of a person to legal advice and legal representation and draws a logical connection between the right to legal representation and the right to a fair trial. The principle of equality before the law is derived from both the Roman-Dutch and English legal traditions. It forms part of the South African common law tradition. Section 9(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".

1.2 It is through legal representation that effective access to courts in terms of section 34 of the Constitution is provided.[2] Accordingly, access to a legal practitioner in South Africa is regarded as a corollary of the right of access to courts. The right to legal representation is a fundamental aspect of criminal justice, in the same way that the right to fair trial and equality before the law are. However, the victim is not regarded as an active participant in the various stages of the CJS.[3]

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1 Huber JL Indigent criminal defendants in South Africa 2004 425.

2 Section 34 of the Constitution of the Republic of South Africa, 1996 Provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

3 SALRC "Project 151: Review of the Criminal Procedure Act 51 of 1977, Discussion Paper 170: Protection of the Rights of Victims of Crime in the Criminal Proceedings" February 2026 viii.

B Terms of reference

1.3 In March 2020, the then Minister of Justice and Correctional Services, Mr R Lamola, MP, through a letter addressed to the Chairperson of the SALRC requested that it include in its research programme the review of the CJS. The Minister's letter was accompanied by the terms of reference (ToR) prepared by the Department of Justice and Constitutional Development (DoJ&CD) in respect of the CJS.

1.4 The ToR were subsequently amplified by a note that accompanied the Minister's second letter addressed to the SALRC dated 26 August 2021. Paragraph 2.2 of the note lists the aspects that must be encapsulated in the contemplated new legislation that replaces the CPA. The paragraph is restated hereunder;

> 2.2 Policy consideration
>
> There is a need to review the criminal justice regime in its entirety to reflect the modern, transformed, accessible, efficient and integrated criminal justice system. The envisaged legislation should encompass broad policy principles such as;
>
> (a) **human rights as entrenched in the Bill of Rights**;
> (b) access to justice, which must be ensured at all stages of reformation of the criminal justice system;
> (c) needs of society today, including Africanisation of the law, should be reflected;
> (d) the rights of victims be promoted, protected and enforced in order to create a victim-centric criminal justice system;
> (e) governance and accountability mechanism must be strengthened; and
> (f) a modernised and technologically advanced criminal justice system which includes the development of integrated performance management tools across various criminal justice line function departments and a crime management information centre.

1.5 This discussion paper is specifically concerned with the Constitutional right to legal representation and the right to legal representation at State expense as provided for under sections 35(2) and 35(3)(3) of the Constitution, as well as the Constitutionality of the provisions of sections 7-17 of the CPA with respect to private prosecution. Other aspects referred to in the ToR and the Minister's note are addressed in the various papers that were developed and published by the SALRC.

CHAPTER 2: RIGHT TO LEGAL REPRESENTATION

A Introduction

2.1 This Chapter looks, first, at the interface between the right to legal representation and the right to a fair trial as enshrined in the Bill of Rights. Second, a discussion of the right to legal representation and the right to legal representation at State expense prior to 1994, and the legal position of these rights post 1994 is provided, although the Constitution came into effect on 4 February 1997.[4] Third, a detailed analysis of section 73 of the CPA is provided together with proposed reform or update of this section. Lastly, the topic of effective legal representation by counsel is discussed.

B Interface between right to legal representation and right to fair trial

2.2 It cannot be gainsaid that a fundamental principle of our law is that an accused person is entitled to a fair trial. The importance of the right to a fair trial is beyond question. The right to a fair trial encapsulates the right of an accused to present his or her case in a legally effective manner under the adversarial CJS. Put differently, the right to a fair trial includes the right to legal representation, along with other rights stipulated under section 35 of the Constitution that address the process and procedure of the criminal trial.[5]

2.3 Several international conventions protect the right to a fair trial. These include article 6 of the European Convention for the Protection of Human Rights, which states that "[i]n the determination of his civil rights and obligations or of any criminal charge

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4 The Interim Constitution of the Republic of South Africa, 1993 came into effect on 27 April 1994.

5 The other rights include, among others, the right to remain silent, to be presumed innocent and not to testify during proceedings.

against him, everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law."

2.4 The SALRC's Discussion Paper 174: The Right to a Fair Trial - The Need to Obviate Delays,[6] focuses on the causes of unreasonable delays in the finalisation of criminal trials in South African courts. The paper looks at the effectiveness or otherwise of section 342A of the CPA (unreasonable delays in trials) and identifies one of the causes of unreasonable delays as being caused by accused persons and legal representatives.

2.5 Section 35(3) of the Constitution provides that "every accused person has the right to fair trial which includes (d) the right to have the trial begin and concluded without unreasonable delay." Prior to the enactment of the CPA, the courts applied the remedy of permanent stay of prosecution when faced with unreasonable delay in criminal trials.

2.6 According to Ngalo, the maxim 'justice delayed is justice denied' has often been used to stress the importance of speedy trials in court, and to show that long and overdue delays are by their very nature a violation of the right to a fair trial and the justice system."[7]

2.7 In the matter of *S v Zulu*,[8] the three-year-long delay in the finalisation of the case was exclusively attributed to the delay caused by the accused and his legal representatives. In this matter, there was a repeated termination of the appointed legal representative. The court held that "the conduct displayed by Mr Mamba in this matter is concerning and warrants a referral to the Legal Practice Council (LPC). The LPC ought to investigate and consider, and for this purpose this judgement will be made available to the LPC, together with a copy of the court file."[9]

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6 SALRC Discussion Paper 174; The Right to a Fair Trial- The Need to Obviate Delays May 2026.

7 Ngalo LZ "The right to a fair trial. An analysis of sections 342A and 168 of the CPA and permanent stay of prosecution" UKZN 2017 22.

8 2023 (10) SACR 343 (MM0).

9 Ibid, par 40.

2.8 The SALRC is of the view that "although section 342A is a powerful tool used to expedite the finalisation of criminal trials, the robust case management system could be a possible cure to the problem of unreasonable delays".[10]

C Right to legal representation prior to 1994

2.9 Prior to 1819, no accused person brought before a court on a criminal charge could as of right demand that he or she be represented by a lawyer. Only after the accused had been apprehended and brought before court could he or she request the court to allow him or her to be represented by a legal practitioner.[11] In South Africa, courts have for over a century recognised the right to counsel during a pre-trial procedure.

2.10 Most of the accused persons in South Africa are indigent. As a result, they must face a trial within an adversarial system without the assistance of a defence lawyer. Commentators have argued that the legal basis for publicly provided criminal defence representation has been in existence in the South African legal system in the form of basic rights and principles, such as the right to legal representation and the principle of equality before the law.[12] Full statutory recognition of the right to legal representation was provided for in the Criminal Procedure and Evidence Act, 1917 (Act No.31 of 1917). Sections 97 and 218 of the latter-mentioned statute contained references to a defendant's right to legal assistance.[13]

2.11 The principle of equality before the law in the context of criminal law was interpreted to mean that access to rights should not be dependent upon the accused's race, sex or class such that, at the very least, a person should not be denied effective

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10 SALRC Discussion Paper 174, par 3,16.

11 Bekker PM "The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa" 2004 174.

12 The preamble to the then 1983 Constitution of the Republic of South Africa stated one of the goals of the Republic is to "uphold the independence of the judiciary and the equality of all under the law".

13 Section 97 of Act 31 of 1917 provided, among others, that "(1) The legal advisers of an accused shall have access to him" while section 218 provided that "every person charged with an offense is entitled to make his defense at his trial and to have witnesses examined or cross-examined by his counsel".

access to courts because of poverty.[14] According to Huber, "the existence of this principle of equality has led to comparisons with American caselaw in which the right of an indigent accused to be provided access to a fair trial grew out of concerns about equality."[15]

1 Case law

2.12 Prior to 1994,[16] South African courts interpreted the right to legal representation as a negative right to mean that a court cannot place obstacles in the way of an accused person seeking legal representation, nor should the court remove obstacles that are not of its own creation.[17]

2.13 In *S v Blooms*,[18] the accused, who was in custody, had arranged to be legally represented on the date to which his trial had been postponed. However, the date of the trial was brought forward unexpectedly and irregularly. After failing to raise any objection thereto, the accused was convicted. In a review, the court set aside the conviction. Van Zijl had this to say at 420E-

> Every accused at any criminal trial has the right to be represented if he so desires, by a legal practitioner. In S v Wessels and Another it was held that a refusal to allow an accused at his trial to have audience through counsel and/ or attorney is such gross departure from the established rules of procedure that the accused in such circumstances has not been properly tried and this being per se a failure of justice it is not necessary for any reviewing tribunal to enquire in terms of section 104 of Act 32 of 1944, whether a reasonable trial court would inevitably have convicted if the irregularity had not taken place.

2.14 In *S v Ngula,*[19] the accused had been arraigned before a court on a charge of culpable homicide arising out of a motor accident. Her attorney had been detained because of adverse flying conditions. At 2 pm the trial proceeded, whereupon she pleaded guilty and was convicted. In review proceedings, she explained in an affidavit

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14 Huber *supra* 428.

15 *Id*.

16 The Interim Constitution of the Republic of South Africa, 1993 came into effect on 27 April 1994, whereas the final Constitution came into effect on 8 May 1996.

17 Huber *supra* 429.

18 1966 (4) SA 417 (C).

19 1974 (1) SA 801 (E).

that she was made to understand that her legal representative's inability to appear in court timeously was no ground for a postponement. Being confused, she had therefore pleaded guilty and remained silent throughout the proceedings. In a review, her conviction was set aside. Eksteen J had this to say at 804C -

> The applicant brings these proceedings in review now on the grounds that she has been deprived of a fundamental right to be represented at the trial by an attorney. That this right is today a fundamental right to every accused person, admits no doubt. It is a right which has been recognised in our courts for a very considerable period of time now.

2.15 In *S v Baloyi*,[20] the appellant was not legally represented. He did not ask for a postponement of proceedings to consider his position, nor to obtain legal representation. He had been taken into custody at midnight and charged with reckless driving in contravention of Ordinance 21 of 1966 (T). He appeared in court in less than 11 hours and was required to plead and stand trial. He was convicted and sentenced on the same day. On review, it was contended, first, that he had not been afforded an opportunity to obtain legal representation; and second, that the trial had been conducted with such haste that he had not been given sufficient time to consider the charge and prepare for his defence. The court held that there had to be at least some indication of the possibility of an irregularity but that there was nothing wrong on the record to suggest that the time was insufficient to permit of a fair trial.[21]

2.16 In *S v Khanyile and Another*,[22] two men, Messrs Khanyile and Mkwanyana, stood trial together on a charge of housebreaking with intent to steal and theft. The crime itself was proved, having been committed about seven years earlier in Empangeni, KwaZulu-Natal. Fingerprints identified as those of the accused were found in the house a couple of days after the burglary, a few months before the trial took place. The only issue at the trial was whether the duo in the dock had committed the offence they were charged with. The only evidence linking them to the offence was their fingerprints. Nothing else linked either man with the crime. The accused, like many poor South Africans who face criminal charges, had no legal practitioner to advise and represent them. Consequently, they conducted their own defences. Neither of them cross-examined the policemen who

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20 1978 (3) SA 290 (T).

21 Ibid, headnote.

22 1988 (3) SA 795 (N).

testified against them in court, nor asked any question whatsoever. If any, the questions they posed were superficial and pointless. The men maintained that throughout the year when the crime was committed, they had been nowhere near Empangeni but far away. The one man was in Durban on the day in question, the other in Johannesburg.[23]

2.17 The magistrate who tried the case, "having examined the photographs and considered the reasons furnished by the expert for the opinion he had expressed, felt confident that he might rely safely on the evidence concerning the fingerprints. He therefore accepted it with no qualms. It proved the falsity of the alibis and held beyond doubt the guilt of both me. The verdict ensued."[24]

2.18 On review, Didcott J strongly emphasised the role of counsel in criminal proceedings as follows:

> When the case first came here on review my Brother who concurs in this judgement raised with the magistrate the problem it had posed, the problem of accused persons defending themselves yet doing so ineffectually once they were laymen and the matter had its difficulties, since they then lacked the training and experience for which the task called.[25]

2 Duty to inform

2.19 In the *Khanyile*[26] matter above, Didcott J confirmed that "where the magistrate did slip was in not telling the men that they were entitled to legal representation if they could get it, and in not offering them the opportunity to obtain it if they wanted one."[27] The *Khanyile* judgement has been described as the first case to interpret the right to legal representation as a fundamental right, instead of it being a negative right.[28]

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23 *Ibid*, par 797.

24 *Idem*.

25 *Idem*.

26 *Khanyile supra* p799.

27 *Idem*.

28 Groepe FE "The evolution of the right to regal representation in South Africa's criminal courts" 2014 22.

2.20 In *S v Radebe*; *S v Mbonani*,[29] Goldstone J referred to a number of cases as examples of a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the acknowledgement that in the absence of such understanding a fair trial may not ensue. He held as follows:

> If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them.[30]

2.21 There are three aspects to the duty of presiding officers to inform accused persons of their right to legal representation. These are the following: "(a) the inherent simplicity or complexity of the case as far as both the law and the facts go; (b) the personal resources of the accused, such as how mature, sophisticated, intelligent and articulate he looks or sounds, or what impression he gives of his general ability to fend for himself in a case with those dimensions; and (c) the gravity of the case and the possible consequences of a conviction."[31]

2.22 The *Khanyile* rule was overturned four years later in the pre-Constitutional dispensation era when the Appellate Division of the Supreme Court (AD) overruled it in *S v Rudman and Another*; and *S v Mthwana*,[32] for two reasons.[33] First, Nicholas JA denied that the common law principle of a right to representation had the broad reach that Didcott J ascribed to it. He instead argued that the concept of a fair trial is fundamentally procedural. Second, Nocholas JA held that given the procedural slant of the fair trial principle, the appropriate question was whether there was an existing procedural rule which required a defendant who could not afford legal representation to have representation provided at State expense. After surveying the existing statutes and case law prior to *Khanyile*, Nicholas JA concluded that such a rule had never been recognised in South African law.

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29 1988 (1) SA 194

30 *Hlantlalala supra* par 6.

31 *Khanyile supra* p796.

32 1992 1 All SA 343 (AD).

33 Huber *supra,* 438. See also Groepe, "The evolution of the right to legal representation in South Africa's criminal courts" 22.

3 Duty to provide counsel

2.23 The *pro deo* system was a form of a legal aid system by the Appellate Division (AD) in terms of which counsel was provided to indigent defendants facing capital crimes such as murder, treason or rape.[34] The *pro deo* system was never extended to lower courts.[35] Absence of counsel in capital crimes served as grounds for overturning a conviction that resulted in a death penalty. Although the provision of legal assistance to indigent accused was regarded as generally unsatisfactory and inconsistent with the principle of equality before the law, the appointment of *pro deo* counsel in capital crimes reflected a measure of pragmatism and an appreciation of the seriousness of the charges faced by the accused.[36]

2.24 Groepe points out that the provision of legal representation to an indigent accused prior to the adoption of the Constitution was not a mandatory legal requirement.[37] However, there was a long-standing practice that *pro deo* counsel was appointed to represent the indigent accused in capital cases. It is also clear that the right to legal representation was progressively extended from *Radebe*,[38] to *Masilela*[39] and *Khanyile*, the progress being haphazard because the gains were subsequently reversed by the restrictive view adopted in the *Rudman*[40] case.

2.25 Like South Africa, the United States of America also has an adversarial CJS. The right to counsel is rooted in the United States Constitution through the Sixth and Fourteenth Amendments to the Constitution.[41] Criminal trials conducted by courts in the individual States are governed by the due process clause of the Fourteenth Amendment to the Constitution. In *Powell v Alabama*,[42] the so-called Scottsboro Boys were convicted

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34 Miller DLC "Some aspects of legal aid in criminal proceedings" 1972 *South African Law Journal* 71.

35 Huber *supra* p437.

36 Groepe FE "The evolution of the right to legal representation in South Africa's criminal courts" University of South Africa 2012 14.

37 Groepe supra, 25.

38 *S v Radebe*, *S v Mbonani* 1988 1 SA 191 (T).

39 *S v Masilela* 1990 (2) SACR 116 (T).

40 1992 1 All SA 343 (AD).

41 *Khanyile supra* p802.

42 1932 287 U.S. 45.

of rape and condemned to death. They had no lawyer, and neither were they given the opportunity to find one. The boys were illiterate, ignorant and indigent. On review, this was considered a denial of the right to counsel by the Supreme Court. Consequently, the verdict was quashed. Sutherland J discussed the elements of the right to fair trial and held as follows:

> What then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

2.26 In *Betts v Brady*,[43] the U.S. Supreme Court held that "a review of state constitutional and statutory provisions on the subject in connection with the common law demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel for indigent defendants in criminal cases is not a fundamental right, essential to a fair trial, and that the matter has generally been deemed one of legislative policy. In the light of this evidence, it cannot be said that the concept of due process incorporated in the Fourteenth Amendment obliges the State, whatever may be their own views, to furnish counsel in every such case."

2.27 In a unanimous decision in the leading case of *Gideon v Wainright*,[44] the U.S. Supreme Court established that the Fourteenth Amendment creates a right for criminal defendants who cannot pay for their own legal practitioners to have the State appoint attorneys on their behalf.

D Right to legal representation in terms of Act 51 of 1977

2.28 Huber points out that the CPA does not provide for the right to counsel in absolute terms, nor does the Act address the question of whether or not the legal adviser referred

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43 1942 316 U.S. 471.

44 1963 372 U.S. 355.

to must be hired by the accused. Nonetheless, the Act is sufficient to establish the existence of a right of an accused to obtain legal advice and representation.[45]

2.29 Section 73 of the CPA is couched as follows:

> **73 Accused entitled to assistance after arrest and at criminal proceedings**
>
> (1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.
>
> (2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.
>
> (2A) Every accused shall-
> (a) at the time of his or her arrest;
> (b) when he or she is served with a summons in terms of section 54;
> (c) when a written notice is handed to him or her in terms of section 56;
> (d) when an indictment is served on him or her in terms of section 144 (4) (a);
> (e) at his or her first appearance in court,
> be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.
>
> (2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.
>
> (2C) If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid South Africa Act, 2014, order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.
>
> (3) In addition to the provisions of sections 3 (g), 38 (2), 44 (1) (b) and 65 of the Child Justice Act, 2008 (Act 75 of 2008), relating to the assistance of an accused who is under the age of eighteen years by his or her parent, an appropriate

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45 Huber *supra*, 427.

person or a guardian at criminal proceedings, any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.

Analysis of section 73 of the CPA

2.30 **Section 73(1)**: *An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest*.

2.31 It must be borne in mind that section 35 of the Constitution makes provision for the right to a fair trial to at least three categories of persons, namely: arrested, detained and accused persons. Section 73(1) of the CPA states that, "subject to any law relating to the management of prisons," an arrested person shall be entitled to legal representation as from the time of his or her arrest. One such law relating to the management of prisons is the Correctional Services Act, 1998 (Act No.111 of 1998) (CSA).

2.32 Sections 17 of the CSA provides as follows:

17 Access to legal advice

(1) Every inmate is entitled to consult on any legal matter with a legal practitioner of his or her choice at his or her own expense.
(2) The Minister may, by regulation, impose restrictions on the manner in which such consultations are conducted if such restrictions are necessary for the safe custody of inmates, but legal confidentiality must be respect.
(3) The Head of the Correctional Centre must take reasonable steps to enable inmates to exercise the substantive rights referred to in section 6(3).
(4) Remand detainees must be provided with the opportunities and facilities to prepare their defence.

2.33 Sections 6(3) of the CSA provides as follows:

> **6 Admission**
> (3) On admission an inmate must be informed promptly of his or her right to-
> (a) choose and consult with a legal practitioner; or
> (b) have a legal practitioner assigned by the State, at state expense, if substantial injustice would otherwise result.

2.34 It is commendable that section 73(1) of the CPA extends the right to legal representation to arrested persons from the first moment that the person is arrested. However, there is no mention either in the CPA, CSA, or section 35(1) of the Constitution that an arrested person be entitled to legal representation at State expense from the moment that a person is arrested. It could, therefore, be concluded that indigent persons may not claim the right to legal representation at State expense at the time of their arrest because they have “the right to remain silent’ and “not to be compelled to make any confession or admission that could be used in evidence against” them prior to being charged with any offence.

2.35 **Section 73(2)**: *An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not, in terms of any law, prohibited from appearing at the proceedings in question*.

2.36 It is submitted that section 73(2) of the CPA be repealed on the grounds that section 25 of the Legal Practice Act, 2014 deals with the right of appearance of legal practitioners and candidate legal practitioners in any court in the Republic, or before any board, tribunal or similar institution.

2.37 **Section 73(2A)**: *Every accused shall-*

> (a) at the time of his or her arrest;
> (b) when he or she is served with a summons in terms of section 54;
> (c) when a written notice is handed to him or her in terms of section 56;
> (d) when an indictment is served on him or her in terms of section 144 (4) (a);
> (e) at his or her first appearance in court,
>
> be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

2.38 As stated above, section 35(1) of the Constitution does not explicitly mention the right to legal representation to arrested persons at the time of their arrest, save for the right of arrested persons to remain silent and not to make any confession or admission that could be used against them in court. Section 73(2A) of the CPA is intended to cure this gap identified in the Constitution. In addition, section 73(2A) of the CPA affords indigent persons the right to legal representation at State expense "at the time of their arrest."

2.39 It is not clear why section 73(1) was retained in the statute book when section 73(2A) was inserted by section 2 of the Criminal Procedure Amendment Act, 1996 (Act No.86 of 1996) with effect from 28 June 2002. Save for the phrase: *whether with or without warrant, shall, subject to any law relating to the management of prisons,* it is submitted that section 73(1) and section 73(2A) of the CPA make provision for more or less the same thing, that is, the right of an arrested/ accused person to legal representation. The only difference is that the latter section provides for legal representation at State expense.

2.40 It is submitted that section 73(1) be repealed and section 73(2A) of the CPA be amended to read as follows:

2.41 **Section 73(2A)**: Every accused shall, subject to any law relating to the management of prisons, -

(a) at the time of his or her arrest, *whether with or without warra*nt;
(b) when he or she is served with a summons in terms of section 54;
(c) when a written notice is handed to him or her in terms of section 56;
(d) when an indictment is served on him or her in terms of section 144 (4) (a);
(e) at his or her first appearance in court,

be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.

2.42 **Section 73(2B)**: *Every accused shall be given a reasonable opportunity to obtain legal assistance*.

2.43 In order to ensure the right to a fair trial, it is vital that accused persons be afforded a reasonable opportunity to obtain legal assistance. On these grounds, it is submitted that section 73(2B) be retained in the statute book.

2.44 **Section 73(2C)**: *If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may*, in addition to any order which it may make in terms of section 342A*, order that the trial proceed without legal representation unless the court is of the opinion that would result in substantial injustice, in which event the court may, subject to the Legal Aid South Africa Act, 2014, order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.*

2.45 The purpose of section 73(2C) of the CPA is to obviate unreasonable delays in the finalisation of criminal trials caused by, in *casu*, accused persons and/ or their legal representatives. As mentioned above, Discussion Paper 174 looks at the effectiveness or otherwise of section 342A of the CPA (unreasonable delays in trials) and identifies as one of the causes of unreasonable delays, the delays caused by accused persons and/ or their legal representatives.

2.46 To obviate the delays, sections 73(2C) and 342A of the CPA should be read together. For section 73(2C) explicitly provides that the order a court can make in terms of this section, such order is *in addition to any order which it may make in terms of section 342A*. Moreover, section 73(2C) provides that in the event of unreasonable delays, a court may *order that the trial proceed without legal representation unless the court is of the opinion that would result in substantial injustice, in which event the court may, subject to the Legal Aid South Africa Act, 2014, order that a legal adviser be assigned to the accused at the expense of the State.*

2.47 Thus, section 73(2C) provides that the court must determine if substantial injustice would result in any given case, and subject to confirmation by the Legal Aid Act, 2014, order that a legal practitioner be assigned to the accused at State expense. Section 342A already makes provision for the State to defray wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State, and vice versa. Accordingly, sections 73(2C) and 342A of the CPA are complementary and may be read together by the court to obviate unreasonable delays in the finalisation of criminal trials.

2.48 **Section 73(3)**: *In addition to the provisions of sections 3 (g),[46] 38(2),[47] 44 (1) (b)[48] and 65[49] of the Child Justice Act, 2008 (Act 75 of 2008), relating to the assistance of an accused who is under the age of eighteen years by his or her parent, an appropriate person or a guardian at criminal proceedings, any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings*.

2.49 It is submitted that the above provision be retained in the CPA.

E Right to legal representation at State expense (post 1994)

2.50 As a Constitutional democracy, South Africa relies on the Constitution for the protection of the rights of arrested, accused and detained persons. The point of departure in all criminal matters is the Constitution and its subordinate legislation. Section 35 of the Constitution gives every accused and detained person the right to have access to a legal representative.

2.51 The right to consult a legal practitioner predates the Constitution. In *Mandela v Minister of Prisons*,[50] this right was described as a common-law right closely related to the right of access to courts. Thus, the Constitution has extended the right to legal representation at State expense to the indigent where substantial injustice would

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46 Section 3(g) of the Child Justice Act, 2008 provides that "parents, appropriate persons and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them."

47 Section 38(2)(a) of the Child Justice Act provides that "a child's parent or an appropriate person or a guardian must attend the assessment of the child, unless he or she has been

(a) exempted by the probation officer from attending.;"

48 Section 44(1)(b) of the Child Justice Act provides that "The following persons must, in addition to the inquiry magistrate and prosecutor, attend the preliminary inquiry, subject to subsections (2) and (3):

(b) the child's parent, an appropriate person or a guardian;"

49 Section 65 of the Child Justice Act provides that a child must be assisted by a parent, an appropriate person or a guardian in proceedings in a child justice court.

50 1983 (1) SA 938 (A).

otherwise result. Ntontela states that section 35(2)(b)[51] of the Constitution has over the years become less problematic because it has become standard procedure for many law enforcement officers to inform a suspect of the right to choose and consult a legal practitioner.[52]

2.52 The right to be informed of the right to legal representation may be exercised by an accused person at any stage during their detention, whether before, during or after the trial. An arrested person must be informed of the right to legal representation promptly in a way he or she will understand the right and the importance thereof.[53]

1 Duty to inform

2.53 *In Hlantlalala and Others v Dyantyi NO and Another*,[54] the legal question for determination before court was whether an irregularity occurred in the appellant's criminal trial by reason of an alleged failure by the magistrate to inform and explain to the accused their legal rights and, if so, what effect such irregularity had on the outcome of the trial.

2.54 Mpati AJA was of the view that this matter will be disposed of on common law grounds and held that "a clear distinction should be drawn between the right of an accused to be informed of his entitlement to legal representation, more particularly the right to apply to the Legal Aid Board for assistance, and to be afforded an opportunity to seek such representation, and the right to obtain legal assistance at State expense. The common law acknowledges the former and the Constitution the latter."[55]

2.55 The court confirmed that "what has been violated in the present case is the first-mentioned right," that is, the right of an accused to be informed of his or her entitlement

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51 Section 32(b) of the Constitution provides that a every detained has a right to choose, and to consult, a legal practitioner, and to be informed of this right promptly.

52 Ntontela M "The right to legal representation at the State's expense at the pre-trial stage for arrested and detained persons' De Rebus September 2025.

53 Groepe *supra*, 26

54 1999 (2) SACR 541 (SCA).

55 *Ibid*, par 6.

to legal representation, more particularly the right to apply to the Legal Aid Board for assistance and to be afforded an opportunity to seek such representation.

2 Duty to provide counsel

2.56 The Supreme Court of Appeal (SCA) in the *Hlantlalala* matter above confirmed that the right to obtain legal assistance at State expense received statutory recognition through the amendment to section 3 of the Legal Aid Act 22 of 1969.[56]

2.57 This section provides as follows:

> **Objects of Legal Aid South Africa**
> (5) The objects of Legal Aid South Africa are to-
> (a) Render or make available legal aid and legal advice;
> (b) Provide legal representation to persons at state expense.

2.58 Sections 35(2)(c) and 35(3)(g) of the Constitution provide that everyone who is detained, including every sentenced prisoner, and every accused person, has the right to a fair trial which includes the right "to have a legal practitioner assigned to the detained and accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

2.59 As such, the wording of sections 35(3)(c) and 35(3)(g) presupposes that the right to legal representation at State expense is qualified. Only when substantial injustice would result should a right to a legal practitioner be made available to a detainee.

2.60 Given that the right to counsel has been defined in concrete terms, it may not be a sound constitutional practice to allow the right to be constrained by considerations of feasibility.[57] The first question is how broadly the right to counsel should be interpreted. According to Huber, the language of the new Constitution clearly emphasises that constitutional principles are to be supreme, with declarations such as "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[58]

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56 *Idem*.

57 Huber *supra*, 439.

58 *Ibid*, 440.

2.61 Second, the right to have a legal practitioner assigned to a detained and an accused person is not described in absolute terms. Legal representation is to be provided at State expense if substantial injustice would otherwise result. Accordingly, it will be up to the courts to determine where that line should be drawn.[59] Ntontela points out that the Constitution does not elaborate on the circumstances that would constitute substantial injustice, nor do the provisions of section 35 allude to what the word may refer to. Moreover, the Constitution does not provide information on who determines whether substantial injustice would result in any given circumstances, although section 4(1)(f) of the Legal Aid Act, 2014 provides that the Board has the power to provide legal services where substantial injustice as envisaged in the Constitution and the Act would result.[60]

2.62 Given that there is no established practice guiding on who must determine the factors to be considered when deciding as to whether substantial injustice would result in any given case, the following factors and circumstances may be considered:[61]

(a) Nature of the offence: The CPA acknowledges the disparity in the various offenses where several schedules regulate the differentiation between alleged offences in the various stages of the criminal trial. Since a serious offence may call for a severe punishment during sentencing, a legal practitioner may need to be assigned to a person at the pre-trial stage to advise the accused appropriately.

(b) Informal admissions: Legal representation may be needed where the accused person has to make informal admissions in the various pre-trial stages. Similarly, where an accused person is to make a pointing out or confession in terms of section 218 of the CPA,[62] such an accused should not only be informed of the right to legal representation at State expense, but law enforcement officers should ensure the legal representative's availability.

(c) Ascertainment of bodily features of persons: Section 37[63] of the CPA permits police officials to take body prints of any arrested person or any person released on bail, among others, to present such person at an identification parade for

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59 *Idem*.

60 Ntontela (De Rebus) supra.

61 *Idem*.

62 Section 218 of the CPA deals with admissibility of facts discovered by means of inadmissible confession.

63 Section 37 of the CPA deals with powers in respect of body-prints and bodily appearance of accused and convicted persons.

purposes of an investigation. A legal practitioner may be made available to an arrested or detained person at State expense to ensure that the processes mentioned in Chapter 3 of the CPA are adequately explained to such a person. However, the right to legal representation does not extend to every pre-trial investigation stage. For instance, a detainee does not have the right to legal representation when a photo parade is concluded.

2.63 The rights detailed in sections 35(2)(c) and 35(3)(g) of the Constitution can be realised through Legal Aid South Africa (LASA)'s network of legal practitioners. LASA is established under the Legal Aid South Africa Act, 2014 (Act No.39 of 2014). Section 4 of the Act provides for the establishment of a Legal Aid Board (Board) that would regulate the organisation's functions. LASA receives funding from the government and is allocated a budget annually.

2.64 The court in *Ehrlich v CEO Legal Aid Board and Another*[64] acknowledged that the demand for legal aid services is disproportionate to the budget received by the organisation from government, which limits the availability of legal aid services to qualifying detainees. However, LASA's limited resources do not excuse the organisation from fulfilling its constitutional obligations. An aggrieved party that is not satisfied with LASA's decision can approach court for review of the said decision.[65]

2.65 Equal access to justice is a cornerstone of democratic societies, and LASA embodies this principle in practice. The criminal justice system is not merely a mechanism for enforcing laws; it stands as a reflection of society's commitment to fairness, equality, and the protection of human dignity.

2.66 In South Africa, LASA has become a vital institution, ensuring that justice is not reserved for the privileged few but remains accessible to all, regardless of socio-economic status. LASA's constitutional mandate is rooted in Sections 35(2) and 35(3) of the Constitution, which guarantee detained and accused persons the right to state-funded legal representation where substantial injustice would otherwise result. The institution's impact is far-reaching by providing competent legal representation; LASA

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64 [2005] JOL 15757 (E), par 2.

65 Ntontela *supra*.

strengthens fair trial rights, reduces systemic inequality, and contributes significantly to public trust in the rule of law.

2.67 The objectives of LASA are to provide legal aid and advice, ensure legal representation at state expense, and provide education and awareness concerning legal rights and obligations, as envisaged in the Constitution and the Legal Aid South Africa Act. Additionally, it advances public legal education and awareness through its Outreach Programme, where paralegals travel to venues closer to where communities reside in order to deliver legal advice services. These services place particular emphasis on vulnerable groups, including the elderly, women, children, and persons with disabilities, by informing them of their constitutional rights and obligations and empowering them to exercise those rights effectively.

2.68 With 64 Local Offices and 65 Satellite Offices, LASA maintains an extensive national footprint. These offices are strategically located near courts and transport hubs to maximise accessibility. In regions with wide coverage areas, Satellite Offices extend services closer to communities, ensuring that no area is left underserved. Local Offices generally comprise both criminal and civil sections, and where situated at High Courts, they include a dedicated High Court Unit to meet specialised demands.

2.69 LASA also implements a Judicare system, which provides clients with access to accredited private practitioners whose fees are covered by LASA according to prescribed tariffs. Instructions are allocated automatically through the internal case management system. In addition, the Legal Aid Manual authorises LASA to enter into Co-operation Agreements with University Law Clinics and NGOs to expand the provision of legal services and strengthen access to justice. General legal advice services are further made available at all LASA Local and Satellite Offices through paralegals, who play a crucial role in supporting communities and ensuring that vulnerable groups are informed of their constitutional rights and obligations.

2.70 Despite these achievements, several challenges persist**.** These include limited financial resources, systemic inequalities rooted in South Africa’s historical injustices, insufficient public awareness of legal rights, significant court backlogs that delay timely justice, and high demand for services that strain capacity. Additional obstacles such as systemic inefficiencies within the broader justice system, understaffing, and socio-economic disparities, particularly in rural and marginalised communities, further

hinder LASA's ability to meet the growing legal needs of the population. Addressing these challenges is essential to strengthening a truly people-centred justice system.

3 Case law

2.71 In the years since 1994, the courts have placed emphasis on the right to legal representation at state expense. It will be seen from the cases discussed below that South African courts are applying the dicta of the foreign courts. More often than not, South African courts expect not just the provision of legal representation at State expense, but of competent legal representation.

2.72 The *S v Makwanyane and Another*[66] case dealt with the abolition of the death sentence. In passing, Chaskalson P referred to the poor standard of legal representation provided by *pro deo* legal representatives and received by those tried for capital crimes. He stated as follows: -

> [49] Most accused facing a possible death sentence are unable to afford legal assistance and are defended under the pro deo system. The defending counsel is more often than not young and inexperienced, frequently of a different race to his or her client, and, if this is the case, usually has to consult through an interpreter. Pro deo counsel is paid only a nominal fee for the defence and generally lack the financial resources and the infrastructural support to undertake the necessary investigations and research, to employ expert witnesses to give advice, including advice on matters relevant to sentence, to assemble witnesses, to bargain with the prosecution, and generally to conduct an effective defence. Accused persons who have the money to do so, are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research, and as a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services.[67]

2.73 Much has changed since 1995. The *pro deo* system has been abolished and, in its place, Legal Aid SA has provided legal assistance in such cases. A summary of the most important cases highlighting the accused person's right to legal representation at State expense and the consequences / effect of the failure to inform the accused of such right is discussed in the ensuing paragraphs.

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66 1995 (2) SACR 1 (CC).

67 *Ibid*, par 49.

2.74 In the matter of *S v Mhlungu and Others,*[68] Mahomed J noted at page 288 as follows:[69]

> What are the rights set out in section 25(3) to 'legal representation at State expense if substantial injustice would otherwise result? Is it procedural or substantive? If it involves both substantive and procedural element, what is the dominant element? Is that the test to be applied in classifying the right? If it is and the dominant element is procedural, how does it help the argument that section 241(8) was never intended to take away fundamental rights in pending proceedings? Is the right to 'legal representation at State expense if substantial injustice would otherwise result' any the less fundamental for being procedural?

2.75 In *Legal Aid Board v Msila*,[70] Kroon J (with Erasmus and Nepgen J concurring) observed with regard to the right to legal representation at State expense as follows:

> The questions which arise when what is in issue is whether an accused person is entitled to legal representation at State expense as envisaged in section 25(3)(e) are the following: Is the accused person in a position to pay for his legal representation, in which event he or she would or could appoint his or her own legal practitioner? If not, will substantial injustice otherwise result if he or she is not afforded legal representation at State expense? This latter question would involve, perhaps not exhaustively, the nature of the proceedings in question in all their ramifications, the potential consequences to the accused person and his or her ability to represent himself or herself. An affirmative answer to both the above questions would, in terms of section 25(3)(e), entitle the applicant as of right to legal representation at State expense.

2.76 In *S v Pitso,*[71] the court per Kruger J (with Cillié concurring) noted with reference to Legal Aid *Board v Msila and Others* as follows:[72]

> The questions which arise when what is in issue is whether an accused person is entitled to legal representation at State expense as envisaged in s 25(3)(e) are the following: Is the accused person in a position to pay for his legal representation, in which event he or she would or could appoint his or her own legal practitioner? If not, will substantial injustice otherwise result if he or she is not afforded legal representation at State expense? This latter question would involve, perhaps not exhaustively, the nature of the proceedings in question in all their ramifications, the potential consequences to the accused person and his or

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68 1995 (2) SACR 277 (CC).

69 *Ibid*, p 288.

70 1997 JDR 0035 (E) p 25.

71 2002 (2) SACR 586 (O).

72 *Ibid*, p 594.

> her ability to represent himself or herself. An affirmative answer to both the above questions would, in terms of s 25(3)(e), entitle the applicant as of right to legal representation at State expense. The first question posed above requires little discussion. It is not to be resolved with reference to any means test prescribed by the third respondent. Whatever the validity of such a means test is when legal aid for other purposes is involved, it does not and cannot have application when the right to legal representation envisaged in s 25(3)(e) is at issue. In that regard the question is no more and no less than the simple one whether the accused person is financially in a position to pay for his or her own legal representation.

2.77 In *S v Gasa and Others,*[73] the court per Howard JP ruled that the evidence of the pointing-out by accused No 1, and the statement made by accused No 2, to Superintendent Havenga was inadmissible due to the fact that accused No 1 was not fully informed of his right to be provided with the services of a legal practitioner at State expense.

2.78 In *S v Soci*,[74] the court held that the failure to advise an unsophisticated accused that he could have an attorney appointed at State expense present during a pointing-out resulted in the evidence of pointing-out to be ruled inadmissible in terms of section 35(5) of the Constitution.

2.79 In *S v Mbambo*,[75] the court reiterated that the accused should be advised of the right to legal representation at State expense at the commencement of the trial, particularly in matters where a conviction will attract the imposition of the mandatory sentence.[76] Failure to do so will result in proceedings not in accordance with justice.

2.80 In *S v Mkhabela*,[77] the accused was charged with theft of copper cables in the Magistrate's Court, Middelburg. He pleaded guilty and was sentenced to imprisonment for 12 months. On automatic review, the court was not satisfied that the proceedings were in accordance with justice since it was not clear from the record if the accused was informed of the possibility of legal representation at the State's expense. The magistrate's response to queries in this regard is as follows:

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73 1998 (1) SACR 446 (D).

74 1998 (2) SACR 275 (E).

75 1999 (2) SACR 421 (W).

76 Sentencing in terms of sections 51 – 53 of the Criminal Law Amendment Act 105 of 1997.

77 2003 JDR 0711 (T).

[3] In his response the magistrate maintains that the accused's rights to legal representation were explained to him during his first appearance on 19 March 2003 and that he elected to conduct his own defence. Concerning the sentence imposed the magistrate's view is that the prevalence and seriousness of the offence justified a term of direct imprisonment. I then sought the opinion of the office of the Director of Public Prosecutions (DPP). A senior advocate and a Deputy Director of Public Prosecutions from the DPP are unanimous in their opinion that it is not clear from the record if the accused was informed of the possibility of representation at state's expense. However, they are both of the view that, as the accused intended to plead guilty, the magistrate's failure to inform him of his right to legal representation at state's expense, did not cause him any prejudice. Consequently, they are of the view that the conviction of the accused should stand as the failure by the magistrate to advise him of his right to legal representation at state's expense caused him no prejudice. For reasons, which follow hereunder, I find this opinion, with respect, to be misconceived and seriously fallacious.

[4] The record from the magistrate's court reflects that only the following short exchange was recorded concerning the explanation of the accused's right to legal representation "Regte: self praat." Even with the most benevolent approach to this patently cryptic recording, I still do not understand what was intended to be conveyed. It is not clear to me exactly which rights were explained to the accused, how they were explained to him and if indeed he understood what was allegedly explained to him. As the record clearly shows the trial commenced five (5) months later i.e. on 18 August 2003 before a different magistrate. No attempts were made by the magistrate to enquire from the accused whether his rights to legal representation had been properly and fully explained to him and if so, whether he still elected to conduct his own defence. The office of the Director of Public Prosecutions concedes, correctly in my view that the magistrate should have made further and proper enquires concerning legal representation before the accused pleaded to obviate any confusion or uncertainty. Clearly the magistrate erred in failing to ensure that the accused understood his rights to legal representation to an extent where he could make an informed decision.

[5] The right to legal representation is a fundamental right, entrenched in section 35(3)(f) and (g) of the Constitution of the Republic of South Africa Act 108 of 1996. Needless to say that the right to legal representation is of cardinal importance to every accused. Amongst others, it is one the most important machineries available to every accused to ensure that he receives a fair trial. The important and crucial role to be played by a legal representative in safeguarding the interests of an accused is well-known. This was lucidly and eloquently described as follows by Justice Sutherland over 50 years ago in Powell v Alabana 287b U 545(1932) at 68 – 9:

"Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with a crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar

with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence:

"How much more is this the case with the unlettered and unsophisticated person who so often appears in out courts?"

[6] There is no evidence on record regarding the level of the accused's academic standards. What is clear Is that he stayed in a so-called shack and worked as a cleaner at Duduka Mine where he earned a paltry R 36-00 per day. I can, with safety deduce herefrom that the accused came from the lower socio-economic class of our society possibly with very little or no education at all. He is clearly unlettered and unsophisticated. He is, in my view, the kind of vulnerable person who needs the full protection of section 35(3)(f) and (g) of the Constitution. The fact that the accused pleaded guilty, in casu, does not solve the problem. It may well be that he pleaded guilty out of ignorance, intimidation or duress. One will never know what could have happened if the accused had had the benefit, which the constitution guarantees him, of legal representation. This remains an area of speculation and uncertainty. What is clear to me is that the accused was, contrary to the clear letter of section 35(3)(f) and (g) denied his constitutional right to legal representation. In my view, it cannot be said that the accused enjoyed a fair trial. See S v Shabangu 1976 (3) SA 555 (A) at 558 F as well as S v Moos 1998 (1) SACR 372 (CPD) at 382 j- 383 a-e. His conviction and sentence can, therefore, not be allowed to stand.

2.81 Bosielo J (with Webster J concurring) set aside the conviction and sentence.

2.82 In 1996, the SALRC was requested to investigate sexual offences by and against children and to make recommendations to the Minister of Justice and Constitutional Development. The investigation into sexual offences probed the question whether a victim of sexual offence should be entitled to legal representation of the victim at State expense. Put differently, the question is whether allowing the victim to participate in the trial as an ancillary prosecutor is the appropriate way to solve the problem inherent in a sexual offence criminal trial conducted within an adversarial CJS.[78] This question is informed by the fact that the right and capacity to participate in a criminal trial may be undermined by the exorbitant costs of legal fees for the majority of South Africans. The

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78 SALRC “Project 107: Sexual Offences: Process and Procedure” 2002 27.

investigation noted that with regard to the prosecution of sexual offences, the interests of the complainants are different from those of the State.

2.83 In light of the fact that the State funded legal aid system does not have sufficient funds and other resources to ensure that every accused person has legal representation, let alone the vulnerable victims, the SALRC did not deem it appropriate to recommend legal representation for victims of sexual offences.[79]

F Provision of effective legal advice by counsel

2.84 Section 3(c) of the LPA provides that the LPC is established as a single unified statutory body to regulate the affairs of all legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession. Chapter 4 of the LPA deals with professional conduct and the establishment of disciplinary bodies. Section 44 of the LPA expressly provides that the provisions of the Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of legal practitioners, including candidate legal practitioners and juristic entities. Accordingly, there is nothing in the LPA that prevents a judicial officer from referring the conduct of a legal practitioner to the LPC for investigation of misconduct through its disciplinary bodies. Thus, section 44 of the LPA bolsters the existing powers of judicial officers to regulate court processes, including the awarding of punitive costs orders against legal practitioners whose conduct serves to bring the legal profession into disrepute and undermine the administration of criminal justice. [80]

2.85 In terms of the Code of Conduct for legal practitioners, all legal practitioners, including candidate legal practitioners and juristic entities, are required to treat the interests of their clients as paramount, provided that their conduct shall always be subject to their duty to the court; the interests of justice; observance of the law; and the maintenance of ethical standards prescribed by the Code of Conduct; and any ethical

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79 SALRC “Report on Sexual Offences” 2002 243.

80 Helen Suzman Foundation “Comments: Discussion Paper 174: The Right to a Fair Trial- The Need to Obviate Delays” May 2026 7.

standards generally recognized by the legal profession.[81] The LPC enforces a strict Code of Conduct that defines the execution of competent representation.[82] The Code of Conduct provides as follows:

> **Part II Code of Conduct: general provisions**
> 2. The provisions of Part II of the code shall apply to, and be observed by, all legal practitioners, candidate legal practitioners and juristic entities including, where the context requires, legal practitioners who are not in private practice, but are not exhaustive.
>
> 3. Legal practitioners, candidate legal practitioners and juristic entities shall –
> 3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;
>
> 26.3 Counsel shall, unless reasonably believe they are not professionally competent to do so, accept the offers of brief to defend persons charged with criminal offences and shall resist any conduct designed to inhibit or discourage the acceptance of such a brief on any grounds, especially any disregard in which such accused person or the cause with which such accused person is associated, may be held by anyone.
>
> 26.4 Counsel may decline offers of brief in matters in which they believe they are not competent to render professional services at the appropriate standard reasonably expected of a counsel in such matters or to discharge their duty of diligence and when deciding such offers counsel shall disclose those reasons to the instructing attorneys.

2.86 Section 40(3) of the LPA provides that if found guilty of misconduct, the disciplinary committee concerned may call witnesses to give evidence in aggravation of sentence and may impose upon him or her a fine, payable to the LPC, or temporarily suspend him or her from practising or from engaging in any particular aspect of the practice of law.

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81 Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities in Notice No.168 of 2019 published in Government Gazette 42337 of 29 March 2019.

82 *Ibid*.

1 Case law

2.87 Post 1994, the concept of effective legal representation was considered in *S v Halgryn,*[83] The court held as follows:[84]

> [14] The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Compare S v Majola 1982 (1) SA 125 (A) at 133D - E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare S v Louw 1990 (3) SA 116 (A) at 125D - E. The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (cf R v Matonsi 1958 (2) SA 450 (A) at 456C as explained by S v Louw (supra)). The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited.

2.88 In *S v Charles,*[85] the legal representative failed to consult with the accused. It was held that it was trite that upon appointment a legal representative has an obligation to conduct a case in the best interests of the client, whilst ensuring that the inherent duty towards justice is maintained.

2.89 In order to be able to conduct the trial in such a manner, the legal representative has to acquaint himself or herself with the charges, facts with which the accused is confronted and, more importantly, the version of the accused. The idea of being represented (apart from the constitutional recognition of its necessity) has developed over centuries and the public (especially accused persons) expect to be properly represented and their cases properly conducted.

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83 2002 (2) SACR 211 SCA.

84 *Ibid*, par 14.

85 2002 2 SACR 492 E. As in *Halgryn*, the judgment was delivered on the same day.

2.90 In this case, the legal representative representing the accused had failed to consult with him prior to the trial and at best relied on notes in his file and his memory of information that he had obtained from the accused when he had consulted with him prior to the bail application, some time prior to the trial. This was unacceptable by any standards of legal practice. It adversely affected the accused's right to a fair trial. In particular, it emerged that during the cross examination of the accused by the prosecutor that whereas that legal representative had put a version to the State witnesses which placed the accused on the scene, this was not the accused's version. He had an *alibi* and had instructed his legal representative accordingly. The conviction and sentence were set aside.

2.91 In *Beyers v Director of Public Prosecutions, Western Cape and others*[86] the accused was charged with driving under the influence of liquor, to which he pleaded guilty. The legal representative had failed to consult with and properly represent the client. The legal representative was standing in for another legal representative who had previously consulted with the accused and who was unavailable. No evidence was led in mitigation and the accused had previous convictions. He was sentenced to imprisonment.

2.92 It was held that an attorney has to consult and properly represent the client. The idea of being represented by a legal adviser cannot simply mean having somebody next to one to speak on one's behalf. It entails that the legal adviser must act in the client's best interests and say everything that needs to be said in the client's favour and call such evidence as is justified by the circumstances in order to put the best case possible before the court in the client's defence. The conviction and sentence were set aside.

2.93 *S v Ntuli*[87] was another case concerning inadequate heads of argument on appeal. It was held that unless counsel properly represents the client, the client's right to a fair trial (or fair appeal) may be negated. At a minimum counsel must prepare a proper argument on behalf of the client. Heads of argument should articulate the best argument available to the appellant, engage fairly with the evidence and deal with the case law. Where inadequate heads of argument are filed, the court has a variety of remedial measures which it may adopt either on their own or in combination with each other.

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86 2003 (1) SACR 164 C.

87 2003 (1) SACR 613 W.

These include the postponement of the hearing until proper heads of argument are filed, an order that the practitioner concerned may not charge any fees and the matter being referred to the relevant professional body for the institution of disciplinary proceedings.

2.94 In *S v Chabedi,*[88] the legal representative failed to apply for the recall of State witnesses in circumstances where this was necessary, despite the court offering him an opportunity to do so if he so wished and omitted to conduct the defence of the accused adequately. The accused testified that his legal representative had not consulted adequately with him and had asked merely what his "attitude" to the charges was or whether he knew anything about them. Before the accused could reply, they were called to court for the commencement of the trial and the consultation was never taken any further.

2.95 When it emerged during the course of the evidence that the injuries sustained by the complainant in a rape case could not possibly have been suffered by the complainant in the way in which both she and the district surgeon described, the magistrate gave the legal representative the option of applying to recall those witnesses and adjourned in order to allow the legal representative to take instructions in this regard. The legal representative then informed the court after adjournment that he was not going to apply to recall the witnesses. In the circumstances, it was held that the accused had not been properly defended. In the present Constitutional era it is one of the functions of a court of appeal hearing a criminal appeal to enquire into the fairness of a trial and ensure that the accused's right to a fair trial is fulfilled, particularly where, as in the present case, an irregularity appears *ex facie* the record. Whether incompetent legal representation could *per se* lead to the setting aside of a conviction would depend on all the facts of the case. It would appear that they must be sufficient to amount to a material irregularity. The conviction and sentence were set aside.

2.96 In *S v Moya,*[89] the accused was charged with robbery with aggravating circumstances. His legal representative had drawn up a guilty plea in terms of the provisions of section 112 (2) of the CPA which did not comply with the provisions of the section and in particular did not disclose facts (as opposed to averments) on the basis whereof the magistrate could have been satisfied of the guilt of the accused. The

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88 2004 (1) SACR 477 W.

89 2004 (2) SACR 257 W.

statement was defective in that (for the reasons given) the magistrate could not have been satisfied of the guilt of the accused. It was held that legal representatives who prepare such statements should acquaint themselves fully with the law on this score and not leave it to others to find deficiencies if there are any. The matter was referred back to the magistrate to be dealt with in terms of the provisions of section 312 of the CPA.

2.97 In *S v Mofokeng,*[90] counsel for the appellant had filed heads of argument in an appeal in which he simply set out the facts and then submitted that the appellant had been correctly convicted. It was held that in the absence of any indication that the appellant had withdrawn the appeal or instructed counsel to concede, counsel had breached the duty of loyalty. If he felt that he could not advance the appellant's case, counsel should have withdrawn and allowed the appellant to represent himself or to find other counsel.

2.98 The Chairman of the Johannesburg Bar Council was requested to appoint an *amicus curiae* to consult with the appellant, report to the court on whether or not the appellant wished to proceed with the appeal and, if so, prepare heads of argument and argue the appeal.

2.99 S v Mvelase[91] was a case that was referred to the High Court for sentencing.[92] Before sentence could be imposed, however, the court had to find that the conviction was in accordance with justice.[93] It was contended that the conviction should not be so, confirmed for two reasons. Firstly, because the accused had not been "warned" of the minimum sentencing provisions and secondly because when the legal representative closed the accused's case without the accused giving evidence, the magistrate made no further inquiry into the matter. It was held that the incompetence of a legal representative should not be assumed. The magistrate was entitled to assume that the minimum sentencing provisions had been explained to the accused by his legal representative.[94] The magistrate was similarly entitled to assume that the legal representative had informed the accused fully of his rights with regard to giving evidence and that the

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90 2004 (1) SACR 349 W.

91 2004 (2) SACR 531 W.

92 In terms of the provisions of section 52 of Act 105 of 1997.

93 Section 52 (3) (b).

94 Despite the fact that they were not even referred to in the charge sheet.

decision not to testify was that of the accused himself. The mere fact that the legal representative had put certain propositions to State witnesses in cross-examination did not lead to the "inevitable conclusion" that the defence case had been closed against the wishes of the accused. It was found that the conviction was indeed in accordance with justice.

2.100 In *S v Moshoeu,*[95] a policewoman was charged with contempt of court for neglecting her duties in connection with alleged failure to investigate a case. At the time when the inquiry in terms of section 108 of the Magistrates Court Act, 1944 (Act No.32 of 1944) commenced, she was not told what the charge was. Both the magistrate and the legal representative assumed that because she was a police officer of 12 years' standing, she would know what the charge was. It was found that this was a "quantum leap". There could be no such presumption. The legal representative was criticised in this case.[96] The conviction and sentence were set aside.

2.101 In *S v Mafu,*[97] the accused were charged with robbery with aggravating circumstances. In leading the accused, the legal representative failed to lead any evidence of the *alibi* versions which they had. Furthermore, he failed to put the *alibis* to the State witnesses saying only that "the accused will say that he did not take part in the robbery." In fact, he did not even lead the accused on their whereabouts at the time of the commission of the robbery. It was held that such conduct on the part of a legal representative was "inexcusable and a breach of the very rudimentary duties of counsel when defending an accused." When cross-examined by the prosecutor, some of the accused testified that during consultation they had given specific instructions on the *alibi* to the legal representative. The convictions and sentences were set aside[98].

2.102 In *S v Toba,*[99] the legal representative advised both accused not to testify and to simply close their case. The accused conceded that this had been discussed with them

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95 2007 (1) SACR 38 T.

96 See at page 40h. The magistrate was severely criticized on this and other grounds. In fact, the judge suggested that Justice College should include the case in its study material.

97 2008 (2) All SA 657 W.

98 In fairness it must be added that another important reason why the conviction and sentence were set aside was because the magistrate descended into the arena.

99 2008 (1) SACR 425 E.

by the legal representative who had indicated to them that he was of the view that it would be very dangerous for them to testify and that it was not in their best interests to do so. They accepted this advice at the time but later brought an application to lead further evidence (being the evidence which they would have given). It was also common cause that the legal representative was experienced having also prosecuted in the Regional Court for several years. The legal representative was invited to file an affidavit setting out his side of the story but declined to do so on the basis that this may prejudice attorney-client confidentiality.[100] The application to lead further evidence was denied and the convictions confirmed.

2.103 In *Rozani v Director of Public Prosecutions, Western Cape,*[101] the accused was charged with two counts of raping his stepdaughter and a further count of attempting to rape her. He pleaded guilty to all three charges. He was duly convicted and sentenced to an effective eight years imprisonment.[102] The prosecutor indicated that she accepted the material facts set out in the guilty plea. Both the legal representative and the prosecutor withheld from the magistrate the fact that in a J88 report dated 28 January 1995 by a doctor who carried out a medical examination on the complainant[103] observed no injuries on her and stated further that an examination of her genitalia showed them to be “normal” and “virginal” and stated that there was “no sign of vaginal penetration.” Both the legal representative and the prosecutor were severely criticised for withholding this very important information from the magistrate.

2.104 This was more particularly in light of the fact that in a review application filed on behalf of the accused an affidavit was filed by a specialist obstetrician stating that it was his opinion that there was no indication that the complainant had penetrative vaginal intercourse with an adult male person. Had she done so, her hymen would not be left intact after the episode. In addition, in an affidavit filed on behalf of the state in reply thereto, a forensic pathologist also expressed the view that the findings on the J88 form were consistent with the history of no vaginal penetration having occurred.

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100 The new legal representative neglected to inform him that the accused had waived the privilege.

101 2009 (1) SACR 540 (C).

102 The offences were committed in 1991, 1993 and 1995 respectively and were thus not covered by the minimum sentencing provisions of Act 105 of 1997.

103 Then 14 years of age.

2.105 The conduct of the legal representative in pleading guilty in such circumstances was described as “startlingly incompetent, if not shocking,” more particularly in light of the fact that he mentioned to the accused’s employer “something to the effect that the district surgeon’s report showed the complainant to be a virgin.” Nevertheless, he allowed his client to sign the statement admitting sexual intercourse on two separate occasions.

2.106 According to the uncontroverted affidavit of the accused, the legal representative never asked him whether he penetrated the complainant and the accused never told him that he had. His conduct had the effect of bringing the magistrate under an erroneous impression that sexual intercourse had in fact taken place, well knowing that the sexual intercourse which is an essential element of the crime of rape may have been absent in counts 1 and 2 to which he pleaded guilty. The convictions and sentences on both rape counts were set aside. It follows that the right to legal representation is meaningless if a legal practitioner is unprepared, inexperienced or disengaged.

2.107 Competence ensures the right is substantive rather than just a technical formality. Ineffective assistance of legal practitioners can directly lead to wrongful convictions, disproportionate sentences or the loss of fundamental rights that could have been preserved with proper skill. A statutory mandate establishes a legal baseline for what constitutes effective counsel – such as the duty to communicate with the client and act with diligence. Our courts have established that competent assistance of legal practitioner is a necessary component of the right to legal representation. The courts not only consider whether a legal practitioner had a technical mandate, but also consider the actual quality of the representation provided.

2.108 Other problems identified which impact on the right to effective legal representation include delays arising where accused persons consult with legal representatives shortly before, and in some instances on, the day of the trial, particularly where legal aid is involved. This is often occasioned by the fact that Judicare legal practitioners manage large volumes of matters, making adequate consultation difficult within limited timelines.[104]

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2 Questions for comment and input

2.109 Given that section 73(2A) of the CPA provides that an accused person has a right to legal representation at State expense as at the time of his or her arrest, the new CPA must give guidance on the following issues, among others:

(a) What should the content and scope of the right to legal representation at State expense be if substantial injustice would result?
(b) Who should determine the question of substantial injustice and at what stage, given that the court comes in at a later stage?
(c) Is it practical to extend the right to legal representation at State expense to an accused person at the time of the arrest? If not, would the limitation of this right be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors?
(d) Whether the language of sections 35(2)(c) and 35(3)(g) of the Constitution can be construed to mean that the right to legal representation at State expense is available only to those who cannot afford legal representation at their own expense?

CHAPTER 3: THE RIGHT TO LEGAL REPRESENTATION IN PRIVATE PROSECUTION

A Introduction

3.1 Private prosecutions were not part of the Roman-Dutch law but were introduced in South Africa by the English. In *Mullins and Meyer v Pearlman*,[105] the court observed that-

> In England the right to institute private prosecutions preceded public prosecutions. One of the things that the British introduced to the Cape was English criminal procedure law. The British settlers found the legal system of the Cape (Roman-Dutch law0 unfamiliar and wanted English law to be introduced.

3.2 As a result, the Criminal Procedure Ordinance 40 of 1828 was enacted to replace the Criminal Ordinance, which codified the Roman-Dutch law. Later, the English procedural law was extended to the rest of South Africa in the Criminal Procedure Act of 1917, which preserved private prosecutions. These types of prosecutions were retained in the subsequent criminal procedure legislation of 1955 and 1977, which is the current Act.

3.3 However, procedural legislation on the topic did not provide for legal representation. A private prosecutor could prosecute the case himself or employ a lawyer to do so on his behalf. On its own, this limited the exercise of the right to rich people. In addition, the right itself was exercisable only where public prosecution was declined and if certain conditions were present.

3.4 It is now apposite to consider specific provisions of the CPA which address the topic of private prosecution. These provisions are located in Chapter 1 of the CPA and the relevant topic commences at section 7 and continues until section 17. These sections will be interpreted and analysed to determine whether they are consistent with the Constitution and, if they are to be retained, whether they need to be reformed to serve all victims of crime and not only those with deeper pockets.

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105 1917 TPD 639

B Section 7 of the CPA

Section 7 Private prosecution on certificate nolle prosequi

(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(b) a husband, if the said offence was committed in respect of his wife;

(c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward,

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act of 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence."

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private person produces to the officer authorised by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits in which the charge is based and that he declines to prosecute at the instance of the State.

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

(d) The provisions of paragraph (c) shall apply also with reference to a certificate granted before the commencement of this Act under the provisions of any law repealed by this Act, and the date of such certificate shall, for the purposes of this paragraph, be deemed to be the date of commencement of this Act.

3.5 Although part of this section was amended in 2010, it still refers to the attorney-general, an official that existed before 1994. Since 1994, the office of the attorney-general was replaced with that of Director of Public Prosecutions (DPP). Therefore, a reference to the attorney-general in the Chapter is understood to mean the DPP. Indeed, in subsection (1) the term Director of Public Prosecutions is used while subsection (2) employs the term attorney-general.

3.6 What this section does is to authorise a private person to pursue a prosecution of the perpetrator of an offence where the DPP has declined to prosecute on behalf of the State. The provision requires the DPP to issue a certificate to that effect known as *nolle prosequi* certificate. In addition to this certificate, the private prosecutor must satisfy certain conditions. If the private prosecutor is not related to the victim of the alleged crime, he or she must have a legal standing (*locus standi*) to institute the prosecution. In order to show that he or she has standing, he or she must prove that he or she has "substantial and peculiar interest in the issue of the trial arising out of some injury which he or she individually suffered in consequence of the commission of the said offence."

3.7 The substantial and peculiar interest expression has received attention of courts in the past and has been construed to mean that the private prosecutor has a claim arising from the commission of the offence in question. In *Mullins and Meyer v Pearlman supra,* the expression was interpreted thus:

> The courts have laid down that any person who has sustained actual injury beyond that suffered by the public generally by reason of the commission of some offence, has a civil remedy against the wrongdoer…It is, I think, clear that where none of civil redress exists the right of private prosecution would cease.

3.8 In subsequent cases this statement was interpreted to mean that an actionable claim was a pre-condition for the private prosecutor's title to launch a private prosecution. In *Levy v Benatar*,[106] the court stated:

> I respectfully associate myself with the more ascertained view that the private prosecutor is required to show that he has suffered an actionable injury, there being no entitlement to prosecute if he is unable to prove an invasion of a legal right. A suitable test to apply is to enquire whether the allegation by the private prosecutor that he has suffered injury if pleaded in a civil suit, would make the declaration excipiable. If it would not, he may prosecute.

3.9 However, in later cases the view that the private prosecutor must have an actionable claim before he or she can be allowed to mount a private prosecution was rejected. In *Phillips v Botha*,[107] the court said:

> I respectfully disagree. As have attempted to show, the passage which was relied on from Mullins' case had no bearing on the question of an injury individually

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106 1987 (4) SA 693 (25).

107 1995 (3) SA 648.

> suffered. In any event, the test enunciated by the learned Judge of Appeal seems to assume that there cannot be an invasion of a legal right which is not actionable. It leaves out of consideration the case where there is proved to be an invasion of a legal right but for reasons of public policy, the injury which that invasion causes is not treated by the law as enforceable.

3.10 What emerges from the various decisions on the subject is that the private prosecutor, in order to have legal standing, must show that he or she has a claim arising from the relevant offence and that the commission of that offence has injured his or her right, regardless of whether the right concerned is enforceable or not. This requirement sets the private prosecutor apart from the other members of the public or the general public which suffers harm whenever a crime is committed. In *Attorney-General v Van der Merwe and Bornman*,[108] the court stated;

> Prosecution is not primarily designed to recover compensation. I do not think therefore, that the expression "substantial and peculiar interest" was intended…to convey only a pecuniary interest in respect of which a prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not offer them in any different degree than any other members of the public to curb, in other words, the activities of those who would otherwise constitute themselves busybodies.

3.11 In addition to the legal standing defined above, section 7 authorises a husband to privately prosecute a perpetrator who committed an offence against his wife. But strangely the section does not afford the wife the same entitlement where the offence was committed against the husband. Instead, the wife and child may privately prosecute only where the offence has resulted in a death. Yet a legal guardian or curator of a minor or a person of an unsound mind may prosecute if the offence was committed against his or her ward.

3.12 Section 7(2) requires that the private prosecutor must first ask for the non-prosecution certificate (*nolle prosequi*) before instituting a private prosecution. Such certificate lapses if the prosecution in question is not commenced within a period of three months from the date on which it was issued.

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108 1994 OPD 197.

3.13 The purpose of section 7, as found by the courts, is to afford victims of crime a redress where the prosecution has declined to prosecute. In *Mullins* supra the court stated:

> One of the objects and perhaps the main object of the Legislature in enacting the right of private prosecution is to reduce the temptation offered to an aggrieved person to take the law into his own hands, if he considers himself injured by a criminal act and the Crown will not take up his case, he may prosecute himself with a view to the punishment of the wrongdoer.

3.14 Section 7 applies where the private prosecutor does not hold a special statutory entitlement to prosecute a crime arising from a violation of the relevant legislation. In that set of circumstances, the applicable provision is section 8.

C Section 8 of the CPA and other provisions

3.15 This section reads as follows:

> **8 Private prosecution under statutory right**
> (1) Anybody upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
> (2) A body which or person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such of prosecution.
> (3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.

3.16 This provision acknowledges that the power to prosecute some offences may be specifically conferred upon a corporate body or an individual and where that has been done, section 8 regulates the exercise of such power. In the first place, the provision subjects the exercise of that power to the decision by a DPP. If the DPP does not decline to prosecute the case himself or herself, the private prosecutor cannot insist on exercising his or her statutory power. There can be no parallel prosecutions of the same

offence. Therefore, this means that the general power of the DPP trumps the specific power of a private prosecutor.

3.17 In declining to prosecute, the DPP may impose any condition he or she deems necessary on the private prosecutor, including the identification and appointment of the person who will conduct the prosecution on behalf of the private prosecutor. The DPP may also supervise how the prosecution is carried out.

3.18 It is important to note that an accused person may even be arrested and detained in respect of an offence for which a private prosecution under section 8 is permitted. It is not clear from the CPA whether a person so arrested would be entitled to be released on bail. But in view of the constitutional right to be released if the interests of justice permit, legislation authorising such arrest should be construed to allow the release on bail.

3.19 The accused who is not in custody is brought to court by means of a summons in the case of a lower court and an indictment in the case of the high court. The indictment or charge-sheet must be served by the private prosecutor or his or her legal representative. This is an indication that the private prosecutor may have a legal representative who may conduct the actual prosecution.

3.20 Once a matter is set down for trial and the private prosecutor fails to attend the hearing on the appointed date and time, the court before which the matter is set down is obliged to dismiss the charge. However, the matter may be postponed if, on reasonable grounds, the court believes that the failure to attend was occasioned by circumstances beyond the private prosecutor's control. A charge may also be dismissed where the private prosecutor fails to prosecute without undue delay.

3.21 A private prosecution may be interrupted at any stage by the DPP who may inform the court that from then onwards the prosecution would be taken over by the State. The DPP must bring an application to that effect by means of motion court procedure. If a proper case is made out, the court must grant an order stopping prosecution by a private prosecutor and allowing the State to take over.

3.22 Costs incurred in running the private prosecution are carried by the private prosecutor. However, if the accused is convicted at the conclusion of the trial, he or she may be ordered to pay the costs. In an appropriate case the court may also order the

State to pay such costs if the DPP had declined to prosecute. Such costs are taxed according to the scale applicable to civil cases.

3.23 Before the process of a private prosecution is commenced, the private prosecutor is required to deposit security for costs, in an amount determined by the court in which the private prosecution will be initiated. At the stage he or she is called upon to plead, the accused may ask the court to increase the amount of security. If the charge is dismissed before the trial commences, the security is forfeited to the State.

D Legal representation

3.24 The analysis outlined above indicates that a private prosecutor who undertakes a prosecution is entitled to legal representation to carry out such prosecution. This limits the entitlement to those who can financially afford legal representation simply because the majority of people cannot conduct a prosecution on their own. Consequently, the benefit of a private prosecution is not available to many people.

3.25 Although the CPA does not expressly say the accused in a private prosecution is entitled to legal representation, it goes without saying that such an accused is entitled to be so represented. The challenge arises where the accused cannot afford legal representation. It cannot be disputed that such an accused is also entitled to a fair trial equivalent to the one that applies to a prosecution by the State. At any rate, a private prosecution may culminate in a conviction and sentence, just as a prosecution by the State may do.

3.26 Therefore, all the rights guaranteed by section 35(3) of the Constitution extend to an accused in a private prosecution, including the right to legal representation at State expense if substantial injustice would result. In any event, the State has previously paid for legal representation of an accused in a private prosecution owing to an employment relationship between it and such accused. In *Williams and Another v Janse van Rensburg and Others*,[109] the court observed:

> In these circumstances it seems to me that we have a situation in which the accused are not personally paying for their defence but the State is, and there is

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109 1989 (4) SA 485 (C).

> a risk that one or more of all of them might at a later stage have to repay these legal costs to the State.

3.27 However, the State is not obliged to provide legal representation for an accused in a private prosecution where it cannot be shown that a substantial injustice will ensue. Nor is it bound to pay for legal representation of a private prosecutor with no means to hire a lawyer. In this regard, the CPA creates an inequality of means to pursue justice for the victims of crime. The question is whether such inequality withstands constitutional scrutiny.

E Constitutionality of private prosecution provisions of the CPA

3.28 Even before 1994, the exercise of the power to prosecute crimes and the performance of the functions of prosecuting those crimes was vested in the prosecuting authorities. Private prosecutions have always been regarded as an exception to the rule and were permitted only where the requirements of the enabling legislation have been met. Thus, in *Ellis v Visser*,[110] the court held:

> This provision of the Code can be traced to the Cape Ordinance 40 of 1828 and was in force in both of the Republics. It shows that contrary to the practice prevailing in England where any person apparently may institute a private prosecution, the right to prosecute in criminal matters in South Africa is jealously guarded by the Crown and is granted to private individuals only where the Crown has refused to prosecute and the special circumstances I have mentioned have been shown to exist.

3.29 The analysis set out earlier indicates that even where the requirements are met and the permission to prosecute is exercised, the State can at any stage stop the private prosecution and take over the prosecution. This is a clear acknowledgement of the position that prosecuting crime is the preserve of the State. What needs to be considered is whether the exceptions to this rule are consistent with the Constitution.

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110 1954 (2) SA 431 (T).

3.30 Section 179(2) of the Constitution confers the power to prosecute and perform the related public functions on the National Prosecuting Authority consisting of the NDPP; DPPs and prosecutors. The provision reads:

> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.

3.31 Accordingly, under the Constitution it is the prosecuting authority only which is given the power to conduct criminal prosecutions. In the eyes of the Constitution, no entity or functionary other than the prosecuting authority possesses the power to institute criminal proceedings. Consequently, if legislation is to give that power to a different functionary of State, that legislation, it seems, would be inconsistent with section 179(2) of the Constitution.

3.32 It is by now axiomatic that the principle of legality demands that public functionaries should exercise only powers and perform only functions conferred on them by law. In this regard, the issue that arises for consideration is whether Parliament may pass legislation giving the power to prosecute crime to a different entity. If done, this appears to be inconsistent with the Constitution. If the drafters of the Constitution intended the position to be, they would have framed section 179(2) differently, to show that the same power may be given to a different functionary by means of legislation. It is clear from section 179 as a whole that the drafters were aware that there are matters relating to the exercise of the power which should be addressed in legislation.

3.33 If Parliament is forbidden to change what the Constitution proclaims, it seems that any legislation which purports to do so cannot conform with the Constitution. But here we are dealing with the CPA which was enacted long before the Constitution. At that time, Parliament was supreme and could pass legislation on any subject and such legislation was immune from review by the courts. Now the supremacy lies in the Constitution and the law that is inconsistent with it is invalid, regardless of whether it predates the Constitution or it was promulgated afterwards. With regard to legislation like the CPA, the invalidity occurred on the date the Constitution came into force.

3.34 Moreover, Chapter 1 of the CPA does not appear to be inconsistent with section 179(2) only. It is also at variance with the structure of the Constitution which gives rise to the principle of separation of powers. In its structure, the Constitution draws a bright line between rights and public powers. In the main, it deals with rights in Chapter 2, which

contains the Bill of Rights. The entire Chapter is devoted to conferring rights on individuals and private corporate entities. No individual is granted public power. The issue of public power is addressed elsewhere in the Constitution when addressing the issue of structures it creates. Therefore, the notion that private persons and individuals may exercise public power is inimical to the Constitution. Ordinary people may not intrude into the domain of government and perform public functions.

3.35 When all said and done, the interests of the victims of crime who wish to see justice served must be catered for, where the prosecuting authority has declined to prosecute. Private prosecution plugs the gap created by a refusal to prosecute by the authorities. However, there are other means of preventing irrational refusals to prosecute. When a prosecutor refuses to prosecute, he or she is declining to perform a constitutional function imposed on him or her by the Constitution. Therefore, it can only be acceptable if such refusal is reasonably justified.

3.36 A failure to perform a constitutional function must be subjected to judicial oversight. But since the majority of the people in this country are poor and cannot afford legal expenses, many such decisions may escape judicial scrutiny. This may be avoided by legislation that forces automatic review of such decisions. It may also obligate the review of such decisions by the NDPP. Then the decision of the NDPP which endorses a refusal must be subject to an automatic review by a judge in chambers. In this way oversight of a prosecutorial refusal to prosecute a matter where crime was committed, and the victim suffered harm, would be guaranteed.

3.37 Case law indicates that the purpose of private prosecution was to prevent victims of crime from taking the law into their own hands and taking a punitive action against the perpetrators. In *Attorney -General v Van der Merwe and Bornman* supra the court framed the purpose of private prosecution in these terms:

> The interest the Legislature had in mind may be peculiar but may also be such that it cannot sound in money…for example, as the chastity and reputation of a daughter or ward, the inviolability one person or the persons of those dear to us. Permission to prosecute in such circumstances was conceived as a kind of safety valve. An action for damages may be futile against a man of straw and a private prosecution affords a way vindictive those imponderable interests other than the violent and crude one of shooting the offender. The vindication is realistic: it consoles the victim of the wrong; it protects the imponderable interests involved by the deterrent effect of punishment and it sets at naught the inroad into such inalienable rights by effecting ethical retribution. Finally, it effects atonement, which is a social desideratum.

3.38 The statement has been affirmed in many subsequent decisions in this country [*Phillips v Botha and Nedcor Bank Ltd v Gcilitshana and Others* supra.] Private prosecution is not the only means in terms of which self-help may be prevented, especially if that appears not to be in line with the Constitution. A solution that applied before 1994 may now be wholly inappropriate.

1 Questions for input and comment

3.39 In the present circumstances, commentators and persons interested in the subject are requested to address the following questions, namely:

(a) whether Chapter 1of the CPA[111] is consistent with the Constitution, to the extent that it permits private prosecution, and if private prosecution is to be retained, whether legal representation at State expense should be extended to victims of crime and accused persons who cannot afford legal expenses? and

(b) whether the wording in section 179(2) of the Constitution to the effect that "the prosecuting authority has the power to institute criminal proceedings on behalf of the State" (emphasis) does not sanction private prosecutions by corporate bodies and private persons, and if so, whether private prosecutions by corporate bodies and private persons is thus inconsistent with the Constitution?

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111 That is, sections 7 to 17 of the CPA.

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