The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa

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Abstract
South Africa has inherited the British adversarial system, which is party-centred: lawyers for both the state and defence play a dominant role in the pursuit of procedural justice. The common law recognises as fundamental the right of the individual to legal advice and legal representation. It is also a fundamental principle of our law that an accused person is entitled to a fair trial. There is a practical and logical nexus between legal representation and a fair trial. The accused must be properly and promptly be informed of this right in order to be afforded a reasonable opportunity of securing it.

The position on egal representation under the interim and final Constitutions is addressed.

The entitlement of an accused person to legal representation at state expense where substantial injustice would otherwise result, as well as effective assistance by counsel, are important principles which are also discussed.

Introductory remarks
In broadest terms, the fundamental aim of a criminal trial is the attainment of justice through the establishment of criminal liability and the determination — if necessary — of an appropriate penalty in a manner fair to all parties involved. The values and principles in terms of which liability and penalties are determined are shared by most Western legal systems and are termed the principles of fair trial — or in American jurisprudence, the principles of due process. The procedures through which these common principles are pursued vary from jurisdiction to jurisdiction. In Anglo-American common law jurisdictions, the mode of procedure is adversarial, while in the Continental system, it is inquisitorial.1

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1For an extensive collection of sources regarding the adversarial and inquisitorial systems, see NC Steytler The undefended accused on trial (1988) 4 n 8.
The essential characteristic of the adversarial system is that the onus rests on the litigant to advance his case for a decision to be made by a judicial officer who remains passive throughout the proceedings.\(^2\) In contrast, in the inquisitorial system, the judicial officer plays the more active role by conducting the proceedings to their conclusion.\(^3\)

South Africa has inherited the British adversarial system together with the rules and traditions of the English legal profession. Because the adversarial system is party-centred, lawyers for both the state and defence play a dominant role in the pursuit of procedural justice. However, legal representation is available only at a price, and has remained the privilege of the few. In South Africa the majority of accused are indigent and consequently face a trial within the adversarial system without a defence lawyer.\(^4\) In 1989 it was estimated that some eighty per cent of accused in South Africa appearing on criminal charges in magistrates' courts did not have the benefit of legal representation, and that 130 000 unrepresented accused were jailed.\(^5\)

The importance and historical development of the right to legal representation
The common law recognises 'as fundamental the right of the individual to legal advice and legal representation'.\(^6\) It is legal representation that provides effective access to justice, and access to a legal adviser is accordingly regarded by our law as a corollary of the right of access to the courts themselves.\(^7\)

Until 1819 a person brought before a court on a criminal charge could not as of right demand that he/she be defended by an attorney or advocate.\(^8\) From the authorities quoted by Wessels, it appears that only after the accused had been apprehended and brought before the court and issue had been joined — that is he/she had pleaded — could he/she request the court to allow him to be represented by an advocate or attorney. The wording of most of these passages, however, leaves one under the impression that, generally speaking, the courts acceded to the accused's request to be represented. It is interesting to note that in discussing this aspect, Vroman quotes Baldus as saying that

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\(^3\)CR Snyman 'The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and Continental system' (1975) 8 Cilsa 100.
\(^4\)Steytler n 1 above (see the introduction 1-2).
\(^5\)Editorial in 1990 De Rebus 427. See, also, 1993 Consultus 9; 1993 DR 539.
\(^6\)S v Mabaso 1990 3 SA 185 (A); Mandela v Minister of Prisons 1983 1 SA 938 (A) at 957 D; S v Wessels 1966 4 SA 89 (C) at 91 D-92 H; R v Slabbert 1956 4 SA 18 (T) at 21 G; Brink v Commissioner of Police 1960 3 SA 65 (T) at 67 C-E; S Selikowitz 'Defence by counsel in criminal proceedings under South African law' 1965-1966 Acta Juridica 53.
\(^7\)Mandela v Minister of Prisons n 6 above at 957 D.
\(^8\)Wessels History of the Roman-Dutch law 376 et seq; Voet 3.3.14 and 15 (Gane's note to Voet 3.3.14); Merula Manier van procederen 4.36.1; Van Leeuwen Romeinse Hollandse regt 5.4.4 and 5; Vroman Tractaat de foro competenti 2.4.3.
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On 2 September 1819 Lord Charles Somerset issued a Proclamation dealing with the 'mode of proceeding in criminal cases', in terms of which a person accused of a serious offence had the right, if he/she so wished, to employ a legal practitioner to defend him. (The Proclamation divided offences into 'crimes' and 'misdemeanours', but this distinction disappeared and with it the last restriction on audience through legal practitioners in criminal cases.)

So completely has the right of audience through advocate and attorney come to be accepted, that in 1920 Juta JP could state without reference to any authority: 'That a person who is charged with an offence before any court in judicial proceedings in this country is entitled to appear by a legal adviser is a proposition which no one will dispute.'

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This right to counsel has been described by our courts as 'so fundamental that in normal circumstances it has never been challenged,' and its denial as 'a tyrannical exercise of power (and) a most serious infringement of the liberty of any subject.' The statutory provisions regarding this right are regarded by some as redundant and merely affirmative.

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This evolutionary process of broadening and extending the right to legal representation continues. In S v Heyman Steyn CJ was concerned with the right to legal representation of a person summoned to be subjected to inquiry under section 212 of the then Criminal Procedure Act 56 of 1955. At 603 H, after referring to earlier decisions in our courts, he continued:

I refer to these cases merely as indicating a trend, in my view a very natural and equitable trend, in the later reported cases, towards allowing legal assistance where the liberty of a person questioned is placed in jeopardy by a possible periodical committal to prison. They suggested a growing practice of recognising the claim to be represented.

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The right to full legal representation was given statutory recognition by section 218 of the Criminal Procedure Act 31 of 1917. Our present Act 51 of 1977 deals with this right in section 73(2) where it is provided that:

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.

The fundamental importance of this right is now beyond question. Indeed, in

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See S v Wessels 1966 4 SA 89 (C) at 91 G-H.

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S v Wessels (supra) 92 A, E-F.

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His judgment is reported in Dabner v SA Railways and Harbours 1920 AD 583.

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The term 'counsel' is used to include advocates or attorneys as the case may be. Similarly with foreign systems 'counsel' refers to the appropriate legal practitioner: Selikowitz 'Defence By Counsel in Criminal Proceedings Under South African Law' 1965/6 Acta Juridica 53 n 4.

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Brink v Commissioner of Police 1960 3 SA 65 (T) 67.

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Li Kui Yu v Superintendent of Labourers n 14 above at 187–8.

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1966 4 SA 598 (A).
Botha JA said:

Oor die belangrikheid van die voordeel van regsbystand by die verhoor van persone wat, veral weens 'n ernstige misdaad, aangekla word, kan daar geen twyfel bestaan nie.¹⁸

The preamble to the Constitution of the Republic of South Africa Act 110 of 1983, proclaimed as one of our national goals 'to uphold the independence of the judiciary and the equality of all under the law'. In terms of section 9 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996, '(E)veryone is equal before the law and has the right to equal protection and benefit of the law.'

The principle of equality before the law is part of the South African common law tradition.¹⁹ It has its foundation in both Roman-Dutch and English law.²⁰ The right to legal representation is a fundamental aspect of criminal justice, just as are a fair trial and equality before the law.²¹ The right of access to one's legal adviser, as a corollary of the right of access to the courts, is a basic or fundamental common law right.²² The fundamental importance of this right is now beyond question and is universally recognised in most civilised societies.²³

The necessity for legal representation

Legal representation is today regarded as a necessity, not a luxury. This point was emphasised by the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts.²⁴ The same point had been made by Justice Black twenty years earlier in Gideon v Wainright.²⁵

The necessity for legal representation in criminal trials flows from two principles:

- the fundamental principle that an accused person is entitled to a fair trial;²⁶ and
- the equally fundamental principle of equality before the law and the application of these principles to the adversarial process.

¹⁷1964 1 SA 29 (A) 33 H.
¹⁸I have made extensive use of the judgment of Goldstone J in S v Mbonani 1988 1 SA 191 (TPD).
¹⁹HR Hahlo & E Kahn South African legal system and its background (1968) 34.
²¹E Grant 'The right to legal representation' (1989) 2 SACJ 47, 48. See also S v Nkwanyana 1990 4 SA 735 (A) 738 E.
²²Mandela v Minister of Prisons 1983 1 SA 938 (A) 957 D.
²³S v Radebe 1988 1 SA 191 (T) 193 B–C, 195 D–E. See also S v Seheri 1964 1 SA 29 (A) 33 H.
²⁴RP 78/1983 vol 1 part II para 6.4.1.
²⁵(1963) 372 US 335 at 344.
²⁶Yates v University of Bophuthatswana 1994 3 SA 815 (BGD).
The right to a fair trial

Milne JA stated in *S v Tyebela*27: 'It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial.'28 American decisions have recognised both the practical and logical nexus between legal representation and a fair trial. Put simply, the argument is that implicit in a fair hearing under the adversarial process is the ability of the accused to present his/her case in a legally effective manner. Where the accused lacks that ability, legal representation is essential, otherwise the trial will not be fair. This argument, which runs through five decades of American case law, was articulated by Justice Sutherland in *Powell v Alabama*29, cited with approval by Goldstone J (as he then was) in *S v Radebe; S v Mbonani*.30 The importance to an accused of being legally represented has also frequently been stressed by our courts.31

Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 (the constitution) affords an accused 'a right to a fair trial'. This right includes no less than fifteen rights addressing the procedure and process of a trial. Before the commencement of the new constitutional order, the right to a fair trial was somewhat limited as articulated in the infamous *dictum*32 by Nicholas AJA (as he then was) in *S v Rudman; S v Mthwana*33 as follows:

What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice.

The constitutional right to a fair trial could not but import 'a radical movement away from the previous state of the law'34. This view contradicts the limited view taken by a number of judges suggesting that the constitutional right to a fair trial is simply a codification of the common law — except for the provision of legal representation at state expense — which will not lead to a significant change in the law.35

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271989 2 SA 22 A 29 G-H.
28See also *S v Alexander* (1) 1965 2 SA 796 (A) 809 C-D; *S v Mushimba* 1977 2 SA 829 (A) 844 H.
301988 1 SA 191 (T) at 195 E-G. See also *Argersinger v Hamlin* (1972) 407 US 25 at 33; Kamisar 'The right to counsel and the Fourteenth Amendment: a dialogue on "The most pervasive right" of an accused' (1962) 32 University of Chicago Law Review at 58; *S v Khanyile* 1988 3 SA 795 (N).
31*S v Seheri* 1964 1 SA 29 (A) at 33 H; *S v Van Wyk* 1972 1 SA 787 (A) at 796 C; *S v Shabangu* 1976 3 SA 555 (A) at 558 F-H; *S v Mabaso* 1990 3 SA 185 (A); *S v Baxter* 1990 2 SACR 109 (T).
331992 1 SA 343 (A) 387 A-B.
34*Shabalalala v Attorney-General of the Transvaal* 1995 (12) BCRL 1593 (CC) par 29 per Mohamed DP (as he then was).
35*Klein v Attorney-General* 1995 2 SACR 210 (W) 217 c-f; *S v Shuma* 1994 4 SA 583 (E) 591 A-B; *S v Malefo* 1998 (1) SACR 127 (W) 152 f-g.
In the Constitutional Court's first judgment, *S v Zuma*, Kentridge AJ said that the *Rudman dictum* was an authoritative statement of the law before 27 April 1994. However,

since that date s 25(3) (of the interim Constitution: Constitution of the Republic of South Africa, Act 200 of 1993; section 35(3) of the Constitution) has required criminal trials to be conducted in accordance with those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions. It was decided, however, that section 25(3) (section 35(3) of the Constitution) contains a list of specific rights, but that the list is not exhaustive, for included in the concept of a fair trial are common-law rights which are not enumerated in the section.

Fairness is an issue to be decided by the trial judge on the facts of each case, having regard to the particular circumstances of each individual case. The test for determining fairness is objective with prejudice as the main yardstick. A trial cannot be completely fair when the accused is in any way prejudiced; but, on the other hand, the trial can hardly be unfair where there is no prejudice. It is almost impossible to set out exhaustive guidelines for determining whether a trial is fair or not, but fairness is the most fundamental requirement in our modern criminal law jurisprudence. The court in each case would have to exercise a proper discretion, balancing the accused's need for a fair trial against the legitimate interests of the state in enhancing and protecting the ends of justice. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and to be seen to be done. But the concept of justice itself is broad and protean. In considering what, for purposes of a particular case, lies at the heart of a fair trial for purposes of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is adequately to ensure that innocent people are not wrongly convicted, because of the adverse effects that a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. In its narrower sense, the object of the right to a fair trial contained in section 35(3) of the constitution is to minimise the risk of wrong convictions and inappropriate sentences and a consequent failure of justice.

As the constitutional right to a fair trial is broader than the lists of rights articulated in section 35(3) of the constitution, a fair trial, therefore, also

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36 1995 2 SA 642 (CC).
37 Paragraph 16 of the report.
38 *K v The Regional Court Magistrate* 1996 (1) SACR 434 (E) 441 d-e.
39 *Key v Attorney-General, Cape Provincial Division* 1996 (2) SACR 113 (CC).
40 *S v Smile* 1998 (1) SACR 688 (SCA).
41 *S v N* 1997 (1) SACR 84 (TkSC) 87 e-g, 88 b-c; *S v Soci* 1998 (2) SACR 275( ECD) 294 a-b.
42 *S v Chavulla* 1999 (1) SACR 39 (CPD) 44 a-b; *S v Majavu* 1994 4 SA 268 (Ck) 309 h-j.
43 *S v Dzukuda; S v Tshilo* 2000 (2) SACR 443 (CC) b-d.
44 *S v Steyn* 2001 (1) SACR 25 (CC) 34 a-b.
The right to legal representation extends to 'substantive fairness'\(^45\) or to the so-called 'residual fair trial right', e.g. assistance by the presiding magistrate or judge.\(^46\)

But the courts have dealt extensively with the issue of the importance of legal representation and its role in ensuring a fair trial.\(^47\) In fact, the right to legal representation is a fundamental right closest to an absolute right in the Bill of Rights of the constitution.\(^48\) In \(S v \) Harris\(^49\) the court pointed out that under the constitution even more weight should be accorded to the right to legal representation than has been done in the past.

**Equality before the law**

Equality before the law is regarded as a fundamental principle of the South African common law which can be traced to its roots in Roman law and Roman-Dutch law.\(^50\)

Voet\(^51\) states that the law preserves equality and binds the citizens equally. This principle has been recognised by our courts for over a century.\(^52\)

The concept of equality before the law has enjoyed statutory recognition in parts of South Africa since the nineteenth century. The 1854 Constitution of the new Republic of The Orange Free State included the guarantee of equality before the law. More recently, however, the preamble to the Republic of South Africa Constitution Act 110 of 1983 declares the 'necessity of standing united and of pursuing' certain national goals, including 'to uphold the independence of the judiciary and the equality of all under the law'.

Sir Hersch Lauterpacht\(^53\) stated as follows:

> The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written Constitutions. It is the starting point of all other liberties.

Perfect equality is not attainable and not what the law intends. The rich will always have greater access to forensic skills than the poor. But if the concept of equality before the law is to be given any meaningful content, it must mean, at the very least, that a person should not be denied effective access to the courts because of poverty. This is the philosophy which underlies the jurisprudence of the United States Supreme Court.\(^54\) Justice should not turn

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\(^45\)See Steytler *ibid* 216 *et seq.*

\(^46\)\(S v \) Tshidiso 2002 (1) SACR 207 WLD 210 e-g.

\(^47\)\(S v \) Dickson 2000 (2) SACR 304 CPD 308 a-b.

\(^48\)\(S v \) Pitso 2002 (2) SACR 586 OPD.

\(^49\)1997 (1) SACR 618 (C) 622i.

\(^50\)DL Carey Miller (1972) 89 *SALJ* 71; Joubert (ed) Law of South Africa vol 5 par 19 at 15.

\(^51\)*Commentarius ad Pandectas* 1.3.5.

\(^52\)*In re Marechane* (1882) 1 SAR 27 at 31; Zgili *v* McCleod (1904) 21 SC 150 at 152; *R v Abdurahman* 1950 3 SA 136 (A) at 145 C; Hurley *v* Minister of Law and Order 1985 4 SA 709 (D) at 715 G.

\(^53\)*An International Bill of the Rights of Man* (1945) at 115.

upon factors as inappropriate as wealth and poverty. Yet, it is precisely the lack of means which excludes the majority of accused from legal representation.\textsuperscript{35}

Representation by counsel was not perceived by the American courts as being an idiosyncrasy of the American constitutional system but, on the contrary, was regarded as 'fundamental in character' to any civilised system of justice.\textsuperscript{56}

This theme was taken up by Justice Black, dissenting in Betts v Brady.\textsuperscript{57} The truth of Justice Black's observation that 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has' is reflected in the conditions which prevail in modern-day South Africa.\textsuperscript{58}

**Opportunity to obtain legal representation\textsuperscript{59}**

If the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity of securing it. Denial of such opportunity when demanded, is a denial of the right to legal representation, and thus of the right to a fair trial.\textsuperscript{60}

An accused must be afforded a reasonable opportunity to obtain the assistance of a lawyer of choice.\textsuperscript{61} During the intervening period, the prosecution must hold off and initiate no steps which may be prejudicial to an accused. An accused can, therefore, not be compelled to plead to a charge until representation has been secured. Even during the trial, the necessary opportunity should be afforded. The fact that the accused is an attorney does not mean that he/she is not entitled to legal representation and it is irregular to dismiss his application for a postponement to obtain legal representation.\textsuperscript{62}

A court affords an accused the opportunity to exercise the right to legal representation by the suitable remand of the proceedings. It is well-established that the discretion to remand proceedings should be exercised judicially. Account should be taken of the importance of legal representation, the gravity of the charge and possible penalty, the complexity of the case, and

\textsuperscript{35}See Gideon v Wainwright n 25 above at 344.

\textsuperscript{56}Powell v Alabama (1932) 287 US 45 at 70.

\textsuperscript{57}(1941) 316 US 455 at 476.

\textsuperscript{58}I express sincere gratitude for being allowed to make use of the heads of argument of counsel for the appellants in S v Rudman, S v Mibwana 1992 1 SA 343 (A). Leading senior counsel in that case is now Justice Chaskalson, Chief Justice of the Constitutional Court of South Africa.

\textsuperscript{59}For this paragraph I have made extensive use of Steytler's work n 32 above at 303-304.

\textsuperscript{60}S v McKenna 1998 (1) SACR 106 (CPD).

\textsuperscript{61}S v Phelem 1997 (2) SACR 651(W) S 73(2A) of the Criminal Procedure Act (inserted by s 2 of Act 86 of 1996, not yet in operation) provides that '(e)very accused shall be given a reasonable opportunity to obtain legal assistance'.

\textsuperscript{62}S v Magbuwazuma 1997 (2) SACR 675 (CPD).
the failure of the accused to arrange for legal representation. 63

In a series of judgments the then Appellate Division has laid down the principles to be applied in an application for an adjournment-in-general and also in an application for a postponement to arrange for legal representation. 64 The discretion to be exercised is that of the trial court. This discretion is to be exercised judicially and in consideration of all relevant facts and circumstances, An Appeal Court will not interfere, or substitute its discretion for a discretion judicially exercised, merely on the ground that it would have come to a different conclusion. 65 When an accused requests an adjournment or postponement to arrange for legal representation but the application is denied without proper reason, a serious irregularity has occurred. If the accused is prejudiced thereby in that justice is not done, the conviction must be set aside 66 as the accused has not had a fair trial as contemplated in section 35(3) of the constitution. 67 On the other hand, an application for a postponement to allow the accused to obtain work to pay for the services of his legal representative may be validly refused. 68

The duty of a court towards an unrepresented accused

It has always been settled law that an accused who is not represented by counsel should be assisted by the court and informed of his/her rights. A heavier burden rests on the prosecutor and the court to ensure that such a trial is fair in all respects. 69 The accused should, inter alia, be informed of an onus resting on him/her 70 ; advised of his/her rights to call witnesses to give evidence and be assisted by the court, if necessary, to subpoena witnesses. 71 Precisely what advice and other help a presiding officer must give to particular accused in a particular case must inevitably be left largely to the good sense of the officer presiding at a trial. 72 The accused should also be assisted by the court when he/she cross-examines state witnesses, and it is unfair to expect that he/she is able to perform as competently as an experienced legal practitioner. 73 The courts should also guard against too easily drawing adverse inferences against an unrepresented accused who fails to put material allegations to state witnesses. 74 The court is, however, no

63 S v Harris n 49 above.
64 R v Zackey 1945 AD 505; S v Seberi 1964 1 SA 29(A); S v Shabangu 1976 3 SA 555(A).
65 S v Harris n 49 above at 622 b-d.
66 S v Maduna 1997 (1) SACR 646 (T).
67 S v Philemon 1997 (2) SACR 651 (WLD).
68 S v Swanepoel 2000 (1) SACR 384 (OPD).
69 S v Mojokeng 1992 (2) SACR 261 (O); S v Nabo 1968 4 SA 699 (EC). The obligation on the presiding officer to assist an unrepresented accused is part of the accused's right to a fair trial in terms of s 25(3) of the Interim Constitution: S v Simxadi 1997 (1) SACR 169 (C).
70 S v Mqubasi 1993 (1) SACR 198 (SEC).
71 S v Hlakwane 1993 (2) SACR 362 (O); S v Moilwa 1997 (1) SACR 188 (NC).
72 S v Hlongwa 2002 (2) SACR 37 (T).
73 S v Maseko 1993 (2) SACR 579 (A). See, also S v Hendricks 1997 (1) SACR 174 (C).
74 S v Mkwedini 1994 (1) SACR 216 (Tk).
substitute for legal representation as such.

The duty to inform the accused of the right to legal representation

As recently as 1988 there were still conflicting decisions as to whether a court is duty bound to inform an unrepresented accused of his/her right to legal representation. In *S v Radebe and Mbonani*, Goldstone J decided that if there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then there is no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence materially prejudicial to the accused, he/she should be informed of the seriousness of the charge and of the possible consequences of conviction. Depending upon the seriousness and complexity of the charge, or of the legal rules relating thereto, an accused should not only be told of this right, but should be encouraged to exercise it. He/she should be given a reasonable time within which to do so and should also be informed, in appropriate cases, that he/she is entitled to assistance from the Legal Aid Board. In the same year in *S v Morrison*, also decided in the Transvaal Provincial Division, the court stated that the right to legal representation did not place a duty upon the presiding officer at every trial to spell out such right to unrepresented accused, and that there was no rule of law or practice requiring the court to tell the accused that he/she has a right to legal representation. Whether there is such a duty upon the presiding officer depends on the circumstances of each case.

*Morrison’s* case was, however, soon afterwards rejected by the same division and *Radebe and Mbonani’s* case approved. The court stated that the question of whether the failure to inform the accused of such a right would in given circumstances constitute an irregularity, should not be confused with the existence of the duty to so inform.

In some cases it has in fact been decided that the failure to inform an unrepresented accused of his/her right to legal representation, constitutes an irregularity *per se* and that any conviction and sentence in such proceedings should, therefore, be set aside. In other cases, however, it has been held that failure to inform an accused of this right will not constitute an irregularity

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75 1988 1 SA 191 (T).

76 The accused’s right to legal representation is a very important right of which he/she should not be lightly deprived. Postponement for that purpose should not be hastily refused: *S v Oakers* 1990 (1) SACR 147 (C). Failure to grant a postponement for a reasonable period constitutes a gross irregularity resulting in an appellant not having had a fair trial. The conviction and sentence were, therefore, set aside: *S v Manguanyana* 1996 (2) SACR 283 (E).

77 See also *S v Mpata* 1990 (2) SACR 175 (NC); *S v Nqoko* 1990 (2) SACR 257 (N); *S v Mthwana* 1989 (4) SA 361 (N).

78 1988 4 SA 164 (T). See also *S v Mashiyana* 1989 1 SA 592 (C).

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

80 *Nkani v Attorney-General, Ciskei* 1989 3 SA 655 (CKGD). See also *S v Motsumi* 1990 (2) SACR 207 (O); *S v Modiba* 1991 (2) SACR 286 (T).
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per se each case depending upon its own facts and peculiar circumstances. In some cases it was decided that failure to inform the accused of his/her rights does not necessarily vitiate the proceedings, but that each case will depend on whether there has been a failure of justice. Such irregularity is thus potentially and not absolutely fatal. It will only be fatal in effect if it prejudiced the accused leading to the trial not being fair. This is a question of fact to be decided on a case by case basis. Prejudice will follow if the accused would indeed have chosen to procure representation through his/her own resources, or those of the Legal Aid Board. A further factor to consider is the accused's own knowledge of his/her rights. In all except trivial cases, prejudice will be presumed unless the prosecution can show that the accused would not have engaged a legal representative even if he/she had been properly informed of the right to do so.

It was also decided that the dictates of public policy then prevailing did not demand that every accused should be defended either at all, or by a representative equal to the task.

It was decided that no rule in our law was transgressed if a court proceeded with a trial on a complex or serious charge where the accused sought but lacked the means to obtain legal representation. Legal assistance cannot, however, be forced upon the accused.

In a watershed decision, Didcott J decided that where a case is of a serious nature, with some complexity in respect of both the law and the facts, and when an accused is indigent and incapable of defending himself adequately, he/she is entitled to legal representation, otherwise the trial would not be fair. The criteria are simply those 'fundamental and essential to a fair trial. And on the selfsame standards, our common law insists, doing so no less regorously or regularly.' Khanyile was correctly termed 'pioneering and revolutionary'.

Whether the Khanyile decision could be implemented in practice is doubtful. As was formerly the case in the USA, 'our less than adequate resources' was given as the reason. As Nienaber J (as he then was) said in S v Davids; S v

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81S v Radebe and Mbonani, supra; S v Rudman 1989 3 SA 368 (ECD).
82S v Simanaga 1998 (1) SACR 351(CkH).
83S v Mkhize 1990 (1) SACR 620 (N). See also S v Rudman 1989 3 SA 368 (ECD).
84S v Mbabapa 1991 (4) SA 668 (NmHC).
85Where s 112(1)(a) of the Criminal Procedure Act would have been applicable on a plea of guilty: S v Motsumi in 80 above.
86S v Motsumi n 80 above.
87S v Davids 1989 4 SA 172 (N) 200 A-B.
88S v Mbuwana 1989 4 SA 361 (N).
89S v L 1988 (4) SA 757 (C).
90NC Steytler n 1 above at 238.
91S v Khanyile n 30 above.
92S v Khanyile n 30 above.
93(1988) 1 SACJ 462 at 468 and 470.
Dladla\textsuperscript{94}: The dictates of public policy currently prevailing do not, in my opinion, demand that every accused should be defended either at all or by a representative equal to the task ... Our law, given our less than adequate resources, has not yet scaled that evolutionary peak.

This view was echoed by the Appellate Division in \textit{S v Rudman}\textsuperscript{95} when it stated that since the funds available to the Legal Aid Board had always been markedly insufficient to supply even its existing needs, overnight implementation of the rule of Kbanyile would be impossible, not only because of the financial constraints on the Legal Aid Board, but also because of the intolerable burden which would be placed on the Board by the ensuing flood of applications. It was stated, however, that the ideal which the Kbanyile case strove for is a \textit{sine qua non} for a complete system of criminal justice, and that any system which lacked it was flawed. Also, although the ideal could not be attained under the prevailing circumstances in South Africa, it should never be lost sight of and should continue to guide all who are concerned with the improvement of the South African criminal justice system. It was also stated that the Kbanyile rule had an extra dimension which took the matter beyond the courtroom and into the realm of politics.

The Supreme Court of Appeal made the position very clear.\textsuperscript{96} A clear distinction should be drawn between the right of an accused to be informed of his/her 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.\textsuperscript{97} The common law acknowledges the former, and the Constitution Act 108 of 1996 the latter. There is a duty upon judicial officers to inform unrepresented accused of their (common-law) right to legal representation. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to an accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of conviction. Depending on the seriousness and complexity of the charge, or of the legal rules relating thereto, the accused should not only be told of his/her right, but should be encouraged to exercise it.\textsuperscript{98} He/she should be given a reasonable time within which to do so and should also be told in appropriate cases that he/she is entitled to apply to the Legal Aid Board for assistance.

Where a judicial officer fails to advise an unrepresented accused of his/her (common-law) right to legal representation, an irregularity may occur.

\textsuperscript{94}1989 4 SA 172 (N) at 200 A–B and 199 I–J.
\textsuperscript{95}1992 1 SA 343 (A) (also reported at 1992 (1) SACR 70 (A)). Chief Justice Corbett was also of the opinion that there were not enough lawyers for this task: see 'The attorney's role in a future South Africa' 1993 \textit{DR} 959.
\textsuperscript{96}Hlantlalala 1999 (2) SACR 541 (SCA).
\textsuperscript{97}See the discussion about this aspect, \textit{infra}.
\textsuperscript{98}S v Mbambo 1999 (2) SACR 421 (W); S v Manale 2000 (2) SACR 666 (NCD); S v Visser 2001 (1) SACR 391 (CPD).
The right to legal representation

However, such an irregularity does not per se result in an unfair trial\textsuperscript{99} necessitating the setting aside of the conviction on appeal. The essential question is whether the verdict was tainted by the irregularity, and, in this regard, it is for the appellant to show that a failure of justice resulted. An irregularity results in a failure of justice whenever there has been actual or substantial prejudice to the accused. Thus, no failure of justice will result if there is no prejudice to an accused and, by the same token, there will be no prejudice to the accused if he/she would in any event have been convicted irrespective of the irregularity. In the present context the test is accordingly whether an accused would inevitably have been convicted, even if the judicial officer had not committed the irregularity of omitting to inform him/her of his/her common-law right to legal representation.

An accused may show that a failure of justice resulted from the failure of a judicial officer to inform him/her of his/her (common-law) right to legal representation by, for example, submitting to the court of appeal, and to the trial court for its comment, an affidavit setting out that he/she was unaware of the right, and that if he/she had been informed thereof he/she would have tried to secure legal representation, at least through the Legal Aid Board.

The fact that no 'administrative machinery rendering free legal services' exists in the former Transkei, is irrelevant in determining whether a failure of justice occurred upon the failure of a judicial officer in that region, to advise an accused of his/her (common-law) right to legal representation. The reasoning that the accused would in any event not have received 'free legal services', because of the absence of administrative machinery for that purpose, is untenable, and cannot be proffered as an excuse for denying a section of the South African society rights otherwise enjoyed by the rest of the country, merely because they happen to be in a particular area.

Therefore, \textit{in casu},\textsuperscript{100} where the unrepresented appellants were not informed of their common law right to legal representation by the Transkei magistrate before whom they appeared on a charge of theft, and it appeared from affidavits filed in a review application not only that they would probably have exercised this right had they been duly informed, but also that they had a 'claim of right' defence which they had not articulated clearly during the trial, but which a legal representative would have formulated properly, an irregularity resulting in a failure of justice was found to have occurred. The appellants' convictions were accordingly set aside.

The General Council of the Bar of South Africa also supported the principle that every accused should be entitled to be represented by a legal practitioner. It added that the adoption of this principle would imply the acceptance by all concerned in drawing up a bill of rights that the state must bear the responsibility of providing free legal representation for indigent persons.\textsuperscript{101}

\textsuperscript{99}\textit{Mgcina v Regional Magistrate, Lenasia} was, therefore, wrongly decided.

\textsuperscript{100}I am still dealing with \textit{Hlantlalala, supra}.

\textsuperscript{101}1993 \textit{DR} 569.

**Legal representation under the interim constitution and the constitution**

*The Interim Constitution*

Section 25(1)(c) of the Interim Constitution reads as follows:

> Every person who is detained, including every sentenced prisoner, shall have the right —
> to consult with a legal practitioner of his or her choice, to be informed of this right promptly, and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state.

And section 25(3)(e):

> Every accused person shall have the right to a fair trial, which shall include the right—
> to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights.

An accused's right to be informed of his/her right to legal representation must be distinguished from the right to legal representation at state expense. The common law acknowledges the former, and the constitution the latter.

One of the first cases dealing with section 25(3)(e) was *S v Lombard*. It was there decided that it was reasonable, justifiable and necessary for an accused's right to legal representation to be limited in terms of section 33(1). It was further decided that section 25(3)(e) did not mean that an accused was entitled to legal representation of his choice at state expense. 'Substantial injustice' is not defined, but the court in *Lombard* states that as a minimum it means that an accused who is charged with an offence for which imprisonment is possible on conviction, and who cannot afford legal representation, would suffer substantial injustice if legal representation is not provided by the state. This is apparently also the criterion used by the Legal Aid Board.

The court should inform the accused of his/her right to appoint a legal representative of his/her choice and he/she must also be informed of his/her right to obtain representation at state expense. The court is not obliged to use the *ipsissima verba* of section 25(3)(e). The question is whether the advice complies substantially with the requirements of this section. It might be advisable to give an accused an opportunity to convince the court that it

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102 Hereafter referred to as 'the Interim Constitution'.
103 Hereafter referred to as 'the constitution'.
104 My emphasis.
105 My emphasis. 'Promptly' is here left out for no obvious reason.
106 Hlanhla Hlanhla 96 above.
107 1994 3 SA 776 (T) (also reported at 1994 (2) SACR 104 (T)).
108 This was confirmed by the Constitutional Court in *S v Vermaas* 1995 3 SA 292 (CC) (also reported at 1995 (2) SACR 125 (CC)).
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would lead to substantial injustice if he/she does not have legal representation.\textsuperscript{109} The determination of what constitutes 'substantial injustice' is in the discretion of the trial court,\textsuperscript{110} and in lower courts the accused's explanation of plea in terms of section 115 of the Criminal Procedure Act 51 of 1977 must be considered in determining this. However, it must be remembered that the right to conduct one's own defence is just as important as the right to legal representation.\textsuperscript{111}

It is not sufficient merely to inform the accused of his/her right to consult with a legal practitioner. The right to consult with a practitioner during the pre-trial procedure, and especially the right to be informed of this right, is closely connected to and protects the presumption of innocence and the right to silence. A failure to recognise the importance of the right of a detainee to consult with his/her legal practitioner has the effect of depriving persons, especially the uneducated, unsophisticated or poor, of their right to remain silent. In order to give proper effect to the right to consult with a legal practitioner, an accused is to be informed of this right in such a way that it can reasonably be assumed that he/she understands the right. The existence of this right without knowledge of its content serves little purpose.\textsuperscript{112}

Even if an accused's application for legal representation has been denied because he/she does not fall within the parameters of the 'means test' applied by the Legal Aid Board, he/she is still entitled to argue at his/her trial that substantial injustice would result if he/she were denied legal aid. The decision of this question, furthermore, falls within the discretion of the trial court.\textsuperscript{113}

General remarks regarding the Interim Constitution

The Constitutional Court has stated that section 25(3) requires that since 27 April 1994\textsuperscript{114} all criminal trials must be conducted in accordance with 'notions of basic fairness and justice.' All courts hearing criminal trials or criminal appeals must now give content to these notions.\textsuperscript{115}

In \textit{S v Marx}\textsuperscript{116} Cameron J also states that a criminal trial should be conducted in accordance with notions of basic fairness. The latter does not, however, require a formalistic repetition or inappropriate or undue formalism. Where, therefore, an accused had been informed upon arrest that he/she was entitled to legal representation, but there was no indication that his/her knowledge extended to the fact that he/she was entitled to legal assistance even while making a statement to the police, the statement was ruled

\textsuperscript{109}M \textit{v Streeklanddros, Middelburg Transvaal} 1995 (2) SACR 709 (T).

\textsuperscript{110}M\textit{sila v Government of South Africa} 1996 (1) SACR 365 (SE).

\textsuperscript{111}M \textit{v Streeklanddros} n 109 above.

\textsuperscript{112}S \textit{v Melani} 1996 (1) SACR 335 (F).

\textsuperscript{113}M\textit{sila v Government of South Africa} n 110 above. See, also, S \textit{v N} 1997 (1) SACR 84 (TKSC).

\textsuperscript{114}The date upon which the Interim Constitution came into operation.

\textsuperscript{115}S \textit{v Zuma} 1995 2 SA 642 (CC).

\textsuperscript{116}1996 (2) SACR 140 (W). This case in fact overrules S \textit{v Molefe} 1991 4 SA 266 (ECD); S \textit{v Januarie} 1991 (2) SACR 682 (SEC).
inadmissible. Likewise, where the police took a statement from an accused, without having waited for his/her attorney to arrive, the statement was ruled inadmissible.\textsuperscript{117}

In \textit{S v Mblakaza}\textsuperscript{118} was stated that an accused's right to legal representation under terms of section 25(3)(e) of the Interim Constitution, includes the right to legal representation during an identification parade. Further, an accused's right to a fair trial in terms of section 25(3)(e) requires that questions of admissibility of evidence be determined during a trial-within-a-trial.

Even if an accused has been duly warned that he/she had a right to legal representation as well as the right not to be compelled to make any admission or confession,\textsuperscript{119} by the investigating officer some two hours before pointing out to another police officer but was not again warned by the officer to whom the pointing out was made, such a pointing out to the latter would be inadmissible.\textsuperscript{120} In the same judgment it was held that it is insufficient to advise an accused of his rights only once at the outset, \textit{eg} on his arrest. It is, however, his/her constitutional prerogative that these rights are to be explained again at every further step in the investigatory process. He/she is, therefore, entitled to be informed of the existence of these rights at every pre-trial procedure where the state seeks the accused's cooperation during the investigatory process.

Claassen J agrees with the following statement by Froneman J in \textit{S v Melani}:\textsuperscript{121}

\begin{quote}
The purpose of the right to counsel and its corollary to be informed of that right (embodied in s 25(1)(c)) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Section 25(2) and 25(3) of the (interim) Constitution make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal process.
\end{quote}

One can only agree whole-heartedly with these sentiments. The above requirements will not be unduly formalistic as it will apply only in regard to a limited number of situations, such as pointings out, warning statements, confessions and identification parades.\textsuperscript{122}

Claassen J also found that evidence obtained unfairly or unconstitutionally is not subject to admission as evidence under a judicial discretion, but is to be interpreted and applied in terms of the constitution itself.\textsuperscript{123}

\textsuperscript{117}\textit{S v Agnew} 1996 (2) SACR 535 (C).
\textsuperscript{118}1996 (2) SACR 187 (C).
\textsuperscript{119}See s 25(2)(c) of the Interim Constitution.
\textsuperscript{120}\textit{S v Mathebula} 1997 (1) SACR 10 (W).
\textsuperscript{121}N 112 above at 348 i–349 a. See \textit{S v Mathebula} n 120 above at 18 d–e.
\textsuperscript{122}\textit{S v Mathebula} n 120 above at 19.
\textsuperscript{123}\textit{Id} at 22. See, however, the text against footnote 89 infra.
The 1996 Constitution
The provisions of the Interim and 1996 Constitutions dealing with legal representation are basically concordant. The only real difference is that while under the Interim Constitution the accused had to be informed promptly of his/her right to consult with a legal practitioner, and merely to be informed (promptly omitted) of his/her right to be represented by a legal practitioner at his trial,124 under the 1996 Constitution he/she must be informed of all these rights promptly.125

A new sub-section has also been inserted in the 1996 Constitution, to the effect that "evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."126 This means that a court has a discretion to exclude improperly obtained evidence. However, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if its admission would render a trial unfair or otherwise be detrimental to the administration of justice.127

The Criminal Procedure Amendment Act 86 of 1996
As has been indicated,128 section 73 of the Criminal Procedure Act 51 of 1977 has been amended by the insertion of a new subsection 73(2A–C).

The provisions of the amending section 2 should be read with the provisions of the 1996 Constitution. In terms of new 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'.

(2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.129

(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

124See sections 25(1)(c) and 25(3)(e). This, to my mind, would also apply to the police and would therefore, nullify S v Januarie n 116 above, where it was decided that there was no duty on the police at the arrest of a person to inform him of his right to a legal representative. See, however, section 73 (2A) of the Criminal Procedure Amendment Act 86 of 1996 and the text thereof infra ?.
125See ss 35(2)(b)&(c) and 35(3)(f)&(g).
126Section 35(5) of the constitution.
127S v M 2002 (2) SACR 411 (SCA).
128See the text between footnotes 22 and 23.
129Cf note 46 supra.
the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), 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. The criterion 'substantial' also appears in section 35(3)(g) of the constitution and will be discussed infra. The advantage of this procedure is that it gives a court firm control over the accused who procrastinates in briefing a lawyer in circumstances where legal representation is in principle deemed necessary to secure a fair trial. In terms of section 73(2C), the court may also order that the costs of such legal representation be recovered from the accused. Section 35(3)(g) provides explicitly that a lawyer assigned to an accused is at state expense. The new section 73(2C) of the Criminal Procedure Act appears to be inconsistent with this provision. If an accused refuses or fails to appoint a legal adviser of choice within a reasonable time, and proceeding without a lawyer would in the opinion of the court result in substantial injustice, the court may, subject to the Legal Aid Act, order that a lawyer be assigned to the accused at state expense. However, the first proviso to the subsection states that 'the court may order that the costs of such representation be recovered from the accused'. The import of this provision is not clear. First, if an accused is able to afford legal representation and does not exercise the right diligently, he/she may be deemed to have waived the right. In such a situation no substantial injustice can result because the accused has opted to proceed pro se. Second, if the assignment of a lawyer is made because substantial injustice would otherwise result, and such assignment is to be made in terms of the Legal Aid Act, then an accused’s indigence is a condition. In such a case, it would be inconsistent with section 35(3)(g) to burden the accused with a cost order which he/she by definition cannot afford.

Right to legal representation where substantial injustice would otherwise result

In *S v Vermaas* the Constitutional Court indicated in an *obiter dictum* that the criteria set out in *S v Kanyile* had to be considered to determine whether 'substantial injustice' would result from a refusal to provide an unrepresented accused with legal representation. The *Kanyile* criteria are well known. They focus on the personal make-up of the accused, the seriousness of the charge and the relative complexity or simplicity of the case. This approach was also adopted by the High Court in *Legal Aid Board v Msila*.

130 Cf the final proviso in s 73(2C): 'the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence.' In *S v Nkwanyana* 1990 4 SA 735 (A) 738 E Nestadt JA held that an accused has a 'fundamental right to represent himself'.


132 I could do no better than to quote verbatim from Steytler n 32 above at 314.

133 1995 3 SA 292 (CC).
The right to legal representation

where the court held:

As the learned judge pointed out, he had not had the opportunity of seeing the applicant; he did not know the circumstances or particulars of the trial, its complexity or simplicity. 134

The questions arising as to an accused person's entitlement 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/her legal representation, in which event he/she would or could appoint his/her own legal practitioner? If not, will substantial injustice otherwise result if he/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/her ability to represent him/herself. An affirmative answer to both the above question would, in terms of section 25(3)(e), entitle the applicant as of right to legal representation at state expense.

An accused is to be advised at the commencement of the trial of the severity of a mandatory sentence upon conviction (in this case a sentence of life imprisonment), and to be encouraged to exercise the right to legal representation at state expense in terms of section 35(3)(g) of the constitution. Failure to do so will have the effect that the proceedings were not in accordance with justice and must be set aside. 135 Where an accused facing a serious charge, elects to terminate the mandate of the legal representative, the magistrate should ask why he/she wishes to appear in person, and if it appears that the accused is under some or other misunderstanding, this must be corrected. 136

The fact that imprisonment may be imposed in the event of a conviction, is but one of the factors which should be considered in coming to the decision that substantial injustice would or would not occur if the trial proceeded in the absence of legal representation. The words 'where substantial injustice would otherwise result' have obviously been carefully chosen to convey a rather vague and elastic concept, to which it is the task of the courts to give more precise content in the light of matters that come before them. 137

Effective assistance by counsel

The right to legal representation conferred by section 73 of the Criminal Procedure Act, is now also entrenched in the Bill of Rights in section 35(2)(c) and 35(3)(g). The effect of the entrenchment of this right in the Bill of Rights may, as has happened in the United States, possibly be that a detained or accused person now has the right to effective or competent legal representation. Should an attorney be approached by a person and it appears from the consultation that the person has been prejudiced as a result of being

1341997 (2) BCLR 229(E) at 240 G-H.
135S v Mbambo 1999 (2) SACR 421 (WLD).
136S v Manale 2000 (2) SACR 666 (NCD).
137Mgcina v Regional Magistrate 1997 (2) SACR 711 (WLD).
represented by an incompetent legal representative, one may perhaps consider the possibility of taking the matter on review and of arguing that our Constitution should be interpreted in a similar way to that of the United States. But once an accused is represented by a legal representative, it is presumed that the defence has the necessary legal expertise to look after the interests of the accused. If the legal representative is inexperienced, little if any allowance is made for such inexperience, and he/she is simply presumed to be on an equal footing with the representative of the state. This means that inexperienced legal representatives must take special care to prevent their inexperience from prejudicing their client.  

If a legal representative is assigned by the state, the accused has little choice as to who the counsel should be. But the constitutional right to counsel must be real and not illusory and the accused has, in principle, the right to proper effective or competent defence. Whether the defence is so incompetent that it renders the trial unfair, is a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the accused. The assessment must be objective, usually, if not invariably, without benefit of hindsight. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting a case is that of counsel who has to make decisions, often with little time to reflect.

The idea of being represented by a legal adviser cannot simply mean having somebody standing next to you to speak on your behalf. Representation entails that the legal adviser acts in the client's best interests, represents the client, says everything that needs to be said in the client's favour, and introduces such evidence as is justified by circumstances to put the best case possible before the court in the client's defence. The conviction and sentence were therefore set aside where a defence attorney failed to consult with and properly represent his client as the latter had not had a fair trial.

Section 35(3)(g) of the constitution embraces the right to legal representation by a person who has placed him/herself in a position to present the client's case as instructed. The failure to place him/herself in such a position obviously defeats the purpose of section 35(3) of the constitution — section 35(3)(g) in particular. In *S v Charles* the defence attorney also did not properly consult, if at all, with the appellant in preparation for trial. The consequences of his conduct were obvious from the record, and are unacceptable by any standards of legal practice. 'Suffice to say that it adversely affect[ed] the appellant's right to a fair trial.' Therefore, unless counsel properly represents his client, the right to a fair trial and the right to a fair appeal may be negated.

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138 *Criminal Court Practice 2003 Practice Notes* 15.

139 *S v Halgryn* 2002 (2) SACR 211 (SCA).

140 *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) 164 (SCA).

141 2002 (2) SACR 492.

142 497 e-g of the report.

143 *S v Ntuli* 2003 (1) SACR 613 (WLD).
A violation of the right to effective counsel may, however, not be easily established. The present strict approach adopted by South African courts in assessing when poor representation by defence counsel constitutes an irregularity, accords with the jurisprudence of the European Court of Human Rights and the United States Supreme Court. In *Strickland v Washington* the latter court noted that ineffectiveness is assessed on whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Being alive to the difficulties of making an evaluation of counsel's conduct after the event, a court, in reviewing counsel's conduct, should be 'highly deferential.' To avoid having to second-guess how counsel should have best conducted a defence, and to prevent the proliferation of litigation on this ground, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' The result is that a claim of ineffective counsel is not readily accepted.

**The right to self-representation**

The right to self-representation is explicitly recognised in international instruments, foreign case law, and South African common law. This right is important for at least three reasons. It recognises the autonomy and dignity of the individual. It further prevents the state from silencing an accused in court, by appointing lawyers of its choice to present an accused's defence against the latter's wishes. Finally, a lawyer acting independently of an accused's instructions, may do so to the latter's prejudice. Section 35(3)(f) of the constitution implicitly recognises the right to self-representation; the right to choose a lawyer perforce entails the right to do without the services of one.

**Concluding remarks**

Whether it is possible or feasible for the state to assign a legal practitioner at state expense to everyone who is detained and also at his/her trial if substantial injustice would otherwise result, is a completely different matter and is not discussed here. A few remarks will suffice.

In 1972 Justice Powell stated in respect of the United States: 'It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel.' However, in the opinion of the court, delivered by

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144 For the following paragraph I give full recognition to Steytler n 32 at 306–7.
145 S v Bennett 1994 (1) SACR 392(C).
147 At 686.
148 At 689.
149 At 689.
150 *Dressler* 1991 385.
151 *Verbatim* quote from Steytler n 32 above at 341.
152 See sections 35(2)(c) and 35(3)(g).
Justice Douglas, it was concluded that the majority did 'not share Mr Justice Powell's doubt that the Nation's legal resources are sufficient to implement the rule we announce today'.

Without even mentioning figures, it can be stated categorically that more money should be made available by the state for legal aid. As early as 1983 the Hoexter Commission stated that

(t)here should be set aside as a goal the provision of legal representation to accused persons of limited means through a comprehensive legal aid scheme available to accused in all serious criminal cases in all courts, and not merely in Supreme Court trials involving capital offences.

The appointment of counsel for indigent accused was justified by Black J in *Gideon v Wainwright* as follows:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

In 1904 Lord de Villiers said: 'It is the primary aim of the court to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut.' Eighty years later, Leon ADJP said with equal force 'that the first and most sacred duty of the Court ... is to administer justice to those who seek it, high and low, rich and poor, Black and White; to attempt to do justice between man and man and State'.

Finally, I can do no better than to quote from the report of the *Hoexter Commission*:

Any state that prides itself on a democratic way of life should not regard legal representation of parties before its court as pure luxury or a fortuitous benefaction of the Government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modern state is access to its courts for all its inhabitants ... For any person who has to appear in court without counsel ... the excellence of his country's judicial system is small comfort and any claim by the state that the courts are open to all has a hollow ring.

Utopia would be if all accused in criminal matters could have legal representation. This is, however, at present impossible and impracticable. The ideal and the goal to be striven for should be that all accused in criminal

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154 *Ibid* at 37 n 7. In this note the court elaborated on the number of counsel in the USA and the number of new admissions to the bar each year.
156 372 US 335 (1963) at 344.
157 *Zgili v McCleod* (1904) 21 SC 150 152.
158 Hurley v Minister of Law and Order 1985 4 SA 709 (D) at 715 G.
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matters should be defended as far as possible. The practical problems, which are not discussed in this article, are admitted, but that does not detract from the ideal situation. While we can argue about how to reach Utopia, all possible avenues to broaden the scope of legal representation for the indigent should be investigated.

\textsuperscript{160}Sec, eg Steytler n 1 above at 14–24.

\textsuperscript{161}P M Bekker 'The undefended accused/defendant: a brief overview of the development of the American, American Indian and South African positions' 1991 CILSA 151 at 188.