

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**THE CONSTITUTIONAL PROTECTION OF SUSPECTS IN CRIMINAL CASES**

A research-paper submitted in partial fulfilment of the requirements for the degree of Master of Law (LLM)

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## DECLARATION

I declare that 'The Constitutional Protection of Suspects in Criminal Cases' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Darren Rudolph



## Keywords

Suspects

Rights

Investigation

Policing

Constitution

Equality

Fair trial

Evidence

Admissibility



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## Abbreviations and Acronyms

ACHPR	African Charter on Human and People's Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
SAPS	South African Police Service
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America



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## **CHAPTER 1**

### **INTRODUCTION AND OVERVIEW OF THE SOUTH AFRICAN LEGAL FRAMEWORK APPLICABLE TO SUSPECTS IN CRIMINAL CASES**

1.1	Introduction and background	1- 4
1.2	Problem Statement	5 -7
1.3	Research Question	7
1.4	Significance of Research	7 - 8
1.5	Limitations of Study	8
1.6	Methodology	8
1.7	Literature Review	8 – 16
1.8	Chapter Outline	16 – 17

## **CHAPTER 2**

### **THE RIGHT TO A FAIR TRIAL: THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK**

2.1	Introduction	18 – 19
2.2	The International Legal Framework relevant to the Right to a Fair Trial	19
2.2.1	The Universal Declaration of Human Rights	19 – 20
2.2.2	The International Covenant on Civil and Political Rights	20 – 21
2.3	The Regional Legal Framework relevant to the Right to a Fair Trial	21
2.3.1	European Convention on the Protection of Human Rights and Fundamental Freedoms	21

2.3.2	American Convention on Human Rights	22 – 24
2.3.3	African Charter on Human and People’s Rights	24 – 25
2.4	The Domestic Legal Framework Relevant to the Right to a Fair Trial	25 - 26
2.5	Conclusion	27

## **CHAPTER 3**

### **A COMPARISON BETWEEN THE LEGAL TREATMENT OF SUSPECTS IN SOUTH AFRICA, THE UNITED STATES OF AMERICA, THE UNITED KINGDOM, AND CANADA**

3.1	Introduction	28
3.2	The Rights of Suspects in South Africa	28 – 33
3.3	The Rights of Suspects in the United States of America	33 – 36
3.4	The Rights of Suspects in the United Kingdom	36 – 38
3.5	The Rights of Suspects in Canada	38 – 40
3.6	Conclusion	40 – 41

## **CHAPTER 4**

### **CONCLUSION AND RECOMMENDATIONS**

4.1	Conclusion and Recommendations	42 – 44
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# CHAPTER I

## 1. INTRODUCTION AND BACKGROUND

In South Africa, the state has a constitutional duty to protect its citizens.<sup>1</sup> If the criminal justice system fails to achieve this objective, then its credibility is at risk and the citizens' rights will be negated.<sup>2</sup>

The South African Police Services (SAPS) is the principal law enforcement agency entrusted with the duty to ensure peace and safety in the country.<sup>3</sup> However, since its formation, it has continuously been plagued by misconduct and corruption.<sup>4</sup> The police are accorded certain powers that are not available to other 'ordinary' citizens. This includes the powers to arrest suspects.<sup>5</sup> The duty to arrest presents the risk of unlawful interference with persons' right to freedom, amongst other rights. Consequently, there is a need for clear procedures and guidance to the police on how they are to interact with civilians and exercise their powers, especially during the investigation of crimes.<sup>6</sup>

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<sup>1</sup> Richard C & Masuku T, 'Tough on Crime and Strong on Human Rights: The Challenge for us all' (2009) *Law Democracy and Development Journal* at 124.

<sup>2</sup> Richard C & Masuku T, 'Tough on Crime and Strong on Human Rights: The Challenge for us all' (2009) *Law Democracy and Development Journal* at 124.

<sup>3</sup> Motsepe L, Mokwena R, Maluleke W 'A Systematic Study on South African Police Service Leadership Crisis towards Supporting Section 205(3) as the Constitutional Foundation for Public Policing' (2022) *International Journal of Social Science Research and Review* at 173.

<sup>4</sup> Bello P & Steyn J 'Students' Perceptions of the South African Police Service in Durban, South Africa: A Non-Judgmental Assessment' (2019) 11 *International Journal of Social Sciences and Humanity Studies* at 67.

<sup>5</sup> David B, K Savage, De Waal J 'A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent' (2000) 16 *South African Journal on Human Rights* at 2.

<sup>6</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 239.

Policing in South Africa has become ‘difficult, dangerous and dirty work’.<sup>7</sup> To boot, the challenges of the police are often considered in the light of an abysmal national crime rate and the failure of the police to provide services and deal with internal corruption.<sup>8</sup> The SAPS is a hierarchical organisation, where institutional dysfunction at the top appears to trickle down to the junior ranks. According to the Institute for Security Studies, ‘political loyalty’ takes preference over competence in the police service, and unsuitable individuals are appointed into leadership positions without following due process.<sup>9</sup> The SAPS have also been heavily criticised for its record on human rights violations in the execution of its duties. Some of the high profile cases of human rights violations by SAPS include the shooting of striking mineworkers at Marikana and the killing of a Mozambican taxi driver who was dragged behind a police van.<sup>10</sup> Despite these human rights abuses by SAPS, accountability is widely known to be negligible in comparison to the numerous reports of impunity.<sup>11</sup> To address the flaws in the police service, there should be political recognition that an adequately trained, high-functioning, ethical and accountable police service is required.<sup>12</sup>

In any democracy, citizens must be protected from unjustified violations of their fundamental rights by the police, as it could have an adverse impact on the personal freedom and associated fundamental rights of citizens.<sup>13</sup> In South Africa, confidence in the police to act lawfully is extremely low. In 2014, General Riah Phiyga, the then National Commissioner of Police, issued a statement in which she condemned the ‘irregular, improper, unlawful, and unacceptable conduct

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<sup>7</sup> Martin J ‘Vigilantism and State Crime in South Africa’ (2021) *Pluto Journals* at 219.

<sup>8</sup> Martin J ‘Vigilantism and State Crime in South Africa’ (2012) *Pluto Journals* at 218.

<sup>9</sup> Newham G ‘SA Police Failures Demand Urgent Reform Before It’s Too Late’ (2021) available at <https://issafrica.org/iss-today/sa-police-failures-demand-urgent-reform-before-its-too-late> (accessed 21 November 2022).

<sup>10</sup> Lukele J *An Analysis of Human Rights Training in SAPS: A Case Study* (unpublished LLM thesis, University of South Africa, 2018) at 21.

<sup>11</sup> United States Department of State, Bureau of Democracy, Human Rights and Labour, Country Reports on Human Rights Practices for 2020, South Africa 2020 Human Rights Report. <https://www.state.gov/wp-content/uploads/2021/03/SOUTH-AFRICA-2020-HUMAN-RIGHTS-REPORT.pdf> (accessed 21 November 2022).

<sup>12</sup> Newham G ‘SA Police Failures Demand Urgent Reform Before It’s Too Late’ (2021) available at <https://issafrica.org/iss-today/sa-police-failures-demand-urgent-reform-before-its-too-late> (accessed 21 November 2022).

<sup>13</sup> Basdeo V, ‘The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure’ (2009) 12 *Potchefstroom Electronic Law Journal* at 307.



by members' that resulted in the SAPS facing multiple civil claims, and urged police officials to act in accordance with the law in instances of arresting and detaining civilians.<sup>14</sup>

Section 35 of the Constitution of the Republic of South Africa (the Constitution)<sup>15</sup> provides for the fair trial rights of: arrested; detained; and accused persons. Their entitlement to certain protections, though sometimes controversial, are in line with South Africa's international obligations. Any unjustifiable infringement of their fair trial rights can result in a conviction or sentence of an accused being set aside on appeal or review.<sup>16</sup> Section 35, however, does not make express provision for the rights of those suspected of committing a crime.<sup>17</sup> This is despite that most people are first engaged by the police while they are suspects but before they are arrested and charged. This can result in the police obtaining evidence from suspects, which they may not have had access to if they had been classified as accused. Such evidence could then be used against them at their trial should they be charged. The police do not have an explicit constitutional duty to inform suspects of any rights they might enjoy during criminal investigations.<sup>18</sup> This omission on the face of it means that suspects will not be allowed to rely on the protections envisaged in section 35. Such rights were specifically included in the Constitution to ensure that the trial of every accused is conducted in line with the values guaranteed in the Bill of Rights.<sup>19</sup>

The issue of the constitutional protection of suspects in criminal cases has been under scrutiny in many divisions of the High Court. Judgments on the issue are, however, conflicting. Some divisions have adopted the view that suspects are not entitled to constitutional protection, whilst others have adopted a seemingly more purposive and inclusive approach to section 35 and found that such constitutional protection does apply to suspects in criminal cases.

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<sup>14</sup> Dereymaeker G 'Making Sense of the Numbers' (2015) 54 *SA Crime Quarterly* at 35.

<sup>15</sup> Act 108 of 1996.

<sup>16</sup> Gardiner F 'The South African System of Automatic Review in Criminal Cases' (1928) 44 *The Law Quarterly Review* at 78.

<sup>17</sup> *S v Sebejan and Others* 1997 (8) BCLR 1086 (T) 57.

<sup>18</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 240.

<sup>19</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 240.

Aside from a lack of consensus on the issue of constitutional protection of suspects, there appears to be a further divide on who exactly is deemed to be a suspect for purposes of criminal investigations. The different divisions of the High Court have also handed down conflicting judgments in this regard. For example, the Court in *Sebejan*<sup>20</sup> held that the terms ‘suspect’ and ‘suspicion’ are vague and difficult to define and by considering the dictionary meanings of these words and decided cases, concluded that ‘a suspicion is an apprehension without clear proof’.<sup>21</sup> Furthermore, the Court by way of *obiter* stated that our courts have usually considered the meaning of the word ‘suspicion’ in the context of the phrase ‘reasonable suspicion’ and that ‘suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking.’<sup>22</sup> Suspicion usually arises shortly before or soon after an investigation started of which the obtaining of *prima facie* proof is the end. In concluding its analysis of who is a suspect, the Court held that ‘it would appear that a suspect is one about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved.’<sup>23</sup> There is merit to the Court’s understanding of ‘suspect’ insofar as it states that it is someone about whom there is some apprehension that she may be implicated in the offence under investigation. It might, however, be deemed unnecessary for the Court to add that it may also be someone whose version of events is mistrusted or disbelieved. Arguably, if the police deemed it necessary to obtain a version from the person in the first place, it indicates a suspicion, so whether they mistrust or disbelieve that version is irrelevant to his status as a suspect.

The finding in *Sebejan* regarding when a person becomes a suspect was rejected in *S v Ndlovu*.<sup>24</sup> In *Ndlovu*, the Court held that the presence of ‘some apprehension’ that someone had committed an offence, as held in *Sebejan*, set the standard too low. The Court indicated that more was required and held that there must be some offence under investigation before anybody can be a suspect in relation thereto. While the Court in *Ndlovu*, merely stated the obvious and did not provide guidance on who may be regarded a suspect, this contradiction in the judgments leaves suspects in a vulnerable position. The protection they will receive (if any) in criminal cases would ultimately

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<sup>20</sup> 1997 (1) SACR 626 (W) at 33.

<sup>21</sup> 1997 (1) SACR 626 (W) at 33.

<sup>22</sup> 1997 (1) SACR 626 (W) at 33.

<sup>23</sup> 1997 (1) SACR 626 (W) at 33.

<sup>24</sup> 1997 (12) BCLR 1785 (N).

depend on the division in which they find themselves. This may also give rise to unequal treatment under the law and ultimately to injustice.

## 2. PROBLEM STATEMENT

Section 35 (5) of the Constitution provides 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 be otherwise detrimental to the administration of justice.’<sup>25</sup> Fair trial rights, enumerated in section 35 of the Constitution, are expressly accorded to arrested, detained and accused persons, and any evidence obtained from these categories of individuals, in violation of the fair trial rights could be rejected at trial.<sup>26</sup> The same protection is not extended to suspects as section 35 makes no express provision for them.<sup>27</sup> This is despite a noticeable pattern of the police collecting evidence from suspects without informing them of their rights, evident from the cases discussed in this chapter. Police have interpreted the lack of explicit reference to suspects in section 35, as relieving them of any constitutional duty to inform suspects of the rights in section 35.<sup>28</sup> As such, the police could argue that suspects are not entitled to the rights in section 35 and therefore evidence obtained from them should be admitted at trial. Given the omission of the word ‘suspect’ from section 35, and what the police have interpreted this omission to mean, it must be questioned what legal protection suspects enjoy during criminal investigations. The protection of section 35 (5) is not restricted to the bearers of fair trial rights. This means that suspects can still rely on this provision to exclude evidence obtained in contravention of any other right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.<sup>29</sup> This appears to be overlooked generally.

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<sup>25</sup> Act 108 of 1996.

<sup>26</sup> *S v Tandwa* 2015 (2) ALL SA 280 (SCA).

<sup>27</sup> *S v Makhala & Another v The State* (438/2020) [2021] ZASCA 19 (18 February 2022) at 30.

<sup>28</sup> Ally D, ‘The need for clarity on whether ‘suspects’ may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis’ (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 240.

<sup>29</sup> Mujuzi J, ‘Evidence Obtained Through Violating the Right to Freedom from Torture and other Cruel, Inhuman or Degrading Treatment in South Africa’ (2015) 15 *African Human Rights Law Journal* at 90.

The right to a fair trial is accorded to every accused person. This right is entrenched in section 35(3) of the Constitution and relates to other more specific rights.<sup>30</sup> For the present discussion the following rights are of special importance: the right to legal representation; the right to be informed of the right to legal representation; the right to remain silent; the right not to be compelled to give self-incriminating evidence; and, prior to trial, the right not to be compelled to make any confession or admission that could be used in evidence against the accused.<sup>31</sup>

Under South African common law, and after the judgment of *Ex Parte Minister of Justice in re R v Matemba*,<sup>32</sup> courts were, save for pointing out, confessions and admissions, not particularly concerned with the way in which the police obtained evidence. The reasoning behind the exceptions was to avoid a lack of voluntariness and the issue of reliability. The general rule applied was whether the evidence obtained was relevant to the issues. If the court found that it was relevant, then such evidence would generally be admitted. In the case of *R v Kuruman Son of Kaniu*<sup>33</sup>, Lord Goddard alluded to a judicial discretion to allow evidence if the strict rules of admissibility would operate unfairly against the accused, and there was authority recognising a judicial discretion to exclude improperly obtained evidence where its probative value was exceeded by its prejudicial effect.<sup>34</sup> With the inclusion of section 35(5) into the Final Constitution, this position changed drastically.<sup>35</sup>

Section 35(5) of the Constitution moved away from the discretionary approach to unconstitutionally obtained evidence that was preferred prior to the advent of the Final Constitution. Zeffert and Paizes argue that the language of section 35(5) is peremptory and would lay down a rule of exclusion as follows: Evidence obtained in the proscribed manner must be excluded if either of the two conditions is satisfied and that there would seem to be no basis for a

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<sup>30</sup> Van der Walt T 'The Right to Fair Criminal Trial: A South African Perspective' (2010) 7 *US-China Law Review* at 29.

<sup>31</sup> De Vos W, 'Illegally or Unconstitutionally Obtained Evidence: A South African Perspective' (2011) *Journal of South African Law* (2) at 274-275.

<sup>32</sup> 1941 AD 75.

<sup>33</sup> 1955 AC 197.

<sup>34</sup> *S v Forbes and Another* 1970 (2) SA 594 (C).

<sup>35</sup> Ally D 'Determining the Effect (The Social Costs) of Exclusion under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?' (2012) 15 *Potchefstroom Electronic Law Journal* at 1.

court to find that such evidence should, in the exercise of its discretion, be received.<sup>36</sup> The problem for suspects arises when they are later accused persons standing trial and wish to contend that the evidence obtained from them, while they were still suspects, were obtained in violation of their fair trial rights in section 35. This is so as section 35 does not mention suspects. This issue is highlighted by the conflicting approaches amongst our courts as to whether evidence obtained from a suspect should be excluded or not during a trial. We thus must ask in our constitutional democracy, when does a person become a suspect for the purposes of a criminal investigation and what are the limitations and entitlements of the police insofar as the fulfilment of their duty to investigate is concerned.

As the position on the protection of suspects in criminal investigations is still unsettled, there is one school of thought which holds that a suspect does not enjoy the protection of section 35 and another in terms of which a court ought to adopt a purposive interpretation of section 35 that extends the protection to suspects.<sup>37</sup> At present, there is no clarity and consistency in South African jurisprudence on the rights accorded to suspects in criminal investigations.

### 3. RESEARCH QUESTIONS

The omission of suspects from section 35 raises the following questions:

- i. Why should a ‘suspect’ for purposes of criminal investigations have protection under the law?
- ii. How can suspects find protection under the law in the light of the supreme Constitution?

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<sup>36</sup> Zeffert DT & Paizes AP, ‘The South African Law of Evidence’ (2017) at 799.

<sup>37</sup> Ally D, ‘The need for clarity on whether ‘suspects’ may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis’ (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 240.

## 4. SIGNIFICANCE OF THE RESEARCH

The research focuses on the rights of suspects during criminal investigations and the source of those rights. Though much research has been conducted on the rights of arrested, detained and accused persons, the research for this thesis is significant due to its exclusive focus on suspects as there is presently not much in-depth, documented legal research on this issue.

## 5. LIMITATIONS OF STUDY

The rights and treatment of arrested, detained and accused persons are referred to in this thesis, but the primary focus is on suspects who are not expressly mentioned as part of the groups of individuals who enjoy the protection of section 35 of the Constitution.

## 6. METHODOLOGY

The topic benefitted from desktop research. The primary sources of research are the constitutional provisions relevant to the question, common law principles pertinent to the issue of fair trials rights and international law. Additionally, interpretative case law (both domestic and international), the Judges Rules (1931) and academic literature on the issue of fair trial rights and the rights of suspects by local and international authors are analysed.

## 7. LITERATURE REVIEW

The right to a fair trial was codified in international legal texts after World War II.<sup>38</sup> To understand the origin of and the need for the protection of suspects during criminal investigations, it is important to consider it within the broader context of a right to a fair trial.

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<sup>38</sup> Robinson P 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley Journal of International Law at 1.

Every person suspected and accused of committing a crime has the right to have their guilt (or innocence) determined by an impartial and competent court or tribunal.<sup>39</sup> The right to a fair trial also includes the right to have one's fundamental human rights observed from the inception of a criminal investigation, during the trial, as well as at the conclusion of the trial. When facing criminal prosecution, an individual must contend with the state's overwhelming power. Due to this power imbalance, the need for equal access to justice and a fair, humane, and just criminal justice system is crucial.<sup>40</sup> This power imbalance is even greater during criminal investigations where the police are interacting with an unrepresented suspect who may be unaware of his status as a suspect and not apprised of any informational warnings.

The right to equality before the law and equal protection and benefit of the law is entrenched in the Bill of Rights. This also applies to the criminal justice system. In general, criminal trials appear to conform to the norm of equal treatment. However, there are significant shortcomings in securing equal treatment during the pre-trial phase especially regarding criminal investigations. Many difficulties regarding pre-trial equality results, in part, from a lack of clarity on the nature of prosecuting powers and the state organ that should be responsible for leading criminal investigations.<sup>41</sup> Whereas section 179(2) of the Constitution confers the power to institute criminal proceedings and to carry out all necessary functions incidental thereto upon the National Prosecuting Authority, section 205 (3) does not clearly delineate administrative policing powers to secure public safety and order from investigations that form part of criminal procedure.<sup>42</sup>

At an international level, the importance of the pre-trial phase of criminal proceedings have gained increased attention over the last two decades.<sup>43</sup> The International Criminal Court Statute (ICC Statute), for example, at article 55 deals with the rights of suspects during the pre-trial phase in that it enumerates rights of persons during investigations. These rights include the right not to be

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<sup>39</sup> Robinson P 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 *Berkeley Journal of International Law* at 4.

<sup>40</sup> Kemp V & Watkins D 'Exploring Children's Understanding of the Legal Rights of Suspects in England and Wales' (2021) *Youth Justice Journal* at 13.

<sup>41</sup> Wolf L 'Pre- and Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' (2011) 14 *PER/PELJ* at 58.

<sup>42</sup> Wolf L 'Pre- and Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' (2011) 14 *PER/PELJ* at 58.

<sup>43</sup> Safferling C 'The Rights and Interests of the Defence in the Pre-Trial Phase' (2011) 9 *Journal of International Criminal Justice* at 651.

compelled to incriminate oneself; the right not to be subjected to any form of coercion, duress, threat or torture, the right to have the assistance of an interpreter and translator, the right not to be subjected to arbitrary arrest and to be informed that there are grounds to believe that one has committed an ICC crime. Despite this, according to Safferling, these rights continue to be threatened in many ways such as by unlawful surveillance of tele-communication, conducting of DNA-tests and unlawful searches.<sup>44</sup>

Common and civil law systems differ on the idea of who an accused is and how such a person is different from a suspect. In the continental law systems, a person is deemed a suspect once charges are filed against them. It is only when the prosecutor files an indictment against such a person, and that indictment is subsequently accepted by a court, that the person becomes an accused. However, in the common law system, the difference lies at the point at which notice is given to the person of the charge against them. Until that point, the person is labelled a 'suspect', and thereafter they become an accused.<sup>45</sup> In other words, the moment the suspect is given notice of the charge against him, he becomes an accused. It should be noted that the common law system is less clear on the issue, and it refrains from engaging closely in theoretical discussions on the precise point at which one becomes a suspect or an accused.<sup>46</sup> This is problematic.

At an international level, statutes of both the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) and the International Criminal Tribunal for Rwanda (ICTR Statute) draw a distinction between the concepts 'suspect'<sup>47</sup> and 'accused'.<sup>48</sup> Additionally, the precise point of the change in status from suspect to accused is contained in Rule 47 (H) (ii) of the ICTY/R Rules of Procedure and Evidence.<sup>49</sup> The rules dictate that '[u]pon confirmation of any or all counts in the indictment ... the suspect shall have the status of an accused'.

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<sup>44</sup> Safferling C 'The Rights and Interests of the Defence in the Pre-Trial Phase' (2011) 9 *Journal of International Criminal Justice* at 651.

<sup>45</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.

<sup>46</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.

<sup>47</sup> Article 18 of the Rules of Procedure and Evidence of the ICTY Statute and Article 17 of the ICTR Statute.

<sup>48</sup> Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.

<sup>49</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.



The term ‘accused’ is mentioned in article 61 of The Rome Statute.<sup>50</sup> The article deals with the amendment to the confirmation of charges, but it does not define the term, nor does it state at which point a person becomes an accused. For this reason, one can assume that in line with the procedures of the ICC, the common law approach to the notion of an accused has been adopted. This is so as prior to the filing of an indictment with the court, but somewhere around the moment of confirmation of charges, a person may become an accused.<sup>51</sup> The Rules of Procedure and Evidence of the ICC confirm this approach by stating in Rule 76(3) that an accused may take an active part in the pre-trial disclosure of evidence. It is worth noting that the Rome Statute does not make any reference to ‘suspects’ nor does the Rules of Procedure and Evidence of the ICC.<sup>52</sup> Rather, multiple articles of the Rome Statute mention the idea of the ‘person during investigation’, such as article 55 which provides for the rights of persons during an investigation.

Despite the international position stated above, it is important to establish at what point the suspect becomes an accused mainly because specific rights are accorded only to an accused and not a suspect. As such, an accused might expect an elevated level of protection in comparison to what he expected when he was a suspect. The distinction in the protection of suspects and accused are significant and the lack of express provisions addressing this issue in the law of international courts and tribunals provides too much room for interpretation and could lead to the unequal treatment of accused persons in criminal trials.<sup>53</sup>

A fundamental principle in criminal proceedings is the right to be presumed innocent. This presumption has long been deemed as a crucial principle in the protection of accused persons against wrongful convictions. This principle encapsulates the notion that an accused person has the right to be deemed innocent until he has been proven guilty of a criminal offence.<sup>54</sup> This right is expressly provided for in both article 11 (1) of the Universal Declaration of Human Rights

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<sup>50</sup> United Nations General Assembly, Rome Statute of the ICC (adopted on 17 July 1998, last amended 2010).

<sup>51</sup> Kremens K ‘The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard’ (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.

<sup>52</sup> Kremens K ‘The Protection of the Accused in International Criminal Law According to the Human Right Law Standard’ (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.

<sup>53</sup> Kremens K ‘The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard’ (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 31.

<sup>54</sup> Tadros V & Tierney S ‘The Presumption of Innocence and the Human Rights Act’ (2004) 67 *The Modern Law Review* at 402.

(UDHR)<sup>55</sup> which provides that '[e]veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence' and article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR)<sup>56</sup> which provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. The right is also recognised in the domestic laws of various states.<sup>57</sup>

The application of the right to be presumed innocent at the pre-trial stage, remains a continuing discussion in literature. International law does not make provision for a specific point at which the protection of an accused begins, but it does provide for the point at which the protection stops, being upon conviction of the accused. This same approach is adopted by the Statutes of *ad hoc* tribunals and the ICC. Further, the regulations of the ICTY, ICTR and the ICC draw a distinction between the notion of accused and suspects and as such an argument can be made that a literal interpretation of those articles would lead to the conclusion that the accused is presumed innocent only during the trial stage. Many authors agree that the presumption of innocence should apply not only to accused persons, but also to suspects until their guilt is proven.<sup>58</sup>

Zappalà opines that it would not make sense for a presiding officer reviewing the charges to presume that a suspect is guilty. He argues further that if the presumption of innocence were not applicable prior to the charges being confirmed, then irreparable prejudice would be done to the rights of the individual before confirmation occurs. Therefore, any protection thereafter would not be effective.<sup>59</sup>

The Rome Statute is unambiguous in its position, as per article 66 (1) thereof, the presumption of innocence does not only extend to accused persons but to 'everyone', meaning that even suspects are to enjoy protection. As such, international criminal law provides even more protection to

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<sup>55</sup> United Nations General Assembly, Universal Declaration of Human Rights (adopted on 10 December 1948).

<sup>56</sup> United Nations General Assembly, International Covenant on Civil and Political Rights (adopted on 19 December 1996).

<sup>57</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 36.

<sup>58</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 37.

<sup>59</sup> Zappalà S Human Rights in International Criminal Proceedings (2003) at 91.

suspects than human rights law as it accords suspects the same protection along with every other person engaged in criminal proceedings.<sup>60</sup>

The right to legal representation is another important right to give effect to the more general right to a fair trial. Article 11.1 of the UDHR and Article 14.1 of the ICCPR recognise fairness and equality before independent and impartial courts and have been repeatedly interpreted by the United Nations Human Rights Council in its General Comment 32 to include the right to legal assistance to ensure the accused's right to procedural fairness.<sup>61</sup> Interestingly, the regulations to the ICCPR make reference to 'everyone' in the situation when the criminal charges against such a person are established. International tribunals have made the choice to provide different provisions for the accused<sup>62</sup> and for a suspect.<sup>63</sup> Interestingly, the right to legal representation for suspects is limited to circumstances where they are being questioned. Nonetheless, it appears to be unreasonable to confine the protections of suspects to only instances of interrogation. It can be argued that if an accused is to be accorded a fair trial, then he should also be accorded full protection during the pre-trial stage when he is a suspect.<sup>64</sup>

The right to remain silent is another important prerequisite to the right to a fair trial. This right is also often referred to as the right against self-incrimination. Article 14 (3) (g) of the ICCPR frames this right as follows: 'the accused has the right not to be compelled to testify against himself or to confess guilt'. The ICC refers to the right to remain silent by drawing a distinction between the rights of those questioned during an investigation (Article 55 (1) (a) of the Rome Statute) and those accused of a crime. The ICC and its *ad hoc* tribunals went further than just acknowledging the right to remain silent by also providing that no negative consequences for the accused (along with suspects) may result from exercising this right.<sup>65</sup>

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<sup>60</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 37.

<sup>61</sup> Soy K & Hing V 'Legal Framework of the Right to Legal Representation' (2019) *Swisspeace* at 16. (accessed via JSTOR on 15 October 2022).

<sup>62</sup> Article 21 (4) (d) of the ICTY Statute and Article 20 (4) (d) of the ICTR.

<sup>63</sup> Article 18 (3) of the ICTR Statute.

<sup>64</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 42.

<sup>65</sup> Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* at 47.

According to Ally, at a regional level, instruments such as the Inter-American Convention,<sup>66</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>67</sup> the African Charter on Human and People's Rights and Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human People's Rights,<sup>68</sup> do not guarantee the right to legal representation during the criminal investigation stage.<sup>69</sup> However, he notes that both the Human Rights Committee and the European Court of Human Rights, as per its respective judgments in the case of *Murray v UK*,<sup>70</sup> have interpreted the right to a fair trial to include the right to legal representation during the pre-trial stage.<sup>71</sup> This shows that both the Human Rights Committee and the European Court of Human Rights adopted a more purposive interpretation of the regional texts despite its lack of express provision for the right to legal representation.

In South Africa, prior to the advent of the Constitution, the right to a fair trial was provided to an accused person in terms of the common law. With the adoption of the Interim Constitution<sup>72</sup>, the right to a fair trial was provided for in Chapter 3 thereof and it was subsequently entrenched in Chapter 2 of the Final Constitution (the Bill of Rights). Section 35 makes provision for the more general right to a fair trial and contains five subsections providing for various rights. It is, however, important to note that the more general right to a fair trial does not only encompass the enumerated rights in section 35(a) – (o).<sup>73</sup> In contrast, there is a dearth of statutory provisions (also judicial- precedent and literature) on the entitlement of suspects to similar protection while engaged in the criminal process.

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<sup>66</sup> Inter-American Convention (adopted on 22 November 1969).

<sup>67</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950).

<sup>68</sup> African Charter on Human and People's Rights (adopted during June 1998).

<sup>69</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 244.

<sup>70</sup> *Murray v UK* decision 28 October 1994 Series A no 300-A (decision of the Commission); *Murray v UK* decision on 8 February 1996 (decision of the European Court of Human Rights).

<sup>71</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* at 244.

<sup>72</sup> Act 200 of 1993.

<sup>73</sup> *Shaik v S* 2007 (12) BCLR 1360 (CC) at 1363-H.

As alluded to above, a closer inspection of the difference in treatment between suspects and arrested, detained, and accused persons in the South African criminal justice system can be attributed to a difference in the interpretation of section 35 of the Constitution. The literal interpretation of section 35 may be criticised as being in violation of section 39 of the Constitution (i.e., the interpretation clause) which directs that ‘when any legislation is interpreted, the result must be a construction that promotes the spirit, purport and object of the Bill of Rights.’

In terms of the notion of concretisation, the process of formulating laws is not finalised upon promulgation of those laws. Also required is the ‘harmonisation of abstract legislative texts with the facts of the case through interpretational methods, within the framework of the Constitution or relevant law.’<sup>74</sup> The Constitution requires that courts make value judgments when interpreting and applying the law, and as the guardians of the values which underpin the Constitution, courts are mandated to ensure the enforcement and protection of the values encapsulated in the Constitution. As such, there has been a significant shift from ‘a literal or textual methodology to a more value-based or a teleological mode of interpretation.’<sup>75</sup> This is a clear distinction from the preference for a literal or textual approach that was adopted before the advent of the Constitution under parliament sovereignty. In the context of the present discussion on the rights of suspects, this would mean a shift from a literal interpretation of section 35 of the Constitution, to a more value based one.

The method of interpreting the Bill of Rights has been established in several judgments of the Constitutional Court and the Supreme Court of Appeal. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd*, the Constitutional Court held that the language of the constitutional text must be interpreted generously, purposively, and in context.<sup>76</sup> Section 39 prescribes that when interpreting the provisions of the Bill of Rights, it is compulsory that consideration must be had for international law. As a signatory to the international legal instruments discussed above, South Africa is bound to the standards set by those instruments.

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<sup>74</sup> Singh A & Bhero M ‘Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of s39 (2) of the Constitution’ (2016) 19 *PER/PELJ* at 3.

<sup>75</sup> Singh A & Bhero M ‘Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of s39 (2) of the Constitution’ (2016) 19 *PER/PELJ* at 3.

<sup>76</sup> 2011 (1) SA 327 (CC).

The Constitutional Court in *S v Makwanyane* held that when interpreting the Bill of Rights, both binding and non-binding international law are appropriate tools of interpretation. The Court explained that the decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court on Human Rights and the European Court of Human Rights could be helpful.<sup>77</sup> Similarly, in *Glenister v President of the RSA*, the Constitutional Court explained that the Constitution reveals a clear determination to ensure that the Constitution and legislation are interpreted in a manner that complies with international law.<sup>78</sup>

Considering section 39, the guidance offered by the Constitutional Court and given the approach to the rights of suspects at international law (as set out above), it may thus be contended that there is a need to analyse how a more purposive interpretation that is in line with international law could ensure better protection for suspects during criminal investigations.

## 8. CHAPTER OUTLINE

This dissertation comprises the following chapters:

### **Chapter 1**

This chapter introduces the research question and the framework which is utilised to engage the question. It also includes a background to the study, literature review, methodology and limitations of the study, as well as an overview of the study structure.

### **Chapter 2**

This chapter discusses the general right to a fair trial at international and domestic law. As a contextual discussion on the rights of suspects cannot be held without a discussion of the greater right to a fair trial, chapter 2 discusses a general right to a fair trial, including the origin and the

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<sup>77</sup> 1995 (3) SA 391 (CC) at 35.

<sup>78</sup> 2011 (7) BCLR 651 (CC).

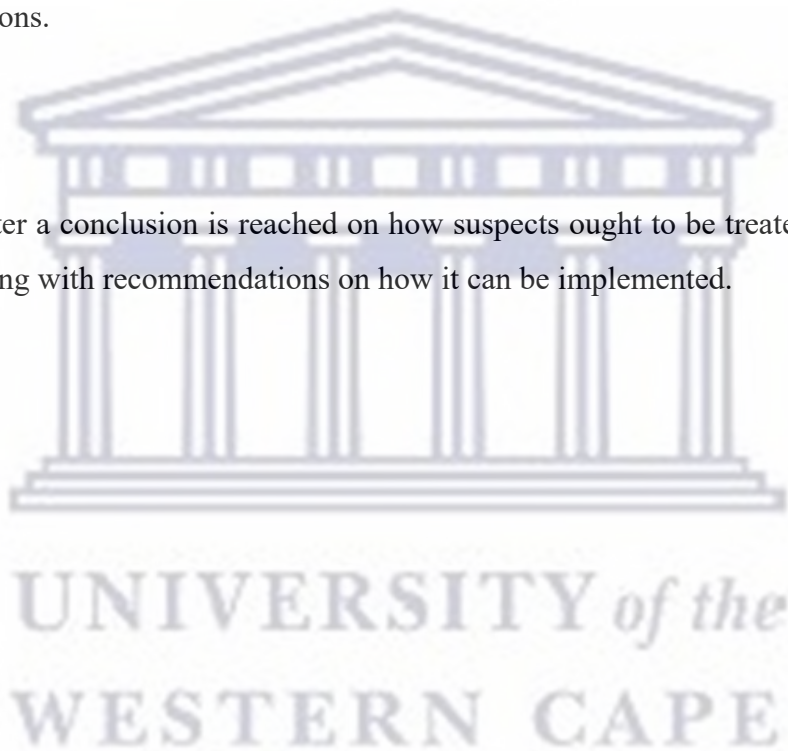
development of this right. International and regional law giving expression to this right are also considered.

### **Chapter 3**

This chapter engages in a comparative analysis of the treatment of suspects in criminal cases in South Africa in comparison to the treatment of suspects in the United States, the United Kingdom and Canada. This is done to establish the strength and weaknesses in the positions adopted in these selected jurisdictions.

### **Chapter 4**

In this final chapter a conclusion is reached on how suspects ought to be treated during criminal investigations along with recommendations on how it can be implemented.



# CHAPTER II

## THE RIGHT TO A FAIR TRIAL: THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

### 2.1 INTRODUCTION

The right to a fair trial guarantees many other rights aimed at preventing excessive and arbitrary exercise of state power in criminal proceedings, while also seeking to promote fairness during the trial process.<sup>1</sup> It is important to discuss and understand the general framework of this right before engaging in any discussion on the more specific rights covered by this umbrella right, including the rights accorded to suspects in criminal investigations. The right to a fair trial is a fundamental one and a failure to observe it undermines other human rights.<sup>2</sup> The requirements for the right to a fair trial to be complied with in criminal cases can be divided into four general categories, namely: the court's character; the rights offered to the accused in the conduct of his defence; the public nature of the proceedings; and a miscellany of other single rules.<sup>3</sup> Respect for the right to a fair trial can only be observed in an environment in which there is also the observance of respect for fundamental rights and freedoms and the rule of law.<sup>4</sup>

For many centuries, the meaning of a fair trial was one in which the trial was conducted in accordance with correct procedure. The term 'fair trial' was not a common expression. However, the meaning of this term shifted around the latter part of the twentieth century to

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<sup>1</sup> Brown-Blake C, 'Fair Trial, Language and the Right to Interpretation' (2006) 13 *International Journal on Minority and Group Rights* at 391.

<sup>2</sup> The School of Oriental and African Studies, 'The Right to a Fair Trial: The Dakar Declaration' (2001) 45 *Journal of African Law* at 140.

<sup>3</sup> Harris D, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *The International and Comparative Law Quarterly* at 354.

<sup>4</sup> The School of Oriental and African Studies, 'The Right to a Fair Trial: The Dakar Declaration' (2001) 45 *Journal of African Law* at 140.



denote a trial where a party's rights were observed. These rights included: the right to a public hearing which is conducted within a reasonable time, to an impartial tribunal, to be properly informed of the charges preferred and to be accorded an opportunity to examine witnesses. The new understanding of what is meant by the term 'fair trial' turned the use of the term from a rarity to commonplace.<sup>5</sup> Langford argues that the history of a fair trial has implications for the discussions around the nature of human rights while noting that there are those who posit that these rights are universal and inherent in humans, while others argue that they are a new fad. Langford's own view is that the right to a fair trial is a novel and peculiar English one and that it is unlikely that it is universal, but rather a 'cultural export' that was spread around the world as English became a world language and English law became one of the two major systems of jurisprudence of the world.<sup>6</sup>

This chapter examines the international, regional and domestic legal framework on the right to a fair trial. Finally, the domestic laws of South Africa which deals with the right to a fair trial is discussed.

## 2.2 THE INTERNATIONAL LEGAL FRAMEWORK RELEVANT TO THE RIGHT TO A FAIR TRIAL

The right to a fair trial has become a prominent feature in efforts to guarantee human rights at an international level.<sup>7</sup> The right was affirmed in 1948 by the Universal Declaration of Human Rights as a basic human right and has therefore been included as an important feature in the United Nations Covenant on Civil and Political Rights. The right to a fair trial has also been guaranteed in texts such as the NATO Status of Forces Agreement, 1951, and the Charters of the Nuremberg and Tokyo Tribunals. Next, some of the primary international law instruments with provisions on the right to a fair trial are discussed.

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<sup>5</sup> Langford I, 'Fair Trial: The History of an Idea' (2009) 81 *Journal of Human Rights* at 37.

<sup>6</sup> Langford I, 'Fair Trial: The History of an Idea' (2009) 81 *Journal of Human Rights* at 37.

<sup>7</sup> Harris D, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *The International and Comparative Law Quarterly* at 352.

## 2.2.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The United Nation's Universal Declaration of Human Rights, is regarded as the most important reference point for cross-cultural discussion of human freedom and dignity in the world.<sup>8</sup> The UDHR codifies the aspirations and hopes of those who are oppressed, provides language in an authoritative manner to the semantics of their claims, and it further provides legislative grounding for the political struggles for freedom and a foundation for various domestic constitutions to transform the notion of citizens' rights into positive law.<sup>9</sup>

Article 10 of the UDHR makes provision for the right to a fair trial. According to the United Nations, this provision is directed at preventing a repetition of the heinous crimes and atrocities perpetrated by Nazi Germany, that also saw courts and judges being compliant in serving the objectives of the Nazi regime, as opposed to the cause of justice in the interests of the citizenry.<sup>10</sup> Other guarantees of a fair trial, including the right to be presumed innocent, are also provided for in Articles 6,7,8 and 11 of the UDHR.<sup>11</sup> The Office of the High Commissioner for Human Rights notes that the right to a fair trial has been accepted by every nation in the world despite that many countries do not always honour the right. It has been argued that fair trials protect suspects and criminal defendants, and they also ensure safer and stronger societies by solidifying confidence in justice and the rule of law.<sup>12</sup> The UDHR inspired many other instruments in its expression of the right to a fair trial.

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<sup>8</sup> Glendon M, 'Knowing the Universal Declaration of Human Rights' (1998) 73 *Notre Dame Law Review* at 1153.

<sup>9</sup> Alves J, 'The Declaration of Human Rights in Postmodernity' (2000) 22 *Human Rights Quarterly* at 478.

<sup>10</sup> Office of the High Commissioner for Human Rights, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 10' Press Release (19 November 2018) available at <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-10> (accessed on 9 June 2023).

<sup>11</sup> Office of the High Commissioner for Human Rights, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 10' Press Release (19 November 2018) available at <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-10> (accessed on 9 June 2023).

<sup>12</sup> Office of the High Commissioner for Human Rights, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 10' Press Release (19 November 2018) available at <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-10> (accessed on 9 June 2023).

## 2.2.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

On 16 December 1966 the United Nations' General Assembly adopted the International Covenant on Civil and Political Rights and the Optional Protocol thereto.<sup>13</sup> Haxhira notes that a litany of rights guaranteed by the ICCPR includes almost all 'classical liberal human rights and freedoms that are particularly in danger of violation.'<sup>14</sup> Among the rights referred to in Article 14 of the ICCPR are: the right to equality before the law, to be presumed innocent until proven guilty and to have a fair and public hearing by an impartial tribunal;<sup>15</sup> the right to be recognised as a person before the law<sup>16</sup>, and the right to privacy and its protection by the law.<sup>17</sup> The objective of the ICCPR is the creation of an environment where everyone is able to enjoy their civil and political rights and to maintain an order in which everyone is able to live as their inherent dignity requires.<sup>18</sup>

In its General Comment No. 32 under the heading "Article 14: Right to equality before courts and tribunals and to a fair trial", the UN's Human Rights Committee notes that the right to equality before the courts and tribunals and to a fair trial is a crucial component of human rights protection as it provides a procedural mechanism to safeguard the rule of law.<sup>19</sup> The Committee also sets out that article 14 of the ICCPR is geared at ensuring the proper administration of justice, and in so doing ensures the guarantee of a series of specific rights. Even though article 14 is not included in the list of non-derogable rights in article 4 of the ICCPR, the Human Rights Committee notes that States which derogate from the normal procedures prescribed by article 14 in instances of a public emergency, is obligated to ensure that such derogations do not go beyond those which are strictly required by the exigencies of the actual situation. It also makes plain that any deviation from fundamental principles of a fair trial, including the presumption

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<sup>13</sup> Robertson A, 'The United Nations Covenant on Civil and Political Rights and The European Convention on Human Rights' (1968) 43 *British Yearbook of International Law* at 22.

<sup>14</sup> Haxhira J, 'The Covenant on Civil and Political Rights' (2013) 3 *Juridical Tribune* at 309.

<sup>15</sup> Article 14, International Covenant on Civil and Political Rights (1966).

<sup>16</sup> Article 16, International Covenant on Civil and Political Rights (1966).

<sup>17</sup> Article 17, International Covenant on Civil and Political Rights (1966).

<sup>18</sup> Haxhira J, 'The Covenant on Civil and Political Rights' (2013) 3 *Juridical Tribune* at 311.

<sup>19</sup> United Nations' Human Rights Committee, General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) at paragraph 2.

of innocence, is always prohibited.<sup>20</sup> The level of protection to persons who are bearers of the right to a fair trial are thus evidently, substantial at international law and may not be arbitrarily departed from. Next the protection offered at regional level is briefly discussed.

## 2.3 THE REGIONAL LEGAL FRAMEWORK RELEVANT TO THE RIGHT TO A FAIR TRIAL

The right to a fair trial has been enshrined in various regional treaties. Expression given to the right in regional texts are often written in similar language and spirit as in international law. Below, however, instruments from the European, North American and African continents are discussed.

### 2.3.1 EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (EU CONVENTION)

On 4 November 1950 at a meeting in Rome, the various ministers representing member states of the Council of Europe signed the EU Convention. The Convention came into effect on 3 September 1953. The EU Convention is unique because it was the first agreement which required of States parties to subject human rights to a system of binding international legal controls.<sup>21</sup> The Convention was designed with the intention of being the primary bulwark for safeguarding the Member States' common heritage, political traditions, ideals, freedom, and respect for the rule of law.<sup>22</sup>

Coblentz and Warshaw posit that this Convention carried the aspirations expressed in the UDHR by bringing it into the sphere of action.<sup>23</sup> Since human rights can only be secured by way of fair procedures under the domestic laws of States parties, the first section of the EU

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<sup>20</sup> United Nations' Human Rights Committee, General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) at paragraph 6.

<sup>21</sup> Coblentz W, Warshaw R, 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1956) 44 *California Law Review* at 94.

<sup>22</sup> Waldock C, 'The European Convention for the Protection of Human Rights and Fundamental Freedoms' (1958) 34 *British Yearbook of International Law* at 356.

<sup>23</sup> Coblentz W, Warshaw R, 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1956) 44 *California Law Review* at 94.

Convention guarantees a right to freedom from arbitrary arrest and provides for prompt arraignment and a summary action to test the legality of the instrument. Furthermore, it provides for a cause of action for arrests and confinements in contravention of these provisions. The requirement of ‘prompt arraignment’ arguably denotes recognition of the precarious position of suspects and thus calls for certainty as to the status of the person concerned.

Under article 6 of the EU Convention, all persons are guaranteed a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ This also indicates a recognition that the status of a person who may have to be engaged in criminal proceedings as an accused must not be unreasonably delayed. Article 6 also gives expression to the more general right to a fair trial by according a criminal defendant the right to be presumed innocent, to confront hostile witnesses, and, if indigent, to free legal assistance.

### 2.3.2 AMERICAN CONVENTION ON HUMAN RIGHTS (AMERICAN CONVENTION)

The American Convention was adopted on 22 November 1969 in San José, Costa Rica by a host of countries located in the Western Hemisphere. It came into force on 18 July 1978 with the aim of consolidating in the Western Hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.<sup>24</sup> In addition the rights guaranteed, and the institutional structure of the American Convention was influenced by the European Convention.<sup>25</sup> As with other regional legal texts, since its inception, the American Convention has seen significant developments through the jurisprudence of its institution.<sup>26</sup> The eighty-two articles of this Convention are designed to regulate the substantive and procedure aspects of safeguarding fundamental human rights. It

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<sup>24</sup> Organization of American States (OAS), *American Convention on Human Rights, “Pact of San Jose”*, Costa Rica, 22 November 1969.

<sup>25</sup> Shelton D, ‘Implementation Procedures of the American Convention on Human Rights’ (1983) 26 *German Yearbook of International Law* at 238.

<sup>26</sup> Antkowiak T, Gonza A, ‘The American Convention on Human Rights: Essential Rights’ (2017) 21 *Max Planck Yearbook of United Nations Law* at 576.

envisioned an organisation such as the Inter-American Commission on Human Rights, and established, the supra-national court, known as the Inter-American Court of Human Rights.<sup>27</sup>

Article 8 of the American Convention guarantees the right to a fair trial and article 9 guarantees the freedom from *ex post facto* laws. The right to a fair trial has been defined as the guarantees that every person accused of a crime has to an impartial and public hearing, to a trial before an established, competent court, to the presumption of innocence until proven guilty and to the right not to be subjected to cruel and unusual punishment.<sup>28</sup>

Buergenthal argues that many of the articles contained in the American Convention comprise provisions which waters down the fundamental character of the very right that is guaranteed.<sup>29</sup> Articles 8 and 9 appear to escape this criticism as its contents are not much different from those contained in the European Convention, as well as in the international legal instruments discussed above. Furthermore, article 8 sets out legal principles that are universally recognised such as, *inter alia*, that every person has the right to presumed innocent while his guilt has not been proven according to law; every person must be judged by a competent court and in accordance with formalities established by domestic law; the indictment or the investigation pertaining to an offence may be secret, but the trial must be public; everyone accused of a crime has a right to be defended by legal counsel and if he is not financially able, counsel must be appointed, and an accused must have adequate means and time for his defence.<sup>30</sup> The American Convention protects all these principles.

It is worth noting that article 27 of the American Convention provides for the suspension of fair trial guarantees by a declaration of a state of siege or martial law and the establishment of military courts to try civilians. However, article 27 also makes it plain that the fair trial

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<sup>27</sup> Garcia-Sayan D, 'The American Convention on Human Rights' (1969) 1 *International Journal of Refugee Law* at 562.

<sup>28</sup> Cabra M, 'Rights and Duties Established by the American Convention on Human Rights' (1980) 30 *American University Law Review* at 37.

<sup>29</sup> Buergenthal T, 'The American Convention on Human Rights: Illusions and Hopes' (1971) 21 *Buffalo Law Review* at 125.

<sup>30</sup> Cabra M, 'Rights and Duties Established by the American Convention on Human Rights' (1980) 30 *American University Law Review* at 37.

guarantees cannot be suppressed and must always be granted in instances where they are indispensable for the protection of the rights recognised by the American Convention.

### 2.3.3 AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (ACHPR)

The ACHPR came into force on 21 October 1986 and despite the critique of some of its provisions as human rights, it is largely viewed as an advancement in Africa.<sup>31</sup> The ACHPR aims to develop an African conception of human rights while simultaneously incorporating other traditional norms of human rights that are not exclusively or typically African.<sup>32</sup> All members of the African Union are parties to the ACHPR and as such, the ACHPR enjoys universal recognition. Upon its ratification, the state parties undertook to enact domestic laws which would give effect to the rights contained in the ACHPR. However, an examination of the state parties' respective constitutions shows that they have taken insufficient legislative measures to ensure compatibility of their laws with the ACHPR.<sup>33</sup>

Various articles of the ACHPR aim to give expression to the internationally recognised right to a fair trial. Article 3 of the ACHPR provides for the equal treatment before and protection of the law<sup>34</sup> and article 5 guarantees everyone the right to the respect of the dignity inherent in a human being. The article further prohibits all forms of exploitation and degradation, which includes cruel, inhuman, or degrading punishment or treatment. Article 6 guarantees the right to liberty and security and prohibits the deprivation of freedom save for reasons and conditions permitted by law.<sup>35</sup> Article 6 also expressly prohibits the arbitrary arrest and detention of anyone.<sup>36</sup>

Article 7 contains an array of the conventional fair trial rights guaranteed in other international legal texts. These include, *inter alia*, the right to be presumed innocent until proven guilty by a

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<sup>31</sup> Bonzie-Simpson E, 'A Critique of the African Charter on Human and People's Rights' (1988) 31 *Howard Law Journal* at 643.

<sup>32</sup> Bonzie-Simpson E, 'A Critique of the African Charter on Human and People's Rights' (1988) 31 *Howard Law Journal* at 645.

<sup>33</sup> Ali A, 'Derogation from Constitutional Rights and its Implication under the African Charter on Human and People's rights' (2013) 7 *Law, Democracy and Development* at 79.

<sup>34</sup> Article 3, African Charter on Human and People's Rights (1986).

<sup>35</sup> Article 5, African Charter on Human and People's Rights (1986).

<sup>36</sup> Article 6, African Charter on Human and People's Rights (1986).

competent court or tribunal, the right to a defence, including the right to be defended by counsel of one's choice and the right to be tried within a reasonable time. Another important feature of article 7 is its prohibition of condemning an act or omission which did not constitute a legally punishable offence at the time it was committed. It also prohibits the imposition of any punishment for an offence that was not criminalised at the time of its commission.<sup>37</sup>

Within the regional law framework, the right to a fair trial is afforded significant protection. The requirement of 'promptness' in the commencement of the trial suggests that there is a recognition and appreciation of the precarious position which may affect a person who does not know their status *vis-à-vis* the criminal justice proceedings. Next the domestic legal framework is analysed.

## 2.4 THE DOMESTIC LEGAL FRAMEWORK RELEVANT TO THE RIGHT TO A FAIR TRIAL.

Due to the history of human rights abuses in South Africa, the right to a fair trial is now enshrined in the Constitution and protected by the Bill of Rights.<sup>38</sup> Today, the Constitution is the primary legal text which guarantees the right to a fair trial in South Africa. Section 35(5) of the Constitution provides a non-exhaustive list of rights that gives effect to the broader right to a fair trial.<sup>39</sup> The Constitutional Court, in *S v Dzukuda and Others; S v Tshilo*<sup>40</sup>, confirmed that the words 'which includes the right' in section 35(3) of the Constitution, is an indication that the rights specifically listed is not exhaustive. The Court also held that

[i]t does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which

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<sup>37</sup> Article 7, African Charter on Human and People's Rights (1986).

<sup>38</sup> Van der Walt T, 'The Right to a Fair Criminal Trial: A South African Perspective' (2010) 7 *US-China Law Review* at 29.

<sup>39</sup> Mujuzi J, 'Developing Common Law to Expand the Meaning of the Right to a Fair Trial in South Africa: The Accused's Right to be Heard before the Court Imposes the Sentence' (2013) 42 *Common Law World Review* at 137.

<sup>40</sup> *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC).



will be established, on a case-by-case basis, as our constitutional jurisprudence on s.35(3) develops.<sup>41</sup>

The specific rights included in the right to a fair trial and listed in section 35(3) of the Constitution include *inter alia* the right to be informed of the charge with sufficient detail to answer it and to choose, and be represented by, a legal practitioner, and to be informed of this right promptly.

The rights listed above follows the international standards set for a fair trial. This shows South Africa's commitment to complying with international law as a state party to international human rights instruments which guarantee the right to a fair trial. These include the ACHPR<sup>42</sup> and the ICCPR<sup>43</sup>. Mujuzi recalls that section 231 of the Constitution governs the status of international law in South Africa and reminds of how the former Chief Justice of South Africa, Justice Ngcobo, made plain the status of international law in South Africa by stating that, *inter alia*, the approval of an international agreement, under section 231(2) of the Constitution, signals the country's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement.<sup>44</sup>

It is worth highlighting that section 35(3) of the Constitution lists more elements of the right to a fair trial than both article 7 of the ACHPR and article 14 of the ICCPR.<sup>45</sup> What is more, is that it is not a closed list and that the question that ought to be considered in each trial is whether the trial was conducted 'in accordance with the general open-ended notions of justice'.<sup>46</sup>

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<sup>41</sup> 2000 (2) SACR 443 (CC) at para 9.

<sup>42</sup> Article 7, African Charter on Human and People's Rights (1986).

<sup>43</sup> Article 14, International Covenant on Civil and Political Rights (1966).

<sup>44</sup> Mujuzi J, 'Developing Common Law to Expand the Meaning of the Right to a Fair Trial in South Africa: The Accused's Right to be Heard before the Court Imposes the Sentence' (2013) 42 *Common Law World Review* at 140.

<sup>45</sup> Mujuzi J, 'Developing Common Law to Expand the Meaning of the Right to a Fair Trial in South Africa: The Accused's Right to be Heard before the Court Imposes the Sentence' (2013) 42 *Common Law World Review* at 140.

<sup>46</sup> Mujuzi J, 'Developing Common Law to Expand the Meaning of the Right to a Fair Trial in South Africa: The Accused's Right to be Heard before the Court Imposes the Sentence' (2013) 42 *Common Law World Review* at 141.

## 2.5 CONCLUSION

South African law relevant to the right to a fair trial is developed around international standards and inspired by a break from its own history of human right abuses, particularly in the criminal justice system. A violation of any fair trial right, enumerated or unenumerated, guaranteed by the Bill of Rights, can result in a conviction and sentence being set aside.

There is little contention left around the content of the right to a fair trial or how the content of this right ought to be established on a case-by-case basis. What is contentious is the stage in the criminal process at which citizens become entitled to the guarantees under the right to a fair trial. At the heart of this contention lies an issue of interpretation. This is so as the framing of section 35(3) indicates the rights are accorded to arrested, detained, and accused persons, yet no mention is made of suspects, despite being just as vulnerable, if not more, when engaged in the criminal justice system. Those who opt for a literal interpretation argue that suspects are not accorded these rights, and those who follow a more purposive approach argue that the spirit and purport of the Constitution dictates that suspects be accorded the right to a fair trial. International and regional law, denote the urgency to inform a person of whether or not they will be criminally charged and tried. Tacitly, this affirms an understanding of the precarious position that suspects find themselves in. Thus, the law dictates albeit indirectly that this stage not be prolonged unreasonably.

# CHAPTER III

## A COMPARISON BETWEEN THE LEGAL TREATMENT OF SUSPECTS IN SOUTH AFRICA, THE UNITED STATES, THE UNITED KINGDOM, AND CANADA

### 3.1 INTRODUCTION

In many jurisdictions, the terms ‘suspect’ and ‘accused’ are used interchangeably, despite the different legal protections accorded to each. A person is a suspect in a criminal case during the investigation stage, and the legal protection accorded is less extensive and defined as those who formally accused. This is, however, not true in all jurisdictions. Below an analysis is conducted on the rights accorded to suspect in South Africa and compared to the rights accorded to suspects in the United States, the United Kingdom and Canada. This is to gauge lessons on compliance with human rights standards.

### 3.2 THE RIGHTS OF SUSPECTS IN SOUTH AFRICA

In the South African criminal justice system, it is important that meaning is given to the term ‘suspect’ in the context of the Bill of Rights while simultaneously striking a balance between the interests of the public in crime prevention and the protection of citizens’ fundamental rights.<sup>1</sup> The term ‘suspect’ is vital to stop the police from labelling individuals as ‘suspects’ when they are collecting incriminating evidence against an individual, without having to comply with the prescripts of section 35 of the Constitution. In addition, the term ‘suspect’ will act as a guide to the police as to when they are expected to activate the informational duties required by the

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<sup>1</sup> Ally D, ‘The need for clarity on whether ‘suspects’ may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis’ (2010) 41 *The Comparative and International Law Journal of Southern Africa* at 258.

Constitution.<sup>2</sup> According to Ally, the inconsistency in the meaning of the term can be ascribed to a difference in the interpretation of section 35 of the Constitution (which is the primary provision in law giving expression to the more general right to a fair trial).<sup>3</sup> What is clear, however, is that the Constitution is the supreme law of the Republic, and all laws and conduct must be consistent therewith for it to be valid, and all obligations which it imposes must be fulfilled.<sup>4</sup> With this fact as a starting point, the treatment of suspects in criminal investigations can be critically discussed with more focus and clarity.

At present, South African courts have handed down conflicting judgments on the constitutional protection of suspects as mentioned in Chapter 1 of this thesis. In *S v Langa*<sup>5</sup>, for example, the Transvaal Division of the High Court adopted a rigid and literal interpretation of the fair trial rights in the Interim Constitution. *In casu*, the accused contended that the police did not advise her, before eliciting information from her, of her right to consult with a legal practitioner, to remain silent and not to be compelled to make a confession as embodied in section 25(1)(c), 25(2)(a), and 25(2)(c) respectively, of the interim Constitution<sup>6</sup>. The Court held that these provisions did not apply in the circumstances under which the accused furnished self-incriminating information to the police, as she was neither a detained person nor an arrested person at the time.

In the Witwatersrand Local Division, the Court adopted a more purposive interpretation of section 35 in *S v Sebejan*<sup>7</sup>. The Court held that to allow the police to collect evidence from potential accused persons or unwary suspects under the pretense of there being no adversarial relationship between the parties would contradict the values and interests embedded in section 35 of the Constitution. This position found favour with the Western Cape Division of the High Court in *S v Orrie*<sup>8</sup> where the accused made certain statements to the police when he was not aware that he was

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<sup>2</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 41 *The Comparative and International Law Journal of Southern Africa* at 258.

<sup>3</sup> Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 41 *The Comparative and International Law Journal of Southern Africa* at 258.

<sup>4</sup> Section 2 of Act 108 of 1996.

<sup>5</sup> 1998 (1) SACR (T).

<sup>6</sup> Interim Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>7</sup> 1997 (1) SACR 626 (W).

<sup>8</sup> 2005 (1) SACR 63 (C).

a suspect and had not been warned of his rights to silence and legal representation. The Court held that section 35 of the Constitution deals with the rights of arrested, detained and accused persons and that this naturally includes the rights of suspects. Furthermore, the Court held that the question of whether, as a suspect, the accused was entitled to the rights of an arrested or detained person had to be determined consistent with the spirit of the Constitution. Though the Court did not give concrete guidance on what the rights of suspects entail, it leaned towards protections akin to that afforded to the abovementioned categories of persons.

In *Khan v S*<sup>9</sup> the appellant was convicted of dealing in and possession of drugs. The Pietermaritzburg Division of the High Court sentenced the accused to five years' imprisonment. On appeal she alleged a pointing out by her of her drugs was inadmissible as the police officers failed to warn her of her right to remain silent and the right against self-incrimination before she produced the drugs. The Court held that a study of applicable case law established that suspects are entitled to certain protective cautions. However, the rights accorded to accused and detained persons are not extended to suspects. The appeal was ultimately dismissed. This judgment makes sense as one can imagine that the intention of the constitutional drafters would not have been for suspects to have no protections at all during police investigations. At the same time, they would have seen the need for police investigators to have sufficient freedom to thoroughly investigate crimes. This might possibly be why suspects are not afforded the same protections as arrested, detained and accused persons. The question however remains what exactly the protections are which suspects should have under the constitutional dispensation.

At the time of writing, the Constitutional Court had not been faced with the task of deciding this issue. The Supreme Court of Appeal (SCA) had an opportunity to provide clarity on the issue in *Makhala and Another v The State*.<sup>10</sup> The SCA found that the contention from *Makhala* surmounted a threshold issue. The SCA had to decide whether *Makhala* was a detained, arrested or accused person when he made two self-incriminating statements to the police, and if he was not any of these, which of his rights were violated. The SCA concluded that the evidence which the trial court accepted does not show that he was arrested, detained, or became an accused person. The SCA

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<sup>9</sup> 2010 (2) SACR 476 (KZP).

<sup>10</sup> 2021 ZASCA 19.

held that *'it follows that [Makhala] had no rights under section 35 that could have been violated.'*<sup>11</sup> The SCA instead found that suspects in criminal cases could find protection in section 12 of the Constitution, which provides for the right to freedom and security of the person, or section 10 of the Constitution, which provides for the right to human dignity.<sup>12</sup> Disappointingly, no further explanation was provided by the SCA for how it had arrived this conclusion. The SCA expressed its view on the issue without providing clarity. The SCA also reaffirmed the long-standing position that the Judges' Rules (1931) makes provision for caution to be administered by law enforcement agencies when dealing with suspects. These Rules are, however, administrative in nature and not law.

Appendix A to the Judges' Rules (1931) requires that caution be exercised by law enforcement agencies to suspects. Rule 1 provides that *'questions may be put by policemen to persons whom they do not suspect of being concerned in the commission of the crime under investigation without any caution being first administered.'*<sup>13</sup> Rule 2 provides that *'questions may be put to a person who is under suspicion where it is possible that the person by his answers may afford information which tends to establish his innocence. In such a case, caution should first be administered.'*<sup>14</sup> Despite its usage of the terms, the Rules do not contain a clear definition of the terms 'suspects', 'suspected' and 'suspicion,' nor does it provide a comprehensive discussion of the content of the caution to be administered.

According to Kriegler J, the Judges' Rules constitute a body of rules approved by the South African Judges' Conference at Cape Town in 1931 for the guidance of police and persons in authority in questioning persons suspected of crimes. These are on the same as, though not identical with, rules framed by English Judges in 1912.<sup>15</sup> Kriegler argues that at most these rules constitute administrative directions, i.e. domestic regulations for guidance to the police force. These Rules may be subjected to criticism due to the practical implications thereof. This is so as Rule 1, for example, may be too cumbersome considering it seeks to provide guidance to poorly trained police

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<sup>11</sup> 2021 ZASCA 19 at 27.

<sup>12</sup> 2021 ZASCA 19 30.

<sup>13</sup> Rule 1, Judges' Rules (1931).

<sup>14</sup> Rule 2, Judges' Rules (1931).

<sup>15</sup> Kriegler J, 'Hiemstra Suid-Afrikaanse Strafproses (5ed) (1993) at 311.

investigators with a general lack of knowledge of the law. The ability to apply this rule must therefore be questioned. Rule 2 is also problematic as it borders on making a police officer a judge and can be said to be unfairly burdening a person by requiring of them to prove their innocence. Currie and De Waal opine that constitutional disputes can seldom be resolved by only looking at the literal meaning (sometimes called the ‘ordinary’ or ‘dictionary’ meaning) of the Constitution’s provisions.<sup>16</sup> They argue that the Constitution provides a complex framework for the exercise of state power, a framework with both procedural and substantive elements. When it comes to the substantive prescriptions, such as the rights in the Bill of Rights, the Constitution is abstract and open-ended in much of its formulation.<sup>17</sup> This means that constitutional interpretation unavoidably involves more than the determination of the literal meaning of a provision. With more specific reference to the issue of the protection of suspects, one may therefore be able to conclude that the exclusion of the word ‘suspect’ from the formulation of section 35 should not necessarily mean that the protection cannot be applied to suspects.

According to Ally, comparative law analysis shows an emerging consensus that the police must inform citizens of their rights from the moment they engage with them in an adversarial relationship by approaching individuals to confirm, disprove, or reveal evidence that links them to a crime.<sup>18</sup> Nortjie notes, however, that the widespread consensus on the need and preference for policing that is rights-compliant, which was derived from the global community, more particularly Western nations, and was favoured for approximately 15 years into South Africa’s new democratic dispensation has changed over the last 10 years as the public concern about crime has increased. It has become apparent how difficult it is for the police to translate good policy into practical action, the environment in which the police perform their functions continue to be demanding and very dangerous, and doubt has started to develop around the sacredness of human rights in many communities.<sup>19</sup>

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<sup>16</sup> Currie I & De Waal J ‘The Bill of Rights Handbook’ (2013) 747.

<sup>17</sup> Currie I & De Waal J ‘The Bill of Rights Handbook’ (2013) 747.

<sup>18</sup> Ally D, ‘The need for clarity on whether ‘suspects’ may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis’ (2010) 41 *The Comparative and International Law Journal of Southern Africa* at 240.

<sup>19</sup> Norjie W, ‘Warrantless Searches and Seizes by the South African Police Service: Weighing up the Right to Privacy versus the Prevention of Crime’ (2021) 24 *Potchefstroom Electronic Law Journal* at 21.

The law recognises that police are required to enforce the law and to keep society safe in an era of rampant crime. However, this duty does not allow the police to violate the rights of anyone or to embark on ‘fishing expeditions’ in violation of the entrenched constitutional rights in unjustifiable circumstances.<sup>20</sup> Wallis JA in *Goqwana v Minister of Safety and Security NO & Others*<sup>21</sup> held that it is important for a reasonable balance to be struck between the need for effective policing in a crime-infested society and the need to protect fundamental constitutional rights, and this is not always an easy task. In this regard, the interpretation of the Constitution requires a delicate balancing act that seeks to harmonise the rights of the individual and that of the State. An important question in seeking to strike this balance is ‘whether there is an acceptable measure of proportionality between the legitimate objectives to be achieved (i.e. the prevention or investigation of crime) and the means chosen to achieve it (i.e. soliciting information from unwary suspects without informing them of their rights).’<sup>22</sup> According to Potgieter, an acceptable Bill of Rights should ensure a proper balance between individual freedom and State power. Legal measures should be put into place to safeguard against the State abusing such power. On the other hand, the Bill of Rights should also not be used to render the State powerless to protect law-abiding citizens effectively.<sup>23</sup>

### 3.3 THE RIGHTS OF SUSPECTS IN THE UNITED STATES OF AMERICA

In the United States of America (USA), a distinction is drawn between a criminal suspect and a defendant in a criminal case. It has been noted that ‘*a suspect is a person who is believed to have committed a crime but has not yet been found guilty. If a suspect receives an arrest warrant, they might then be identified as a defendant.*’<sup>24</sup> This indicates that the status of a person changes upon receipt of an arrest warrant. Amsterdam, notes that over the last few decades there has been a

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<sup>20</sup> Du Toit, de Jager, Paizes et al. ‘Commentary on the Criminal Procedure Act’ (2022) Ch2 – p2.

<sup>21</sup> 2016 (1) SACR 384 (SCA) AT 13.

<sup>22</sup> Swanepoel J, ‘Warrantless Search and Seizure in Criminal Procedure: A Constitutional Challenge’ (1997) 30 *The Comparative and International Law Journal of Southern Africa* at 347.

<sup>23</sup> Potgieter J, ‘The Role of Law in a Period of Political Transition: The need for objectivity’ (1991) *THRHR* at 806.

<sup>24</sup> Cornell Law School, available at <https://www.law.cornell.edu/wex/suspect> (accessed on 20 July 2023).



widespread impression that the U.S. Supreme Court have vastly accorded greater rights to criminal suspects and defendants.<sup>25</sup>

Throughout the Twentieth Century, the U.S. Constitution has been viewed as being the primary source of constitutional rights in that country. It was during the tenure of Earl Warren as the Chief Justice of the U.S. Supreme Court that most of the provisions in the Bill of Rights involving criminal procedure were held binding on state proceedings by virtue of the Due Process Clause of the Fourteenth Amendment.<sup>26</sup>

It was during the 1960s that the U.S. legal system saw an unprecedented extension of rights guaranteed by the Federal Bill of Rights to state criminal prosecutions. In this regard, the U.S. Supreme Court has opted to interpret the Due Process Clause of the Fourteenth Amendment to require state courts to extend to criminal suspects and defendants a number of rights previously guaranteed only in federal trials.<sup>27</sup> This means that prior to the intervention by the U.S. Supreme Court, suspects and defendants were accorded more rights in criminal proceedings at a federal level, causing the Supreme Court to rule that those extended rights should apply to suspects and defendants at a state level as well. The reason for the initial limitation of rights was that states only accorded suspects and defendants the rights enumerated in their respective state constitutions. This intervention saw significant changes mainly from the latter part of the Twentieth Century when most protections accorded in the Federal Bill of Rights were extended to state proceedings through the Due Process Clause of the Fourteenth Amendment.<sup>28</sup> These protections extended to both suspects and defendants and included, *inter alia*, the right to counsel; the privilege against self-incrimination; the right to a public trial; the right to be free from unreasonable searches and

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<sup>25</sup> Amsterdam A, 'The Supreme Court and the Rights of Suspects in Criminal Cases' (1970) 45 *New York University Law Review* at 785.

<sup>26</sup> Hicky T, 'Using State Constitutions to Extend the Rights of Suspects in Criminal Proceedings' (1987) 43 *Journal of Contemporary Criminal Justice* at 43.

<sup>27</sup> Hicky T, 'Using State Constitutions to Extend the Rights of Suspects in Criminal Proceedings' (1987) 43 *Journal of Contemporary Criminal Justice* at 43.

<sup>28</sup> Hicky T, 'Using State Constitutions to Extend the Rights of Suspects in Criminal Proceedings' (1987) 43 *Journal of Contemporary Criminal Justice* at 43.

seizures; the exclusionary rule of evidence; the right to be free from cruel and unusual punishment; the right to confront and cross-examine adverse witnesses and the right to a speedy trial.<sup>29</sup>

In *Edward v Arizona*<sup>30</sup>, the U.S. Supreme Court reaffirmed the rule that where a suspect in a criminal investigation elects to exercise his right to legal representation, the authorities are compelled to provide such a suspect with access to an attorney before resuming any questioning, unless the suspect elects to initiate further communication. In *Arizona v Roberson*<sup>31</sup>, the same court considered whether a suspect, after asserting his right to counsel, waives it by responding to questions from different authorities regarding a different investigation. Determining that an expressed need to consult an attorney does not diminish the context of a separate investigation, the Court held that the rule prohibiting re-interrogation of a suspect who asks for but fails to receive legal representation also applies to authorities investigating separate offences.<sup>32</sup>

Presently in the U.S., the leading case on the rights of suspects is *Miranda v Arizona*.<sup>33</sup> *In casu*, the U.S. Supreme Court held that taking a suspect in a criminal case into custody places his constitutional rights against self-incrimination at great peril. The Court determined that to protect this right, it had to impose certain procedural safeguards. These safeguards included the right to consult with an attorney before and during a custodial interrogation. The Court highlighted the importance of this right as it noted that only a legal representative would be able to protect a suspect from the inherent pressures of custodial interrogation.<sup>34</sup>

Fitzpatrick notes that the Supreme Court in *Arizona v Roberson* balanced the rights of a suspect in the custody of the police with the interest of society in bringing criminals to justice. The Court established a rigorous standard for authorities re-interrogating a suspect who had previously asserted their right to legal representation. Fitzpatrick argues that this gave rise to certain practical

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<sup>29</sup> Hicky T, 'Using State Constitutions to Extend the Rights of Suspects in Criminal Proceedings' (1987) 43 *Journal of Contemporary Criminal Justice* at 45.

<sup>30</sup> 451 U.S. 477, 484 – 85 (1981).

<sup>31</sup> 108 S. Ct. 2093 (1988).

<sup>32</sup> 108 S. Ct. 2093 (1988) at 2098-101.

<sup>33</sup> 384 U.S. 436 (1966).

<sup>34</sup> 384 U.S. 436 (1966) at 444.

problems, because, for example, the questioning of suspects already in custody, a valuable tool in criminal investigations, becomes even more difficult for the police to implement.<sup>35</sup>

The above denotes that the rights of suspects in criminal investigations are clearer in the United States of America than it is in South Africa. The highest court in the USA has on numerous occasions made it plain which rights are accorded to suspects in criminal investigations, and more importantly, how those rights are to be interpreted. The position in South Africa is more uncertain.

### 3.4 THE RIGHTS OF SUSPECTS IN THE UNITED KINGDOM

The United Kingdom does not have a written constitution and thus has no single text that clearly sets out the rights of individuals. In addition, in the United Kingdom, little distinction exists between a suspect and arrestee, detainee and a person who has been charged. A clear distinction between a suspect and convict, is the only concrete difference in categories of persons in conflict with the law. Consequently, it may be assumed that a person is deemed a suspect throughout the criminal process up until conviction. The Police and Criminal Evidence Act 1984 (PACE) both confirm the legality of and extends the already wide range of powers accorded to the police in England and Wales. This includes the authority to stop and search, search premises, arrest, and detention for questioning. According to the Royal Commission on Criminal Procedure, despite the need for such powers to protect the interests of the community, it ought to be balanced by enhanced protection for the rights of suspects.<sup>36</sup>

PACE provides for certain safeguards on the rights of suspects who have not been charged. One such safeguard is the third-party involvement in process of detention and questioning by police. This safeguard allows suspects various rights of access to and communication with; *inter alia*, relatives, legal advisors, doctors, and interpreters. The ultimate effect of having such third parties present is to reduce the traditional secretiveness and exclusivity of police stations and to contribute to the requirement of transparency and openness that is recognised and encouraged by the Royal

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<sup>35</sup> Fitzpatrick J, 'Constitutional Law - the Rights of Criminal Suspects in Subsequent Custodial Interrogations' (1989) 23 *Suffolk University Law Review* at 116.

<sup>36</sup> Dixon D, Bottomley K, Coleman C, etc. al. 'Safeguarding the Rights of Suspects in Police Custody' (1990) 1 *International Journal of Research and Policy* at 115.

Commission as crucial to police accountability. For suspects who have been arrested, the PACE Code of Practice is the primary source of information which details their rights while in police custody. However, its utility to suspects is rather limited in that the code provides for detailed legal rules, a breach of which is sanctioned by the Police Discipline Code, is not written in language which most suspects will be able to understand (assuming that they can read, and many can certainly not).<sup>37</sup>

A second safeguard introduced by PACE was the requirement of detailed procedures designed to regulate the treatment of suspects. These procedures deal with the initial detention, reviews of continued detention, and questioning.<sup>38</sup>

In England and Wales, in 1912, English Justices laid down a set of rules with the aim of providing guidance to police officers when investigating crime. These Judges' Rules are, however, not rules of law. Resultantly, there can be no sanctions for a breach thereof. At the worst, police officers who fail to comply with these rules may be subjected to harsh criticism for failure to comply, and suffer the penalty of having crucial evidence being declared inadmissible during a criminal trial.<sup>39</sup> In 1964, the Justices introduced new Judges' Rules, which relaxed the rules prohibiting police questioning of a suspect after a certain stage in the interrogation has been reached.<sup>40</sup> Rule 1 provides that

*when a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.*<sup>41</sup>

Hatherill posits that this rule is self-explanatory. He argues that at times, it helps to persuade a reluctant witness by reminding him that Her Majesty's Judges have categorically stated that the police are permitted to take statements from individuals, whether suspect or not, if the police

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<sup>37</sup> Dixon D, Bottomley K, Coleman C, etc. al. 'Safeguarding the Rights of Suspects in Police Custody' (1990) 1 *International Journal of Research and Policy* at 116.

<sup>38</sup> Dixon D, Bottomley K, Coleman C, etc. al. 'Safeguarding the Rights of Suspects in Police Custody' (1990) 1 *International Journal of Research and Policy* at 116.

<sup>39</sup> Johnston T, 'Judges' Rules and Police Interrogation in England Today' (1966) 57 *Journal of Criminal Law and Criminology* at 85.

<sup>40</sup> Gooderson R, 'The Interrogation of Suspects' (1970) 48 *Canadian Bar Review* at 270.

<sup>41</sup> Rule No. 1, Judges Rules 1964.

believe that such statements may assist an investigation into a crime.<sup>42</sup> This rule also makes it plain that police are allowed to question those suspected of committing a crime. However, in this regard, English police have no more authority than other police, and questions and answers may be admitted in evidence against the suspect should he eventually be charged with the crime, subject to the proviso that his answers were not extorted from him.

Rule No. 2 of the Judges' Rules provide that

*Whenever a police officer has made up his mind to charge a person with a crime, she should first caution such a person before asking any question or further questions*<sup>43</sup>

The above denotes that the law requires a difference in treatment when dealing with a witness or suspect and someone who is charged with the offence under investigation. Hatherill notes that this rule does not allow the police to question *ad lib*, a person charged or about to be charged, provided he has cautioned that person; rather the police may only question sufficiently to remove ambiguity in what has already been said, and even then only after caution.<sup>44</sup> Unlike with PACE, these Judges' Rules have not proved to be a handicap to police interrogation. They represent intelligent guides to police officers to follow. When these rules are duly complied with, a maximum protection is given to a suspect and full opportunity to obtain truth for the criminal trial is permitted.<sup>45</sup>

### 3.5 THE RIGHTS OF SUSPECTS IN CANADA

Canadian law, like South African law, provides expressly for the rights of arrested and detained persons, but no similar rights are expressly accorded to suspects. In Canada, as in South Africa, the police are required to give a primary and, in some cases, a secondary caution to a suspect.<sup>46</sup> In most cases, such caution is given to a suspect after the caution required by sections 10(a) and (b)

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<sup>42</sup> Hatherill *G Police Interrogation and the Rights of the Accused in England* 7ed (1962) 350.

<sup>43</sup> Rule No. 2, Judges Rules 1964.

<sup>44</sup> Hatherill *G Police Interrogation and the Rights of the Accused in England* 7ed (1962) 351.

<sup>44</sup> Hatherill *G Police Interrogation and the Rights of the Accused in England* 7ed (1962) 351.

<sup>45</sup> Hatherill *G Police Interrogation and the Rights of the Accused in England* 7ed (1962) 357.

<sup>46</sup> Brook C, Fiannaca B, Harvey D, et al. 'Comparative Examination of Police Interrogation of criminal suspects in Australia, Canada, England and Wales, New Zealand, and the United States' (2021) 29 *William and Mary Bill of Rights Journal* at 918.

of the Canadian Charter of Rights and Freedoms have been given.<sup>47</sup> Section 10(a) and (b) of the Charter provides as follows,

*Everyone has the right on arrest or detention*  
*(a) to be informed promptly of the reasons therefor;*  
*(b) to retain and instruct counsel without delay and to be informed of that right.*

There are instances in which the Canadian police are constitutionally required to provide another caution, referred to as the ‘prosper warning’. This warning requires that if a person requests to speak to a legal representative and then changes their mind, police must warn the person that they still have the right to contact a legal representative. During this time, the police may take no statements from the person until they have been provided a reasonable opportunity to contact a legal representative. In essence, the police are obligated to advise the person of what they are giving up.<sup>48</sup>

The Canadian Bill of Rights and Charter makes provision for a wide range of rights to a person suspected or accused of a crime. The Bill of Rights is the model for the ‘Legal Rights’ section of the Charter. Pye notes that in some instances the language of the Bill of Rights is simply incorporated into the Charter. In other words, a change in language appears to have been adopted purely for stylistic reasons and not for substantive reasons.<sup>49</sup> Section 10(b) of the Charter, which provides for the right to instruct counsel, is crucial in instances when the police seek to interrogate a suspect. A suspect who does not know how to acquire the assistance of a legal representative or who does not have the means to afford one and is arrested in a place (in Canada) where Legal Aid Duty Counsel is unavailable, might find that the constitutional right of counsel is illusory. According to Pye, the level of protection in such instances fall far short of the protection accorded

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<sup>47</sup> Canadian Charter of Rights and Freedoms, s10, Part I of the Constitution Act, 1982.

<sup>48</sup> Brook C, Fiannaca B, Harvey D, et al. ‘Comparative Examination of Police Interrogation of criminal suspects in Australia, Canada, England and Wales, New Zealand, and the United States’ (2021) 29 *William and Mary Bill of Rights Journal* at 919.

<sup>49</sup> Pye K, ‘The Rights of Persons Accused of Crime under the Canadian Constitution: A Comparative Perspective’ (1982) 45 *Law and Contemporary Problems* at 226.

to a person subjected to a custodial police interrogation in the United States if the suspect asserts his desire to consult counsel, no counsel is provided to him, and a statement is elicited from him.<sup>50</sup>

Despite the Canadian Charter's protections to those suspected and accused of committing a crime, it simultaneously ignores some contemporary and vital issues of concern in so far as the balance that needs to be struck between the State and the individual in criminal proceedings. On this point, Pye argues that it is obvious that a charter of rights should try to deal with all issues of criminal procedure. However, he notes that an observer is struck by the high degree to which specific protections are given to the citizens in areas where the danger of abuse by the state is relatively slight, yet in areas where the danger of government abuse is great, the constitution provides few protections.<sup>51</sup>

### 3.6 Conclusion

A comparison of the treatment of suspects in South Africa and those in the countries discussed above highlights one common obstruction to the rights of suspects: a failure to adopt an inclusive interpretation of the right to a fair trial and due process in their respective jurisdictions. The position adopted by South Africa, the United Kingdom and Canada is similar. This could be because in all three jurisdictions, the English Judges' Rules are viewed as the main source of rights or warnings to be administered to suspects. Consequently, the issues emanating from these jurisdictions (on this point) are also similar: the Rules from which suspects derive their rights are not law but only administrative in nature and it is fraught with ambiguity. This means that suspects will remain exposed to the risk of providing the police with possible incriminating evidence which they might have difficulty challenging once they are formally arrested and charged.

In the USA, the Supreme Court's position comes closest to ensuring that suspects are adequately protected during criminal investigations. The Court's decision to adopt an inclusive approach to the Due Process Clause of the Fourteenth Amendment ensures that the rights of suspects are on

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<sup>50</sup> Pye K, 'The Rights of Persons Accused of Crime under the Canadian Constitution: A Comparative Perspective' (1982) 45 *Law and Contemporary Problems* at 232.

<sup>51</sup> Pye K, 'The Rights of Persons Accused of Crime under the Canadian Constitution: A Comparative Perspective' (1982) 45 *Law and Contemporary Problems* at 246.

par with those of a criminal defendant. The Court's decision to compel law enforcement authorities to ensure that suspects are informed of their right to a legal representative and to ensure that access to such a legal representative is granted before any questioning, safeguards a suspect against providing self-incriminating evidence.





# CHAPTER IV

## 4.1 CONCLUSION AND RECOMMENDATIONS

This thesis posed two research questions, and the primary focus was on the rights of suspects in criminal cases during the investigation stage. The following questions were raised throughout the research: for purposes of criminal investigations, why should a suspect have protection under the law and how can suspects find protection under the law in the light of the supreme Constitution? The following are recommendations which focus on issues of informational warnings and enforcers of the law:

First and foremost, there is a need for clarity on who is deemed a suspect under South African law. It should also be made clear which rights are accorded to this group of individuals. This should assist in making it plain to police officials that they cannot engage these individuals, on any issue pertinent to a pending investigation, without providing them with certain informational warnings. This development may decrease the risk of police officers collecting information from suspects and using it once the suspect is formally charged and prosecuted. Importantly, this is to protect suspects who are often unrepresented when approached by police. Once the police approach any person with some apprehension that he had committed an offence, a legal obligation should dictate that such a person be informed of certain informational warnings or rights. At a minimum, these should include: the right to remain silent, the consequences of not remaining silent and the right to the assistance of a legal representative and an interpreter. It cannot be denied that whether the police engage someone as an uninformed suspect or arrested person, any information they obtain from such a person, without having informed them of their rights or informational warnings, places them at a risk of providing evidence that could adversely affect them or cause them to incriminate themselves.

A failure by the police to inform a suspect of their rights should be a lawful ground on which courts may exclude any evidence obtained from an uninformed suspect if the admission thereof would render a subsequent trial unfair or be detrimental to the administration of justice. This will ensure

that the protection of suspects is on par with those of arrested, detained, and accused persons. A risk of exclusion of evidence obtained from uninformed suspects may discourage the police from soliciting evidence from unwary suspects and encourage compliance with the fair trial standards set internationally. This method of investigation will also be in line with the Constitution as it will promote the spirit, purport, and object of the Bill of Rights.

The proposal that suspects should be accorded the same protections as accused persons, does not require new legislative measures or amendment of the Constitution. It requires a purposive and inclusive interpretation of section 35 by all courts. This means that suspects whom the police approach, should be included as a group entitled to the same rights as those who have been arrested and charged. However, given that only certain divisions of the High Court have opted for such an interpretation and the SCA adopted a literal approach to section 35, there might be a need for a legislative provision which expressly provides for the rights of suspects.

A legislative provision which sets out the rights of suspects will fortify the administrative rules in the Judges' Rules as non-compliance with a legislative provision could have harsher consequences than non-compliance with an administrative rule. A legislative provision giving effect to the right of suspects could also provide for a sense of uniformity and certainty. This is so not only for the police, but also for prosecutors and presiding officers. This means that all police officers will know exactly which rights are accorded to suspects and which informational warnings they are entitled to. Prosecutors will know how to guide police investigations, when required to do so, and will be alerted to enrolling cases where there has been non-compliance with the law pertaining to suspects. Finally, all courts will know which rights are accorded to suspects as opposed to each court having a different interpretation of existing laws when trying to ascertain which rights suspects enjoy during criminal investigations.

It should not be forgotten that much of South Africa's criminal laws and jurisprudence was developed under the apartheid regime which intentionally sanctioned, and in certain instances encouraged, human rights abuses. This meant that the police could conduct their investigations with little regard for the human rights. The advent of the Constitution invalidated many of these laws and police practices. It is against this background that an argument in favour of the rights of suspects should be considered. Allowing the police to engage unwary civilians, knowing that the SAPS has a record of human rights abuses, will not be in line with the values enshrined in our

Constitution. The drafters of the Constitution recognised this, hence, among other reasons, there was the need to accord specific rights to arrested, detained, and accused persons. There is no justification for why suspects, who are often in an even more vulnerable position than those who are arrested, detained, and accused, should not be accorded similar protection.

It is trite that despite laws being put in place, police officials will still contravene those laws while conducting investigations, either due to a flagrant disregard for the law or due to ignorance. To avoid contraventions, it is recommended that once Parliament has introduced a new law governing the rights of suspects, the SAPS should provide training to its members on that law and implement the necessary standing orders to ensure compliance. Such a standing order should also provide sanctions for non-compliance.

In conclusion, this thesis has demonstrated that suspects *are* entitled to certain rights under our Constitution. However, a lack of consensus on the interpretation of the Constitution has made it difficult for suspects (who later become accused persons) to enforce those rights. As such, legislative intervention is urgently required to make express provision for the rights of suspects. The interest of justice requires such legislative intervention, and as equality is one of South Africa's core value, it is necessary to eradicate the unfair discrimination between those arrested, detained and accused in the criminal justice system, and suspects.

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# BIBLIOGRAPHY

## Domestic Case Law

*Ex Parte Minister of Justice in re R v Matemba* 1941 AD 75.

*Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651 (CC).

*Goqwana v Minister of Safety and Security NO & others* 2016 (1) SACR 384 (SCA).

*Khan v S* 2010 (2) SACR 476 (KZP).

*Makhala and Another v S* 2021 ZASCA 19.

*Murray v UK* 28 October 1994 Series A no 300-A.

*S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC).

*R v Kuruman Son of Kaniu* 1955 AC 197.

*S v Forbes and Another* 1970 (2) SA 594 (C).

*S v Langa* 1998 (1) SACR (T).

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

*S v Ndlovu* 1997 (12) BCLR 1785 (N).

*S v Orrie* 2005 (1) SACR 63 (C).

*S v Sebejan and Others* 1997 (8) BCLR 1086 (T).

*S v Tandwa* 2015 (2) ALL SA 280 (SCA).

*Shaik v S* 2007 (12) BCLR 1360 (CC).

*Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 1995 (3) SA 391 (CC).

## Foreign Case Law

*Arizona v Robertson* 108 S. Ct. 2093 (1988).

*Edward v Arizona* 451 U.S. 577, 484 – 85 (1981).

*Miranda v Arizona* 384 U.S. 436 (1966).

## Constitutions

Constitution of the Republic of South Africa, Act 108 of 1996.

Interim Constitution of the Republic of South Africa, Act 200 of 1993

## Domestic Legislation

Criminal Procedure Act 51 of 1977.

Interim Constitution of the Republic of South Africa, Act 200 of 1993.

National Prosecuting Authority Act 32 of 1998.

South African Police Services Act 698 of 1995.

## International Legal Instruments

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

International Criminal Court, Rules of Procedure and Evidence, U.N. Doc.

PCNICC/2000/1/Add.1 (2000)

International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996).

International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc.

ITR/3/REV.1 (1995).

United Nations (General Assembly) 1966 “International Covenant on Civil and Political Rights” *Treaty Series 999* (December).

United Nations General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6.

United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

## Books

- Currie I & De Waal J (2013) *The Bill of Rights Handbook* 6ed, Cape Town: Juta.
- Du Toit E, De Jager F, Paizes A (2022) *Commentary on the Criminal Procedure Act*, Juta
- Kriegler J (1993) *Hiemstra Suid-Afrikaanse Strafproses* 5ed Durban: Butterworths.
- Swanepoel JP, Joubert J et al 'Criminal Procedure Handbook' (2020) 13ed, Cape Town: Juta.
- Swanepoel JP, Joubert J et al 'Criminal Procedure Handbook' (2017) 12ed, Cape Town: Juta.
- Zappalà S (2003) *Human Rights in International Criminal Proceedings*, Oxford University Press.
- Zeffert DT & Paizes AP (2017) *The South African Law of Evidence*, Durban: LexisNexis.

## Journal Articles

- Ali A 'Derogation from Constitutional Rights and its Implication under the African Charter on Human and People's Rights' (2013) 7 *Law, Democracy and Development* 78 – 110.
- Ally D, 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 *The Comparative and International Law Journal of Southern Africa* 240 – 259.
- Ally D 'Determining the Effect (The Social Costs) of Exclusion under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?' (2012) 15 *Potchefstroom Electronic Law Journal* 447 – 513.
- Alves J 'The Declaration of Human Rights in Postmodernity' (2000) 22 *Human Rights Quarterly* 478 – 500.

Amsterdam A 'The Supreme Court and the Rights of Suspects in Criminal Cases' (1970) 45 *New York University Law Review* 785-815.

Antkowiak T 'The American Convention on Human Rights: Essential Rights' (2017) 21 *Max Planck Yearbook of United Nations Law* 401- 407.

Basdeo V 'The Constitutional Validity of Search and Seizure Powers in South African Criminal Procedure' (2009) 12 *Potchefstroom Electronic Law Journal* 307 - 332.

Bello P & Steyn J 'Students' Perceptions of the South African Police Service in Durban, South Africa: A Non-Judgmental Assessment' (2019) 11 *International Journal of Social Sciences and Humanity Studies* 61 - 85.

Bonzie-Simpson E 'A Critique of the African Charter on Human and People's Rights' (1988) 31 *Howard Law Journal* 643 – 665.

Brook C, Fiannaca B, Harvey D 'Comparative Examination of Police Interrogation of Criminal Suspects in Australia, Canada, England and Wales, New Zealand, and the United States' (2021) 29 *William and Mary Bill of Rights Journal* 909 – 1008.

Brown-Blake C 'Fair Trial, Language and the Right to Interpretation' (2006) 13 *International Journal on Minority and Group Rights* 391 – 412.

Buergethal T 'The American Convention on Human Rights: Illusions and Hopes' (1971) 32 *Buffalo Law Review* 121 – 136.

Cabra M 'Rights and Duties Established by the American Convention on Human Rights' (1980) 30 *American University Law Review* 21 – 64.

Coblentz W, Warshaw R 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1965) 44 *California Law Review* 94 – 104.



De Vos W 'Illegally or Unconstitutionally Obtained Evidence: A South African Perspective' (2011) 3 *Journal of South African Law* 286 -282.

Dereymaeker G 'Making Sense of the Numbers' (2015) 54 *SA Crime Quarterly* 29 – 41.

Dixon D, Bottomley K, Coleman C 'Safeguarding the Rights of Suspects in Police Custody' (1990) 1 *International Journal of Research and Policy* 115 – 140.

Fitzpatrick J 'Constitutional Law – the Rights of Criminal Suspects in Subsequent Custodial Interrogations' (1989) 23 *Suffolk University Law Review* 111 – 117.

Garcia-Sayan D 'The American Convention on Human Rights' (1969) 1 *International Journal of Refugee Law* 561 – 564.

Gardiner F 'The South African System of Automatic Review in Criminal Cases' (1928) 44 *The Law Quarterly Review* 78 – 84.

Glendon M 'Knowing the Universal Declaration of Human Rights' (1998) 73 *Notre Dame Law Review* 1153 – 1190.

Harris D 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16 *The International and Comparative Law Quarterly* 352 – 378.

Haxhira J 'The Covenant on Civil and Political Rights' (2013) 3 *Juridical Tribune* 308 – 315.

Gooderson R 'The interrogation of Suspects' (1970) 48 *Canadian Bar Review* 207 – 307

Hicky T 'Using State Constitutions to Extend the Rights of Suspects in Criminal Proceedings' (1987) 43 *Journal of Contemporary Criminal Justice* 43 -55.

Johnston T 'Judges' Rules and Police Interrogation in England Today' (1966) 57 *Journal of Criminal Law and Criminology* 85 – 92.

Kremens K 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2014) 1 *Wroclaw Review of Law, Administration & Economics* 26 - 48.

Kemp V & Watkins D 'Exploring Children's Understanding of the Legal Rights of Suspects in England and Wales' (2021) *Youth Justice Journal* 1 - 18.

Langford I 'Fair Trial: The History of an Idea' (2009) 81 *Journal of Human Rights* 37 -52.

Mokoena M 'The Right to Remain Silent: A One-Eyed Approach to Truth-Seeking?' (2015) 2 *Journal of Law, Society and Development Multi-, Inter- and Transdisciplinary* 120 -139.

Motsepe L, Mokwena R, Maluleke W 'A Systematic Study on South African Police Service Leadership Crisis towards Supporting Section 205 (3) as the Constitutional Foundation for Public Policing' (2022) *International Journal of Social Science Research and Review* 172 – 195.

Mujuzi J 'Developing Common Law to Expand the Meaning of the Right to a Fair Trial in South Africa: The Accused's Right to be Heard before the Court Imposes the Sentence' (2013) 42 *Common Law World Review* 137 – 150.

Mujuzi J 'Evidence Obtained Through Violating the Right to Freedom from Torture and Other Cruel, Inhuman or Degrading Treatment in South Africa' (2015) 15 *African Human Rights Journal* 89 – 109.

Norjie W 'Warrantless Searches and Seizures by the South African Police Service: Weighing up the Right to Privacy versus the Prevention of Crime' (2021) 24 *Potchefstroom Electronic Law Journal* 1 – 27.

Potgieter JM 'The Role of Law in a Period of Political Transition: The Need for Objectivity' (1991) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal* 341 – 363.

Pye K 'The Rights of Persons Accused of Crime under the Canadian Constitution: A Comparative Perspective' (1982) 45 *Law and Contemporary Problems* 221 – 248.

Richard C & Masuku T, 'Tough on Crime and Strong on Human Rights: The Challenge for us all' (2009) *Law Democracy and Development Journal* 121 – 135.

Robertson A 'The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights' (1968) 43 *British Yearbook of International Law* 21- 48.

Robinson P 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 *Berkeley Journal of International Law* 1 - 11.

Soy K & Hing V 'Legal Framework of the Right to Legal Representation' (2019) *Swisspeace* (accessed via JSTOR on 15 October 2022) 16 - 19.

Safferling C 'The Rights and Interests of the Defence in the Pre-Trial Phase' (2011) 9 *Journal of International Criminal Justice* 651 -667.

Tadros V & Tierney S 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *The Modern Law Review* 403 - 434.

Shelton D 'Implementation Procedures of the American Convention on Human Rights' (1983) 26 *German Yearbook of International Law* 246 – 350.

Singh A & Bhero M 'Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of s39 (2) of the Constitution' (2016) 19 PER/PELJ 2 -22.

Van der Walt T 'The Right to a Fair Criminal Trial: A South African Perspective' (2010) 7 *US-China Law Review* 29 – 41.

Waldock C 'The European Convention for the Protection of Human Right and Fundamental Freedoms' (1958) 34 *British Yearbook of International Law* 356 – 362.

Wolf L 'Pre- and Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' (2011) 14 *PER/PELJ* 58 - 203.

## Other Papers

United States Department of Justice '2020 Country Reports on Human Rights Practices: South Africa' (2021) Bureau of Democracy, Human Rights, and Labor 1-35.

## Online Publications

African Policing Civilian Oversight Forum, South African Human Rights Commission, Dialogue on Rights and Policing (28 -19 April 2016) available at <http://apcof.org/wp-content/uploads/2016/08/Police-and-Human-Rights-Dialogue-Report-WEB.pdf>

Hlupheka M, Adewale O 'The Structure of South African police: Towards a Single Police Service' (2021) *Cogent Social Science* available at <https://www.tandfonline.com/doi/pdf/10.1080/23311886.2021.1959974?needAccess=true>

Newham G 'SA Police Failures Demand Urgent Reform Before It's Too Late' (2021) available at <https://issafrika.org/iss-today/sa-police-failures-demand-urgent-reform-before-its-too-late>

PJ Schwikkard 'A Constitutional Revolution in South African Criminal Procedure' (2015) available at <https://lawexplores.com/a-constitutional-revolution-in-south-african-criminal-procedure/>

Office of the High Commissioner for Human Rights, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 10' Press Release (19 November 2018) available at <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-10>

Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html>

The Law Library of Congress 'Miranda Warnings Equivalent Abroad' (2016) available at <https://lawexplores.com/a-constitutional-revolution-in-south-african-criminal-procedure/>

UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, available at: <https://www.refworld.org/docid/478b2b2f2.html>

United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2020, South Africa 2020 Human Rights Report (2020) available at <https://www.state.gov/wp-content/uploads/2021/03/SOUTH-AFRICA-2020-HUMAN-RIGHTS-REPORT.pdf>