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A cost-effectiveness study

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A cost-effectiveness study

Victor Southwell and

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Pretoria

Human Sciences Research Council

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ABSTRACT

This report concerns the implementation of a bill of rights in the South African criminal justice system. A bill of rights will have a pervasive impact on all aspects of a criminal trial, from the magistrate's courts to the provincial and appellate divisions of the Supreme Court. At present presiding judicial officers are not experienced in dealing with constitutional matters which come to the fore in criminal trials, mainly because there has, to date, been no need for them to consider the philosophy and practice underlying the application of a bill of rights. Soon however all legal practitioners in the 'new South Africa' will have to take account of comparative constitutional law. Presiding judicial officers will have to examine the rules of evidence and procedure critically in the light of human rights law and be able to re-interpret statutes with the bill of rights in mind, abandoning the old 'intention of the legislature' as sole or main principle when interpreting statutes.

In the report the authors propose a system to deal with constitutional issues as they arise in the course of criminal trials. Two recent court judgments were scrutinised to illustrate the problem. In these two judgments points were raised which would be constitutional issues under a bill of rights. The authors show that effective methods for dealing with these types of issue are presently lacking.

Current South African criminal procedure is also investigated in the report. It is shown that although there is no statutory provision for interlocutory relief, such approaches are acknowledged. An investigation of cases of interlocutory approach revealed that the types of issue considered in those cases will be constitutional under a bill of rights. The authors consider the fact that there has been some resistance towards interlocutory appeal or review, *inter alia* in the South African Law Commission's recent report on the simplification of appeal procedures. However, in recent times, a more pragmatic approach towards appealability has emerged; this trend is investigated in the report.

The legal systems of the United States of America, Germany and Spain are also reviewed to determine how these countries deal with constitutional questions. Particular attention is given to the use of interlocutory appeals in the USA. Alternative models to interlocutory appeal for the management of constitutional issues are explored, but the authors conclude that none of these models offer a realistic alternative. The interlocutory procedure is re-examined in the final instance and guidelines are proposed for its application in criminal trials after the introduction of a bill of rights in South Africa.

EKSERP

Hierdie verslag het te doen met die implementering van 'n handves van regte in the Suid-Afrikaanse kriminele regstelsel. 'n Handves van regte sal 'n omvattende invloed op alle aspekte van 'n kriminele verhoor hê — vanaf die landdroshowe tot die provinsiale en appèlafdelings van die Hooggeregshof. Op die oomblik is voorsittende regsbeamptes onervare in die hantering van grondwetlike sake wat in kriminele verhore na vore tree, grootliks omdat dit vir hulle tot op hede onnodig was om die filosofie en praktyk onderliggend aan die toepassing van 'n handves van regte in ag te neem. Dit sal egter binnekort vir alle regspraktisyns in die 'nuwe Suid-Afrika' nodig wees om grondwetlike reg in aanmerking te neem. Voorsittende regsbeamptes sal getuienis- en prosedurereëls krities moet bekyk in die lig van menseregte, en hulle sal in staat moet wees om wette te herinterpreteer teen die agtergrond van 'n handves van regte. Boonop sal hulle die ou 'bedoeling van die wetgewer' as die enigste of hoofbeginsel moet laat vaar wanneer hulle wette interpreteer.

In die verslag stel die skrywers 'n stelsel voor om grondwetlike kwessies te hanteer soos hulle mettertyd in kriminele verhore na vore kom. Twee onlangse hofuitsprake is noukeurig ondersoek om die probleem te illustreer. In hierdie twee uitsprake is punte uitgelig wat onder 'n handves van regte grondwetlike kwessies sou wees. Die skrywers wys daarop dat effektiewe metodes om hierdie kwessies aan te spreek, tans ontbreek.

Die huidige Suid-Afrikaanse strafproses is ook in die verslag ondersoek. Daar word aangedui dat hoewel daar geen statutêre voorsiening vir interlokutoriese versagting gemaak word nie, sulke benaderings wel erken word. 'n Ondersoek na gevalle van 'n interlokutoriese benadering het aan die lig gebring dat die soorte kwessies wat in hierdie sake oorweeg is, onder 'n handves van regte grondwetlike sake sal wees. Die skrywers neem in ag dat daar 'n mate van weerstand teen interlokutoriese appèl of hersiening is, onder meer in the Suid-Afrikaanse Regskommissie se onlangse verslag oor die vereenvoudiging van appèlprosedures. Tog het daar onlangs 'n meer pragmatiese benadering tot appelleerbaarheid na vore getree. Hierdie tendens word in die verslag ondersoek.

Die verslag bied ook 'n oorsig van die regstelsels van die Verenigde State van Amerika, Duitsland en Spanje om te bepaal hoe grondwetlike kwessies daar hanteer word. Daar word veral aandag geskenk aan interlokutoriese appèl in the VSA. Alternatiewe modelle vir interlokutoriese appèl met die oog op die hantering van grondwetlike kwessies word ondersoek, maar die skrywers kom tot die gevolgtrekking dat geeneen van die modelle 'n realistiese

alternatief bied nie. Die interlokutoriese prosedure word uiteindelik herondersoek en riglyne word voorgestel vir die toepassing daarvan in kriminele verhore na die instelling van 'n handves van regte in Suid-Afrika.

CHAPTER I

INTRODUCTION AND ORIENTATION

South Africa will soon have a new constitution. It is widely accepted that a bill of fundamental human rights will form part and parcel of this constitution. The current system of 'parliamentary sovereignty' will make way for 'constitutional sovereignty'.

Currently, parliament is still the supreme authority; the judiciary has no power to invalidate parliamentary legislation which has been duly passed. Soon, however, South Africa will have a system where the courts have testing power over legislation; all state actions and parliamentary legislation will be required to comply with the provisions of the bill of rights. The principle of judicial review is no longer a revolutionary concept. The challenge is no longer to adopt a bill of rights, but to make it work.[1]

This report is concerned with the practical implementation of a bill of rights in the South African criminal justice system. A bill of rights will have a pervasive impact on all aspects of the criminal trial, from the magistrate's courts to the provincial and appellate divisions of the Supreme Court. At present presiding judicial officers are not experienced in dealing with constitutional matters as such in criminal trials, mainly because there has, to date, been no need for them to consider the philosophy and practice underlying the application of a bill of rights. But soon all legal practitioners in the 'new South Africa' will ideally need to be able to find their way around comparative constitutional law, be able to read *inter alia* French or German, and have the necessary comparative primary and secondary legal sources at hand. Presiding judicial officers will have to examine the rules of evidence and procedure critically in the light of human rights law and be able to re-interpret statutes with the bill of rights in mind, abandoning the old 'intention of the legislature' as sole or main interpretative principle when interpreting statutes.

In order to cultivate a *Rechtsstaat* culture, judicial officers will have to express their commitment to human rights clearly and unequivocally. It has been pointed out, and rightly so, that there is no reason why judges and magistrates should not attend workshops to acquaint themselves with all practical, philosophical, moral, legal and economic implications of the bill of rights.[2] All this will take time. Knowledge of, and above all a culture of respect for human rights, will manifest itself overnight.

In the meantime many questions arise. Can we afford a situation where 'inexperienced' magistrates and judges decide crucial constitutional issues as

they arise in the course of criminal trials as they have been deciding ordinary points of law and fact in the past? Will it not lead to wholesale waste of time and money if a trial is allowed to continue for months and even years after an incorrect decision by a presiding officer on a constitutional point — only to have the conviction set aside by a constitutional appellate court in the light of a correct interpretation of the rights of the accused after the accused has finally been convicted and sentenced? Do we not need radical change in our criminal procedure to facilitate the application of new constitutional principles? Does our current criminal procedure make sufficient provision for handling this type of problem?

We shall propose a system to deal with constitutional issues as they arise in the course of criminal trials. In Chapter 2, two recent judgments are scrutinised to illustrate the problem. In these two judgments points were raised which would be constitutional issues under a bill of rights. It will become clear that effective methods for dealing with these types of issue are presently lacking. In Chapter 3, current South African criminal procedure is investigated. It will be shown that although there is no statutory provision for interlocutory[3] relief, such approaches are acknowledged. An investigation of cases of interlocutory approach will show that the types of issue considered in those cases will be constitutional under a bill of rights. We shall consider the fact that there has been some resistance towards interlocutory appeal or review, *inter alia* in the South African Law Commission's recent report on the simplification of appeal procedures. Fortunately, in recent times, a more pragmatic approach towards appealability has been emerging; we shall investigate this trend.

In Chapter 4, we venture into foreign legal systems to investigate briefly how constitutional questions are dealt with in the United States of America, Germany and Spain. Particular attention will be given to the use of interlocutory appeals in the USA. In Chapter 5, we explore alternative models to interlocutory appeal for the management of constitutional issues, but conclude that none of these offer a realistic alternative. Finally, in Chapter 6, we re-examine interlocutory procedure and propose guidelines for its practical application in criminal trials after the introduction of a bill of rights.

CHAPTER II

EXAMINING THE PROBLEM

INTRODUCTION

For the purposes of this article two basic assumptions are made. First, South Africa will soon have a bill of rights to guarantee certain basic human rights including the right to life, right to equality, right to dignity, freedom from torture and from cruel and inhuman treatment and punishment, and the right to a fair trial. The right to a fair trial is generally dealt with as a broad concept, setting out rules for arrest, awaiting trial, principles of due process, innocent until proven guilty, nature of evidence, detention pending formal charges and first appearance, bail, and the trial itself.[4]

Second, there will be an independent judiciary with a court of highest authority dealing with constitutional issues. Whether South Africa should have a specialised constitutional court or whether the ordinary court structure, headed by the Appellate Division, should deal with constitutional issues is currently under debate.[5] It is not the purpose of this study to enter this debate. There are strong indications that a specialised constitutional court is favoured by at least the technical committee drafting the new constitution at the multi-party negotiations currently under way.[6] For present purposes, however, it is sufficient to know that there will be a court dealing at the highest level with issues arising from the constitution.

Two recent judgments where the Appellate Division was faced with issues that would clearly be 'human rights issues' under a new constitution, serve to illustrate the theme of this study.

S v BALEKA[7]

The so-called 'Delmas treason trial' is well-known for different reasons, not least because it is one of the longest criminal trials in South African legal history.[8]

The trial of the 22 accused commenced on 16 October 1985, after preparations starting in November 1984. During the course of the trial 152 witnesses were called by the state over a period of almost ten months (from January 1986 to approximately October 1986). The defence, in turn, called 126 witnesses from July 1987 to 22 June 1988. At the conclusion of the trial, the state presented argument lasting a full week (2 377 pages) and the defence,

not to be outdone, argued for a month. Judgment was finally handed down on 15 November 1988. At that stage the court had been in session for 437 days, over a period of 37 months. Twenty-seven thousand and two hundred pages of oral evidence had been heard, while 14 425 pages of documentary evidence, 42 video and audio recordings, five films and several photographs and plans had been handed up. At the conclusion of the trial, three years after the first oral evidence had been led, 11 of the accused were convicted. The court granted limited leave to appeal. Eventually, on 27 November and 15 December 1989, more than five years after preparations had begun, the appeal was upheld and the convictions and sentences of all the appellants were set aside.

Some may argue that justice had taken its course. Granted, a long course, but it was a trial of immense complexity. If it took five years for justice to be served, it was five necessary — and certainly not wasted — years. Of importance for this study however, is the fact that some 17 months into the trial, the trial judge[9] made an order in terms of section 147 of the Criminal Procedure Act[10] in which he held that one of the assessors had become unfit to act as assessor and that the trial should proceed before himself and the remaining assessor. Van Dijkhorst J based this decision on the fact that the assessor in question had previously signed a petition drawn-up by the United Democratic Front (an extra-parliamentary political organisation opposed to apartheid). In his opinion this petition was an important facet of the state's case against the accused. Neither the accused nor the state was given an opportunity of debating the issue of the dismissal of the assessor or stating their views on the matter to the court before Van Dijkhorst J came to his decision. The accused accordingly brought an application for the quashing of the trial, alternatively for the judge to be recuse himself. This was refused. At the conclusion of the trial the accused were, however, granted leave to appeal and certain special entries were made. The matter then proceeded to the Appellate Division which gave leave for two of the special entries to be argued and adjudicated upon separately from the merits. For this purpose only a shortened version of the record was required to be placed before the court.[11]

The first part of the special entry[12] related to the powers of the trial judge under section 147(1) of the Criminal Procedure Act to dismiss an assessor, it being contended by the appellants that Van Dijkhorst J did not have the power in the circumstances since the assessor did not 'become' unable to act as his alleged inability had already existed at the commencement of the trial. On an interpretation of the relevant section, the Appellate Division held[13] that Van Dijkhorst J did indeed not have the power to rule that the assessor was unable

to act as such. The appeal was accordingly upheld and the appellants discharged.

Corbett CJ also dealt with the submission that Van Dijkhorst J had acted improperly in not having heard argument before dismissing the assessor. In doing so, he took the opportunity to emphasise the importance of the maxim *audi alteram partem*. Where a judge acts in terms of section 147

> ... [it] is incumbent upon him to hear the parties on the question as to the further conduct of proceedings, and more particularly as to whether he should direct that the trial proceed before the remaining members of the Court or that the trial should start *de novo* and a new assessor be appointed.[14]

Had there been a bill of rights in operation at the time, the accused in Baleka could well have raised an 'infringement of constitutional rights' objection to Van Dijkhorst J's decision to dismiss the assessor without a hearing as the *audi alteram partem* rule is an acknowledged basic human right, forming part of a broader right to a fair trial. The important question is whether it could ever be justified for a trial which (after the discharge of the assessor) had become a nullity in law, to continue for some 20 months; that both the state and defence could be forced to continue spending many thousands of rands; and that the accused, who had already been in detention for some years, could be further detained for a lengthy period. Under a future bill of rights, a Baleka-type situation may arise frequently, with the courts having to deal with constitutional issues virtually on a daily basis. Common sense suggests that the trial in Baleka should have been postponed temporarily and the relevant ruling referred to the Appellate Division. After the point had been settled the matter could have been abandoned or other appropriate steps taken. Given the course of events in Baleka, can one blame the public for having little faith in our legal system and exclaiming "The law is an ass"?[15]

S v SHEEHAMA[16]

In Sheehama, the appellant had been convicted on five charges of murder arising from the deaths of five people as a result of the 1986 bombing of a butchery in Walvis Bay. The admissibility of certain admissions and pointings-out made by the appellant was considered by the trial court during a lengthy 'trial within a trial' and eventually allowed as evidence. The trial then continued and the appellant was eventually convicted. The question on which the appeal centred was whether the admissions and pointings-out made by the appellant had been correctly admitted as evidence by the trial court.

The confessions in question were made to a magistrate in Walvis Bay after the appellant had been arrested and interrogated by the so called *Koevoet* unit of the police and by the security police. In addition, the appellant had pointed out certain places to the police, accompanied by further confessions. It was argued on behalf of the appellant that these admissions had not been made freely and voluntarily but under the influence of fatigue and fear induced by protracted assaults, torture and threats to his life by members of *Koevoet* and the security police. Although the trial court found that the appellant had been subjected to assaults and torture before he was taken to Walvis Bay, there was no evidence that he had been assaulted at Walvis Bay and, in the view of the trial judge, if the appellant was afraid of being assaulted there, he could have requested the magistrate to ensure that he did not again fall into the hands of *Koevoet* and the security police. Consequently, the trial court held that the willingness of the appellant to make confessions to the magistrate could not be attributed to prior violence.

The Appellate Division disagreed, holding that the appellant had good reason to believe that he would be returned to the security police after his visit to the magistrate and that he would eventually be handed back to *Koevoet* if he failed to confess to the bombing. He had no reason to believe that the magistrate could prevent his return to the hands of his torturers. He had received no assurances in this regard from the police or the magistrate and had not been permitted to contact his legal advisers or his family. Accordingly, the trial court had erred in finding that the confessions made by the appellant to the magistrate, as well as those made to the police later in the context of the pointings-out, had been made freely and voluntarily.

There was an additional reason why the admissions at the time of the pointings-out were inadmissible: although the appellant had been warned that he was under no obligation to point anything out or make any statement, this warning was translated from Afrikaans to Ovambo by a police interpreter and it later emerged that in the words of the interpreter, the 'warning' had in fact become an order to the appellant to point out anything which he was ordered to.

A further question before the Appellate Division was whether the pointings-out themselves, separated from the verbal communications by the accused, were not perhaps admissible as evidence. The court held that the pointings-out were in reality nothing more than (non-verbal) extra-judicial admissions; their admissibility therefore also depended on whether they had been made freely. The view that evidence of a forced pointing out is admissible in law was rejected.[17]

Finally, the court dealt with section 218(2) of the Criminal Procedure Act[18] which regulates the admissibility of pointings-out when they form part of inadmissible confessions or statements. Interpreting the section as merely providing that evidence of a pointing out **may** be admitted as evidence, not that it **must** be so admitted, the court held that the section provides that evidence of a pointing-out which is otherwise inadmissible will not become admissible merely because it forms part of an inadmissible confession or statement.

On all considerations, the Appellate Division concluded that the pointings-out made by the appellant were inadmissible as evidence — a ruling tantamount to the introduction of an American-type exclusionary rule regarding illegally obtained evidence.

Once again it is evident how resources may be wasted by not allowing a trial to be interrupted or suspended pending appellate review. The issues on which the appeal turned, *viz.* the admissibility of confessions and pointings-out made under duress, or the admissibility of illegally obtained evidence, are classic human rights issues which will also arise under a future bill of rights. Would it not make more sense if an accused, faced with a similar situation under a bill of rights dispensation, were to be afforded an opportunity immediately to challenge the decision of the trial court on such an issue? The trial court's proceedings would, of course, have to be stayed pending the finalisation of the constitutional issue. Once the issue had been settled the case would, if necessary, be referred back to the trial court for the trial to proceed. In a case such as Sheehama's, it could mean that the state would have to withdraw the charges (*in casu* of murder) against the accused or attempt to prove them by constitutionally acceptable means.

Regardless of the procedure adopted after the constitutional issue has been settled, a proper system of immediate challenge would go a long way to saving both time and money in criminal trials.

CHAPTER III

THE PRESENT SYSTEM OF CRIMINAL PROCEDURE IN SOUTH AFRICA

INTRODUCTION

By now it should be clear that scenarios such as Baleka and Sheehama will have to be avoided if a future bill of rights is to have an immediate and effective impact on criminal justice.

After the Delmas trial the question was asked whether statutory provision need to be made for interlocutory decisions (such as the decision to dismiss an assessor) to be taken on appeal before conclusion of the trial to avoid the "[w]holesale waste of time, wholesale waste of money on both sides and considerable deprivation of freedom ..." which occurred in the Delmas trial.[19] Similarly, it may also be asked whether our existing system of criminal procedure is equipped to deal with comparable future bill of rights issues.

Interlocutory appeals were recently investigated by the South African Law Commission[20] together with another issue raised by the trial court in the Delmas trial, namely whether trial courts should be permitted to decide particular disputes separately at the outset of a trial.[21] We discuss the latter question first.

SEPARATE HEARINGS

Regarding the separate hearing of disputes, the Law Commission referred to the general rule that all disputes should be settled during one session so that a final judgment is delivered at the end of the proceedings, thus concluding the matter.[22] However, the commission cautioned against raising this rule to an unshakeable principle[23] and referred to the following words of Van Dijkhorst J in the Delmas trial

> A further aspect of our procedure which needs overhaul is the absolute rule that the whole state case must be presented and closed before the defence is called upon. Although as a general rule it has merit, its immutability precludes the presiding officer from ruling that a certain aspect upon which the whole case for the state hinges be determined first. Had we had the power we would have ordered in this case that the question whether the

United Democratic Front propagated violent revolution be determined first. A negative answer to this question might render more than a year's evidence redundant. Why one should patiently sit through months of state and defence evidence which may later turn out to be totally irrelevant is beyond our grasp. It is not fair to the accused. It ties down judicial officers who could be beneficially used otherwise. It is not justice. The court should be statutorily empowered in appropriate cases to rule that certain issues be decided *ab initio*. In civil cases the rules provide for this. See rule 33(1) of the Rules of the Supreme Court. Of course such a power would be sparingly exercised as findings on credibility in the initial stages might possibly curtail a party in the future proceedings. But the power should exist and should be used when the occasion arises.[24]

Referring to rule 33(4) of the Rules of the Supreme Court[25] as well as the position in England[26] the Law Commission recommended

(i) that statutory provision should be made for the separate hearing of disputes; (ii) that this power should exist over points of law as well factual issues; (iii) and that such a procedure only be allowed in exceptional circumstances and on good reasons provided that it appears that the factual issue or point of law may resolve the whole matter, or that it appears as if money and time will be saved or evidence be eliminated without prejudice.[27]

INTERLOCUTORY APPEALS

Regarding interlocutory appeals, the Law Commission again referred to the general rule followed by our courts, namely that appeals should not be heard piecemeal.[28] However, as stated in Malinde,[29] the Supreme Court has the inherent jurisdiction to arrange its proceedings in the interests of justice. Therefore, such appeals and reviews will be allowed (and have been allowed in the past[30]) in cases where 'unusual circumstances' call for it.[31] Accordingly, the Law Commission was of the opinion that statutory provision need not be made for interlocutory appeals or reviews. It believed that the existing legal position was satisfactory; that the separate adjudication of disputes should create no special problems.[32]

Since the Law Commission was not required to investigate the procedural management of 'bill of rights objections' as we do here, it could afford to view interlocutory appeals as exceptional and infrequent occurrences not requiring special statutory provision. However, we believe that the need to obtain clarity on the effects of a bill of rights, and to obtain it speedily in the course of criminal procedure, will be important. Particularly in the first few

years after the introduction of a bill of rights, it will be of paramount importance to settle constitutional issues with a high degree of authority and speed when they arise in the course of criminal trials. Such a system will certainly advance legal certainty and strengthen public confidence in the effectiveness of the bill of rights.

Although we agree that 'nothing happens overnight', we nevertheless feel that we have to look for mechanisms to establish and cultivate a human rights culture in as short a time possible.

> We cannot wait for such a culture to slowly evolve from grassroots level over a period of perhaps centuries. A more immediate stimulus or steering mechanism is needed, but grassroots participation in the process and the involvement of all courts are necessary.[33]

If one examines the cases in which South African courts have considered interlocutory appeals or reviews in the past, it becomes clear that the types of question before the courts would under a bill of rights be considered as constitutional.[34] For this reason we need to take another, careful look at interlocutory relief and the underlying principles governing its application by our courts.[35]

In the past the courts have been reluctant to allow matters to be taken from the trial court to a higher instance before the conclusion of the trial, and perhaps not without reason. Courts of appeal are not there to give opinions whenever trial courts run into a points about which they are unsure.[36] Gregorowski J, in McComb v Assistant Resident Magistrate of Johannesburg and the Attorney-General,[37] states the reason for this reluctance

> The idea of a trial is that it should be as much as possible continuous, and that it should not be stopped. If this kind of procedure were to be allowed it would mean that a trial may become protracted, and may extend over a number of months. The magistrate would sit on one day and hear part of the evidence of a witness; then the hearing would have to be postponed till the opinion of the Supreme Court could be taken, perhaps a month or two later. Thereafter the trial would again be continued, after some months and immediately it is resumed objection may again be raised in connection with some evidence, with an application to the Supreme Court, and again back to the magistrate. I think that would produce an intolerable condition of things.[38]

Accordingly appeals are normally only heard after the conclusion of a criminal trial.[39] A criminal trial is only concluded once sentence has been passed and the trial court becomes *functus officio*. Appeals will not be

entertained piecemeal. Therefore, in Lawrence v Assistant Resident Magistrate of Johannesburg,[40] the Supreme Court refused to intervene, holding that it was not prepared to entertain appeals piecemeal and that the proper remedy was an appeal after the conclusion of the trial.

This is the norm. However, the courts are prepared to concede that in exceptional cases, it is possible for an accused to approach the court of appeal before the end of the trial. But what makes a case exceptional? In Ginsberg v Additional Magistrate of Cape Town,[41] the court held that although as a rule the court will only review matters after the completion of the criminal case, it was not prepared to say that the court would never exercise the power to review, or a similar power, before conclusion of a case, if there were gross irregularities in the proceedings.[42] In Ellis v Visser,[43] it was argued on behalf of the applicant[44] that he was entitled to approach the Supreme Court to intervene at an early stage because, if the case were allowed to continue, it would be a protracted one, and if he were acquitted at the end of it, he would have been seriously prejudiced by the high costs and adverse publicity. The court, however, dismissed this argument,[45] stating that the applicant was not in a worse position than anyone who is prosecuted and eventually acquitted.[46]

In Wahlhaus v Additional Magistrate of Johannesburg,[47] the Appellate Division had the opportunity to consider interlocutory appeal and review applications. The court referred to the following dictum in Gardiner and Lansdown:[48]

> While a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the undetermined course of proceedings in a court below, it certainly has the power to do so, and **will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained** ... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.[49]

Ogilvie Thompson JA considered that this statement correctly reflected the position in relation to undetermined criminal proceedings in the magistrates' courts, but added that the prejudice, inherent in the accused being obliged to continue with a trial until its conclusion before being allowed to test the correctness of the magistrates' decision in the Supreme Court, does not *per se* necessarily justify the Supreme Court in granting relief before conviction.[50]

The 'grave injustice' or 'justice not otherwise attained' test has found general application. It is sometimes said that an interlocutory remedy will only be allowed if its refusal will cause the accused 'serious prejudice'.[51] In R v Marais,[52] it was held that the court will come to the assistance of an accused before the end of a trial in cases of gross irregularity and when the prejudice to the accused is so serious that it would result in a miscarriage of justice.[53]

Attempts have been made at times to find statutory support for the restriction of interlocutory remedies. In S v Harman,[54] dealing with appeals from superior court decisions to the Appellate Division, it was said that the Criminal Procedure Act does not envisage the bringing of an appeal with leave of the court *a quo* before sentence has been imposed. The reason given was that section 316(1) specifically states that a convicted person's application for leave to appeal must be made "within a period of 14 days **of the passing of any sentence as a result of such a conviction**"[55] or any extended period granted. That is the rule, said the Appellate Division, and it works against piecemeal appeals. However, in our view, the statutory provision merely regulates the time limits within which the application for leave to appeal must normally be made. It need not be interpreted as necessarily excluding appeals prior to sentencing.

In S v Majola,[56] Trollip AJ had an opportunity to reconsider the Harman decision to which he had been a party some five years earlier. He came to the conclusion that there is no reason for reading such an absolute restriction into the ordinary appeal procedure set out in section 316. Reiterating the general rule that interlocutory appeals should be limited to exceptional cases, he concluded that in Harman there were no exceptional circumstances present and that this was the true reason why an appeal was not appropriate.

In the lower courts any accused has the right to appeal against any conviction and any resultant sentence or order in terms of section 309(1)(a) of the Criminal Procedure Act. Rule 67(1)(a) of the rules promulgated in terms of the Magistrates' Court Act[57] states that a convicted person desiring to appeal under section 309(1)(a) of the Criminal Procedure Act, shall lodge his notice of appeal within 15 days after the date of the "conviction, sentence or order" in question. It should at once be clear that the legislature did not intend to exclude interlocutory remedies in the lower courts by the wording of section 309(1)(a) and rule 67(1)(a). Once again time limits are the topic of rule 67(1)(a). If the legislature intended excluding interlocutory remedies, it would merely have stated that appeals must be lodged within 15 days after 'conviction'. It is difficult to see why provision was made for the appeal of

'orders' if interlocutory appeals were to be excluded. After all, in a criminal trial an order is not necessarily a final judgment.

In R v Adams,[58] the Appellate Division, dealing with the reservation of questions of law, came to the conclusion that these questions can only be considered after conviction and not earlier.[59] The court also made comments which apply to all interlocutory approaches,[60] stating that in general a criminal trial is to be a continuous procedure with no appeals or interlocutory approaches before conviction. The court noted that where interlocutory approaches are made, there is generally an absence of consequential procedural provisions to meet the case. For instance, if an interlocutory application for the reservation of a question of law is allowed, the question arises whether the trial may or may not be continued in the trial court pending the ruling on the questions of law by the Appellate Division.[61] While it is not impossible that such difficulties could be resolved by the trial court and Appellate Division, the court nevertheless felt that some express provision would have been made by the legislature if it contemplated such an innovative procedure.[62] To prove its point the court referred to section 4 of the (now repealed) Natal Act,[63] which provided specifically that the Native High Court could reserve questions of law "at any stage of the hearing of a case ... and thereupon the proceedings shall be stayed pending the determination of the question so reserved". The court concluded[64] that if the legislature wanted to provide for this type of approach it would have provided for it in express terms, as was done in the Natal Act.

The court referred to Wahlhaus[65] in passing, stating that the general principle of criminal trials as a continuous procedure was confirmed by that decision. Unfortunately, the court failed to note that Wahlhaus not only went beyond this general principle, acknowledging interlocutory approaches, but actually laid down principles or guidelines for its application.[66]

In the final analysis, it is difficult to support the argument that interlocutory approaches are totally excluded simply because of a lack of express statutory provision. This line of argument could be turned on its head, so that it could be said that interlocutory approaches are permissible precisely **because of** a lack of express exclusion. In our view, the absence of express statutory reference to interlocutory remedies means only that the principles governing it are not to be derived from statutes, but that one should rely on inherent powers and look to case law to find the applicable principles.

Despite the rather rigid approach favoured by Adams, a more pragmatic approach has also at times been followed. 'Exceptional circumstances' were found to exist in S v Bailey.[67] In this case the accused applied for the recusal of the magistrate at the adjournment of the hearing. The application was

refused but an interlocutory review application was allowed by the Supreme Court. One of the grounds on which the accused based their application was that the magistrate had personal knowledge of some of the issues he had to decide.[68] The review court approved the general rule as stated in Ginsberg[69] and added that the decision to interfere will depend on the facts of each case, and particularly whether there will be prejudice if it is not exercised. Also relevant will be the type of irregularity. In this case the case had lasted two days, but further hearing was expected to last four days. If the magistrate had been wrong not to recuse himself, the court found that the applicants would have been put to considerable expense in respect of proceedings that would be abortive if a conviction resulted.[70] The present authors favour this realistic approach, which clearly serves the true ends of justice.

For interlocutory relief to be granted, the irregularity complained of need not necessarily originate only from the bench. In S v Majola,[71] the appellant was found guilty of murder and robbery with aggravating circumstances. He was sentenced on the robbery charge, but before sentence could be imposed on the murder charge, it became apparent that the accused had never been consulted by his advocate as to whether he wanted to testify or not. The court did not impose a sentence but gave leave to appeal. After once again stating the general rule that the Appellate Division is loath to entertain piecemeal appeals except in exceptional circumstances the court set aside the convictions on murder and robbery as well as the sentence imposed for robbery and referred the matter back to the trial court, holding that an act or omission by a legal representative could well constitute a serious irregularity vitiating the procedures.[72] This was in fact the situation *in casu* where the trial court, in convicting the accused relied heavily on his failure to testify.[73] The accused had been seriously prejudiced by this and the higher court therefore was willing to entertain the appeal before sentencing had occurred in the trial court. Once again, it is evident to the present authors that pragmatic considerations persuaded the Appellate Division to intervene in the interests of justice. It simply would not have made sense for the trial court to continue in a situation where the trial judge himself had become convinced that the proceedings would in all probability be set aside on appeal.

A similar approach was adopted by the Supreme Court in Ncukutwana v Acting Additional Magistrate of Lady Frere.[74] When it became apparent that the trial would be a lengthy one, the accused's attorney decided to make use of a tape-recorder to record the evidence.[75] Despite the attorney's assurances that the recorder would be placed out of sight and operated completely silently, the magistrate refused him permission to switch it on. The attorney's

response was that if he was not allowed to use the machine, he would have to withdraw. The trial was postponed and the accused applied to the Supreme Court to review the proceedings.

The Supreme Court referred to the well-known words of Gardiner and Lansdown[76] and to the Wahlhaus case[77] and proceeded to apply the principles enunciated there.[78] It held that the accused had the right to be represented by the attorney of his choice and that the attorney was entitled to make a record of the proceedings against the accused. The effect of the magistrate's order was to deny the accused representation by the attorney of his choice. If the accused had to wait for the trial to be completed before objecting it might have been impossible for him to demonstrate that a failure of justice had occurred as a result of the irregularity as is required for review purposes.[79] As in Bailey,[80] the court followed a pragmatic approach and found that the magistrates order was plainly wrong and unreasonable and that although the trial proceedings had not been finalised, the court should grant the relief sought. The court concluded[81] that this was one of those rare cases where it had to intervene in finalised proceedings because "justice might not by other means be obtained" and set the magistrate's order aside.

In Rascher v Minister of Justice,[82] the court was faced with an interlocutory application for a *mandamus* directing the respondents to disclose the name and address of the complainant in a prosecution. It appeared that the accused needed to know the identity of the complainant for him to 'prove' his innocence. The magistrate refused on the ground that he was bound by the rule that the accused may not know the identity of an informer. In a lucid and to-the-point judgment the higher court held that this rule should *in casu* be relaxed in favour of the applicant, that the contrary decision by the magistrate had been wrong, and that it might result in a miscarriage of justice to the extent that the Supreme Court would be justified at any time during the course of the trial proceedings to interfere by way of review.[83]

It is heartening to note how the court dealt with the objections to interlocutory intervention. It was argued on behalf of the attorney general that the petitioner had used the wrong procedure since the 'non disclosure' rule only comes into operation after questions have been put to a witness during the course of the trial.[84] In this case the petitioner had raised his points before any evidence had been led. The court dismissed this argument,[85] stating that since the prevention of a possible miscarriage of justice is the object to be aimed at, technical points of pleading should not prevail over the petitioner's right *in casu* to have the informer's name disclosed to him. Furthermore, although the court felt[86] that the petitioner should have asked for an order against the magistrate rather than the minister, it once again did not wish to

quibble over a point of procedure, since a *mandamus* against the magistrate would have rendered the same results as an order against the minister. The point, according to the court, was that the magistrate had erred; his mistake could be easily rectified (as it should be in the interests of justice) by granting the order prayed for. However, the court decided not to award the costs of the application to the petitioner, because the prosecuting authorities were correct in their refusal to usurp the prerogative of the court, which alone could authorise the rule to be relaxed.[87]

The Rascher decision is clearly preferable to the rigid and overly cautious approach in Adams.[88] A balance must be struck between society's interest that criminal trials should be continuous and uninterrupted on the one hand, and society's interests that an accused should not be seriously prejudiced to the extent that a miscarriage of justice occurs. Unfortunately, Adams was an Appellate Division judgment whereas Rascher was only a judgment of the Transvaal Provincial Division. Although some courts were able to distinguish Adams on the basis that it dealt specifically with the reservation of a question of law, the principles applied in Rascher did not find conclusive support in the Appellate Division until 1990.

This brings the discussion back to Baleka[89] and particularly the petition in that case for a 'splitting' of the appeal so that the special entry could be determined first, reported as S v Malinde.[90] The special entry related to the trial judge's power to dismiss an assessor in the circumstances, it being argued by the appellants that the trial had thereafter continued before an improperly constituted court.[91]

Referring to Appellate Division rule 13,[92] the Appellate Division held that, although no specific provision exists in the rules of court for an order such as the one requested, the court does have the power to regulate its own procedures in the interests of the proper administration of justice. While reiterating its principle opposition to piecemeal appeals, the court added[93] that if in the light of all considerations, it appeared that the advantages outweighed the disadvantages, the court would grant such an application if there appeared to be a reasonable likelihood that the alleged advantage would in fact result.[94]

Applying the foregoing to the facts before it, the court held[95] that if the decision on the special entry were successful, it would dispose of the entire appeal and if so, considerable savings of time and money could be effected. On the other hand, if the appeal on the special entry were dismissed, there would be no prejudice to the state or a waste of court time. The court accordingly directed that the special entry be heard prior to and separately from the main appeal.[96]

The present authors applaud the court's approach in Malinde. The Appellate Division seems to have moved away from the formalistic and over-simplified approach adopted earlier,[97] in the direction of an approach which accords with international interlocutory trends.[98] Even more importantly, it is a common sense approach and provides a sorely needed flexibility in our criminal procedure.

At this stage the principles of interlocutory remedies, as developed by our courts, may be summarised as follows. Interlocutory remedies are allowed in rare and exceptional circumstances.[99] Exceptional circumstances exist in cases where gross irregularities have occurred[100] and where denial of the remedy would lead to grave injustice[101] and prejudice the accused to such an extent as to lead to a miscarriage of justice.[102] However, a wrong decision in law, does not in itself constitute such an irregularity that would automatically entitle an accused to take the matter on interlocutory review.[103] The wrong decision may only be taken on immediate appeal or review when it might result in a miscarriage of justice.[104] An act or omission by a legal representative can constitute sufficient irregularity to permit an interlocutory approach.[105] Factors to be taken into account in determining whether an interlocutory remedy should be allowed, include the convenience of the parties and of the court. If the advantages outweigh the disadvantages, the court will grant the application. The court also has to consider the cogency of the point in issue, because unless it has substance the court will be wasting time and money. There must be a reasonable likelihood that the alleged advantages would in fact result.[106]

Although it is evident that interlocutory approaches do exist in South African procedure, and that certain principles for their application have crystallised through the years, it remains a question whether these principles are adequate to deal with constitutional questions which arise in criminal trials. This question will be considered below.[107] But first, we shall investigate some foreign legal systems where bills of rights have been in place for years and have proven themselves workable.

CHAPTER IV

THE MANAGEMENT OF CONSTITUTIONAL ISSUES IN SOME FOREIGN JURISDICTIONS

INTRODUCTION

In this chapter we examine the basic principles of constitutional law and procedure in three foreign legal systems, *viz.* the American system where the ordinary courts decide constitutional issues, the German system and the Spanish, where specialised constitutional courts which decide only constitutional points, have been established.

THE UNITED STATES OF AMERICA

INTRODUCTION

Although it is not the purpose of this article to attempt a detailed analysis of American constitutional procedure, it is necessary to investigate the impact which a bill of rights had on American criminal procedure to appreciate the task ahead for South Africa.

In the United States of America human rights questions are in the first instance left in the hands of the ordinary court system. The US Supreme Court has general jurisdiction to judge all questions of public law, and private law cases, where the parties involved are citizens of different states. The American Constitution is now more than two centuries old and although it has developed a rich constitutional and human rights jurisprudence, this took a long time to happen — longer than South Africa has.[108]

Few, if any, areas of American law have undergone such significant revision over the last few decades as its criminal procedure. The changes have been so rapid and far-reaching that some commentators have characterised it a legal 'revolution', although some prefer to view it as merely 'accentuated evolution'.[109] The United States Supreme Court has been a key participant in this revolution. During the 1960s, almost every Supreme Court term was marked by one or more decisions announcing significant new developments in the field of constitutional criminal procedure. While the Court's rulings during the 1970s contained fewer dramatic innovations, they provided a substantial body of law building on or modifying the new developments of the 1960s.

The Supreme Court's substantial role in the development of criminal procedure is a product, in part, of the special emphasis upon criminal procedure in the United States Constitution. Of the 23 separate rights noted in the first eight amendments, 12 concern criminal procedure.[110] The Fourth Amendment guarantees the right to be secure against unreasonable searches and seizures and prevents the issue of warrants unless certain conditions have been met. The Fifth Amendment requires prosecution by grand jury indictment for violation of all infamous crimes and prohibits placing a person 'twice in jeopardy' or compelling him to be a 'witness against himself'. The Sixth Amendment lists several rights that apply in all criminal prosecutions, including the right to a speedy trial by an impartial jury, notice of the nature and cause of the accusation, confrontation of opposing witnesses, compulsory process for obtaining favourable witnesses, and the assistance of counsel. The Eighth Amendment adds a prohibition against requiring excessive bail. Finally, in addition to the guarantees directed specifically at criminal procedure, the Fifth Amendment, in its general prohibition against the deprivation of life, liberty or property without due process of law, also impacts on criminal procedure.

The impact of the provisions of any constitution depends in the end on the courts' approach in determining their content. Had the US Supreme Court adopted a narrow interpretation, the constitutional guarantees would have had a minimal effect on criminal procedure. On the other hand, if the broadest conceivable interpretation had been adopted, the constitutional guarantees would have governed almost every aspect of criminal procedure. The degree of constitutional regulation does, however lie somewhere between these extremes.[111] Two main trends in the American 'constitutionalisation' of criminal procedure can be discerned: (1) the extension of the application of the Bill of Rights guarantees to the different states *via* the Fourteenth Amendment; and (2) the expansion of the interpretation of individual guarantees both to cover more and more aspects of the criminal justice process, and to provide greater regulation of those aspects previously covered.[112] It is not unlikely that some, if not all, American principles will eventually be 'incorporated' into the South African criminal justice system. A look at the constitutionalisation process that occurred in the USA may therefore illustrate the possible extent of the impact of a Bill of Rights on South African criminal procedure.

FOURTEENTH AMENDMENT EXPANSION

The first ten amendments to the US Constitution were enacted as limitations upon the US Federal Government. In 1868 the Fourteenth Amendment was adopted extending federal constitutional controls over the actions of state governments. This amendment provides, *inter alia*, that no state may "deprive any person of life, liberty and property without due process of law".[113] Its interpretation led to conflicting decisions on whether and to what extent the amendment made the first ten amendments (called the 'Bill of Rights') applicable to all states.[114]

There is no need to describe the process of interpretation here. The end result, however is important; the Supreme Court has held the following Bill-of-Rights-guarantees to be fundamental and applicable to the states under the same standards applied to federal government: the freedom from unreasonable searches and seizures and the right to exclude any evidence obtained in violation thereof from criminal trials;[115] the privilege against self-incrimination;[116] the guarantee against double jeopardy;[117] the right to the assistance of counsel;[118] the right to a speedy trial;[119] the right to a jury trial;[120] the right to confront opposing witnesses;[121] the prohibition against cruel and unusual punishment;[122] the right to a public trial;[123] and the right to notice of the nature and cause of the accusation.[124]

EXPANDING EXISTING GUARANTEES

Apart from making most of the Bill of Rights guarantees applicable to the states *via* the Fourteenth Amendment, the Supreme Court has also substantially expanded the scope of these guarantees as applied to both federal and state procedure.[125] The areas of pre-trial police investigation and the trial itself have become the two phases of the American criminal process most extensively regulated by constitutional limitations.[126]

The one major element common to the constitutional regulation of all aspects of police investigatory practices is the so-called exclusionary rule. This rule provides for the exclusion from criminal prosecution of evidence obtained in violation of the constitution and usually comes to the courts' attention *via* a pre-trial motion to exclude certain evidence pursuant to this rule.[127] In Mapp v Ohio,[128] the Supreme Court rejected the earlier notion that the exclusionary rule was not applicable to the states. The Mapp rationale was subsequently extended to require exclusion of evidence obtained through other unconstitutional practices — such as in Miranda v Arizona,[129] where the Fifth Amendment privilege against self-incrimination was applied to

custodial interrogation, thereby extending the Fifth Amendment's exclusionary requirement to any statements obtained from such interrogation without first having given the 'Miranda warnings' regardless of whether those statements were inherently untrustworthy or not. A Mapp-type exclusionary rule will certainly command attention in future constitutional litigation in South Africa.

Bail reform is yet another area where constitutionalisation may occur as it did in the USA. Although the Eighth Amendment provides that excessive bail may not be required, standards for determining what constitutes 'excessive bail' have still not been fully developed by the Supreme Court.[130] Recently there has been a movement away from requiring 'money' bail as it results in the confinement of large numbers of untried defendants solely on account of their inability to raise the required amounts. Bail reform projects have been initiated to ascertain the factors that would make defendants safer candidates for release without financial guarantees.[131]

Further examples of the 'constitutionalisation' of areas of criminal procedure include the prosecutors discretionary decision to charge or not to charge,[132] review of the prosecutor's decision,[133] joinder of offences in view of the Fifth Amendment's 'double jeopardy' prohibition,[134] limitation of prosecutorial discretion relating to the timing of the prosecution by the Sixth Amendment requirement that the accused shall enjoy the right to a speedy trial,[135] regulations regarding the defendants choice of plea,[136] and negotiated pleas,[137] pretrial discovery[138] and the nature of trial by jury.[139]

Just as the Sixth Amendment requires an impartial jury, due process requires an impartial judge, particularly in cases involving a bench trial.[140] This quality has also been the focus of constitutional litigation, as it may well be in a future South Africa.[141]

The Sixth Amendment right of the accused to be confronted with the witnesses against him, has been utilised in several ways. It has been held to guarantee the right of the accused to be present at his trial,[142] to require that the accused is given sufficient leeway in cross-examining prosecution witnesses, and to limit the prosecution's use of hearsay evidence, i.e. statements by persons who do not testify at the trial and therefore cannot be cross-examined.[143]

The Fifth Amendment privilege against self-incrimination *inter alia* permits the accused to refuse to take the stand at trial. The Supreme Court has dealt with many aspects incidental to this right. It has been held that the privilege bars any adverse comment by the court or prosecutor on the accused's failure to testify;[144] a state practice requiring the accused desiring to give evidence to do so before any other testimony for the defence has been led, places an unconstitutional burden on the accused's right not to testify since the effect

would be to force the accused to decide whether or not to testify before he has heard the testimony of the witnesses.[145]

Post-trial procedures in South Africa may undergo 'constitutionalisation' through interpretations similar to those of the US Supreme Court. This court has laid down principles to be considered when imposing sentence[146] and has established that the accused's right to legal representation also applies to the sentencing stage,[147] probation revocation proceedings[148] and to parole revocation proceedings.[149] Numerous constitutional requirements for appellate review of criminal convictions have also been formulated.[150] The availability of appellate procedures may not be conditioned on the convicted accused's financial status. If a trial transcript is required for review the state must provide that transcript free to the indigent appellant.[151] The state must also provide the indigent appellant with appointed counsel for the first appeal that is granted as a matter of right.[152]

Finally, the US Supreme Court has involved itself in interpreting the double jeopardy clause of the Fifth Amendment which provides that no person shall be put in jeopardy twice for the same offence.[153]

In the hundreds of cases involving the 'constitutionalisation' of criminal procedure certain general themes are reflected.[154] These include

- an emphasis on achieving equality in the administration of the criminal law; the court has recognised the unequal impact of criminal procedure on the poor and racial minorities and has sought to eliminate at least the official aspects of such inequality; and

- a general shift away from the idea that the different states should have the widest possible latitude in the administration of their own systems of criminal justice; since the 1960s it has been maintained that a uniform constitutional standard, though more restrictive, actually improves federal-state relations and that states should not be allowed the same discretion they have in social and economic systems when fundamental rights are involved.

A study of American constitutional criminal procedure will be essential for future constitutional litigation in South Africa.

PROCESSING CONSTITUTIONAL CLAIMS

Although both federal and state courts are duty bound to recognise constitutional criminal procedural claims, they may also impose reasonable

procedural requirements on accused persons wishing to raise such claims.[155] All jurisdictions, for example, impose requirements as to when objections to unconstitutionally obtained evidence may be raised. Most jurisdictions also require that objections to the admission of such evidence be presented by motion to suppress.[156] As a general rule, the motion to suppress must be made at the earliest opportunity, and more specifically before the trial has commenced,[157] especially if the prosecution has given notice of its intention to introduce the evidence. This requirement is often embodied in statutes or rules of criminal procedure[158] but also has a firm basis in the case law of many states.[159] A pre-trial motion is required because it assists in the orderly presentation of evidence by eliminating from the trial those disputes over police conduct not immediately relevant to the question of guilt.[160]

Despite the foregoing, courts have a discretion to permit a motion to suppress illegally obtained evidence to be introduced during trial if there are special reasons why the application could not have been submitted earlier. In People v Johnson,[161] the accused had been represented during preliminary proceedings by a series of assistant public defenders who had not filed the motion, and the prosecuting attorney later erroneously represented to the court that a motion had been made and denied. It was held that invocation of the time requirement would be unfair under the circumstances.[162]

For the effective administration of pre-trial motions, it is clear that an accused should have the benefit of discovery procedures. In the United States the accused may under some circumstances be permitted to examine certain prosecutorial evidence before the trial. Although there is no common law provision for discovery in criminal trials, the courts have liberalised this position and have given judges relatively broad discretionary powers to order the prosecution to permit the defendant to examine specific evidence when such examination is shown to be necessary for the preparation of the defence's case.[163]

When a pre-trial motion is filed by an accused, the court should hold a hearing on it. If the motion regularly raises a constitutional issue, for example the exclusion of illegally obtained evidence, the court should hold a hearing on it even though the trial is already under way or if the matter comes to light after the trial. The defence is allowed to present witnesses, including the police officers involved, to establish grounds for the exclusion of evidence. The state is permitted to cross examine the defence witnesses and call its own witnesses.[164] Although under ordinary motion practices the burden of producing evidence in support of the motion lies on the party introducing the motion, recent state decisions have placed the burden on the state to prove the

lawfulness of search and seizure, reliance being placed on the Fourteenth Amendment 'due process' provisions.[165]

On conclusion of the hearing, the judge determines the admissibility of the evidence questioned. If he finds the evidence inadmissible, the prosecutor must determine if the remainder of evidence is sufficient to proceed to trial. If he concludes that it is not, he may ask the court to dismiss the case. If the ruling occurs during the trial once the jury has already heard the evidence, the court should declare a mistrial.[166]

There is rarely any interlocutory appeal against an order denying the motion to suppress as an accused will first wait and see whether the evidence is actually used against him and he is convicted.[167] However, provision is made for interlocutory review[168] of interim questions in American criminal trials. This warrants closer scrutiny to determine whether it has any relevance for future South African criminal procedure.

The jurisdiction of federal courts of appeal is prescribed by statute.[169] Section 1291 of the United States Judicial Code[170] states that the circuit courts (the first court of appeal on state level) have jurisdiction over appeals from all final decisions of the circuit courts (lower courts). Final judgments are appealable as of right and the circuit court may not refuse to hear such an appeal.[171] This section in general prohibits appeals before sentencing (because the sentence is considered as the final judgment in a criminal proceeding).[172]

Several policy reasons have been advanced for the final judgment rule.[173] First, appealing final orders is more efficient as all objections can be brought before the appeal court simultaneously.[174] Second, some orders may become moot points if the objecting party ultimately wins the trial.[175] Third, the appeal court may be able to review the various rulings from a broader perspective after the trial court has issued a final judgment.[176] Fourth, the trial process will proceed more rapidly if not interrupted by interlocutory appeals.[177] Fifth, avoiding immediate appeals from every order will preserve respect for the trial judge's authority.[178] Finally, this rule prevents parties from using the interlocutory appeal process as an expensive delaying tactic.[179]

Despite the apparent rigour of the final judgment rule in criminal proceedings, there are procedures that permit the bringing of certain appeals before final judgment. These are known as the Cohen collateral order and the writ of *mandamus* and will be discussed separately.[180]

In Cohen v Beneficial Industrial Loan Corp,[181] the US Supreme Court held that an order, which was not a final judgment, may be appealed under 28 USC section 1291. The court reasoned that to protect important rights, the

concept of finality should be construed in a practical way and concluded that there is a "small class [of decisions] ... too important to be denied review and too independent of the cause itself to require that appellate consideration" await final judgment.[182] Although Cohen was a civil case, the approach adopted has also been applied to criminal proceedings. In Stack v Boyle,[183] the Supreme Court, relying on Cohen, held that an order dismissing a claim that the amount of bail set violated the Eighth Amendment proscription against excessive bail was an appealable interlocutory order. Since Stack the Supreme Court has extended the Cohen rule to orders dismissing claims that the Fifth Amendment proscription against double jeopardy has been violated[184] and to orders dismissing claims that a prosecution violates the so-called 'speech and debate clause' of the constitution which protects Congressmen from having to defend themselves for any speech or debate in either Congress or the Senate.[185]

To fall under the Cohen rule, interlocutory orders must meet a three-pronged test.[186] First, the order must finally dispose of an important right of the litigant. Second, the right disposed of must be independent of the main action. Third, it must be possible that the right involved may be damaged irreparably if an interlocutory appeal is not permitted. This test essentially balances the possible damage to an individual's rights against the principles of economy and efficiency underlying the final judgment rule. If all three criteria are not met, the balance favours the application of the final judgment rule.[187]

The three-pronged Cohen test is applied strictly in criminal matters. In United States v MacDonald,[188] the circuit court allowed the accused to appeal an order because of the unique circumstances and because, if the appeal were not allowed, the burdens "of a prolonged trial [might] be for naught".[189] On appeal the Supreme Court held that the right to appeal is not determined by the extraordinary circumstances of a case, and therefore the circuit court did not have jurisdiction under Cohen.[190] If the Cohen test is not met, it is not a case for interlocutory appeal.

The All Writs Act[191] provides the other procedure through which the courts of appeal may review orders in criminal matters before final judgment. Federal courts are authorised "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law".[192] This provision authorises circuit courts to issue writs of *mandamus* to the district courts, requiring those courts to take certain actions. Traditionally, such writs were reserved for "extraordinary situations or matters affecting the court's jurisdiction".[193] However, as was said in In re Josephson,[194] *mandamus* did not give federal appeal courts unlimited power

to review "any unappealable order which [the court] believe[s] should be immediately reviewable in the interests of justice".

Despite attempts to expand the doctrine's scope,[195] the Supreme Court has consistently returned to the 'exceptional circumstances' approach and continues to summarily reject transparent attempts to substitute a writ of *mandamus* for an appeal. In Will v United States,[196] the court stated that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy". With this in mind, the First Circuit Court has stated that the 'extraordinary circumstances' where the *mandamus* may apply include: (1) clear abuses of discretion by the lower court; (2) situations where there is a need to confine an inferior court to the lawful exercise of its powers or to compel it to act when it is under a duty to do so; and (3) situations "raising important issues of first impression".[197] From this it is apparent that *mandamus* is limited to rulings involving abuse of discretion by district courts and is therefore not used to correct lower court rulings on close questions of law.

Despite the potential of interlocutory criminal appeals in the United States as discussed above, it is clear the courts are unable to permit an interlocutory appeal based solely on considerations that the appeal is likely to conserve resources. For this reason it has been argued by certain commentators[198] that, to reduce the cost of operating the American criminal justice system, Congress should enact a jurisdictional statute which grants the courts a discretion to permit an interlocutory criminal appeal which is likely to conserve resources.[199]

There is precedent in civil procedure for the recognition of such a discretion. Section 1292(b) of the United States Judicial Code,[200] grants the courts of appeal jurisdiction to hear certain interlocutory appeals from otherwise non-appealable civil orders. If a lower court states in writing ('certifies') that the order involves a controlling question of law over which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate termination of litigation, then the superior court may, in its discretion, hear the appeal.[201]

Section 1292(b) differs from both the Cohen collateral order rule and the writ of *mandamus* in that the initiative to go on appeal does not lie with the accused but with the district court. The accused cannot initiate or even attempt to initiate an interlocutory appeal unless the district court allows it, i.e. certifies that it seems appropriate. The rationale behind this is that the trial court, having itself ruled on the issue[202] will be familiar with the approximate cost of the trial, being in a position to request the attorneys for information concerning the number of witnesses they plan to call and the

expected length of time each witness will be questioned, as well as the difficulty of the question involved in the appeal. Furthermore, the appeal is not permitted automatically; the circuit court has a discretion whether or not to permit the appeal.

The benefits of the section 1292(b) certification procedure are two-fold. First, it enables the courts to limit interlocutory appeals to those cases in which interlocutory appeal is likely to be economically beneficial. Second, it reduces the wasted expenditure that results when an appeal is disallowed for lack of jurisdiction. It is argued[203] that these benefits will also be obtained if section 1292(b) is made applicable to criminal trials. There are lengthy criminal trials, just as there are lengthy civil trials. Furthermore, such a procedure would enable courts to correct erroneous rulings on pre-trial motions (such as the pre-trial motion to suppress, discussed above),[204] allowing the courts to avoid almost all costs associated with what would have been a wasted trial had the interlocutory appeal not been allowed.

In spite of these compelling arguments, section 1292(b) does still not apply in criminal trials. However, to mitigate the harshness of the final judgment rule and the few exceptions that do exist, the courts have developed a more pragmatic approach to appealability. In the words of the Supreme Court, among "the considerations that always compete in the question of appealability, the most important ... are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other".[205] This balancing of competing needs for judicial economy and justice represents the court's recognition that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action'"[206] or, as the court has also phrased it, "the requirement of finality is to be given a 'practical rather than a technical construction'".[207] To sum up, the test for allowing an interlocutory appeal has been formulated as follows: "Where the danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review the appeal should be allowed prior to the issuance of a final judgment".[208]

Among the factors to be taken into account in making the appealability decision under the above-mentioned balancing approach, are (1) the delay which may result before the case would ultimately be heard on appeal after a final judgment, (2) the harm such a delay would cause to the litigants' financial or personal situation, and (3) the expected length and expense of the trial, in relation to the relative financial capabilities of the parties seeking appeal, which may prove a waste if the district court's order is ultimately reversed;[209] and the likelihood that the order from which appeal is sought

will be reversed. The latter does not entail asking the appeal court to make a complete examination of the merits of an attempted appeal, but rather a kind of 'probable cause' examination of the issue, by which the appeal court could satisfy itself without full study of the merits that the issue on appeal poses a legal question the answer to which was either uncertain or likely to have been incorrectly determined by the district court.[210] Correctly applied, this pragmatic balancing approach may vastly improve the American appellate process which, like South African criminal procedure, suffers from an excess of formalism and rigidity.

Much of what has been said about the United States also applies to South Africa. South African lawyers may also expect a future 'constitutionalisation' of criminal procedure with all its pros and cons. The possibility of introducing a process similar to the American pre-trial motion to suppress evidence (e.g. illegally obtained evidence) into our criminal procedure will be investigated below.[211] Finally, as in the United States, no statutory provision is made for interlocutory appeals in South Africa. A process of certification of issues seems to have merit in a South African context.[212]

THE FEDERAL REPUBLIC OF GERMANY

INTRODUCTION

The Federal Republic of Germany has a specialised constitutional court, the German Federal Constitutional Court (hereafter referred to as the FCC). Now almost 43 years old, the FCC has been described as the mainstay of German constitutionalism, the symbol of the rule of law in the eyes of most German citizens as well as an effective counter-majoritan check on the political branches of government.[213] The FCC is a specialised tribunal, empowered to decide only constitutional questions and some public law controversies. It is useful to examine the FCC briefly from a South African point of view since it is possible that South Africa may get a similar judicial body for the purposes of constitutional review. We here investigate the jurisdictional and procedural aspects of the FCC.

The FCC is composed of 16 judges, including a president and vice-president of the court. It is a 'twin court', because of its division into two senates, each consisting of eight judges, with mutually exclusive jurisdiction and personnel.[214]

The court's jurisdiction is laid down in ten different articles of the Basic Law of 1949 (constitution), all of which have been further codified by the Federal Constitutional Court Act (FCCA) of 1951. The court is

constitutionally and statutorily circumscribed and cannot extend its functions or powers in terms of general constitutional provisions, or its general role as guardian of the constitution. However, the FCC itself interprets the relevant clauses determining its jurisdiction. The two areas of the court's jurisdiction most relevant for present purposes are discussed below. Well over 95 % of the court's case load consists of constitutional complaints. Although the few cases which have been decided in areas such as abstract judicial review, disputes between certain organs of state and federal-state disputes are of enormous political significance,[215] they fall outside the ambit of this article.

CONCRETE JUDICIAL REVIEW

Concrete, or collateral, judicial review arises out of an ordinary law suit. If a German court is convinced that a relevant federal or state law under which a case has arisen violates the Basic Law, it must refer the constitutional question to the FCC before the case can be decided hence the use of the term 'collateral'. Judicial referrals do not depend upon the issue of constitutionality having been raised by one of the parties. A lower court is obliged to make such a referral when convinced that a law under which a case arises is in conflict with the constitution. The petition must be signed by the judge or judges who voted in favour of the referral, and accompanied by a statement of the legal question at issue, the provision of the Basic Law allegedly violated, and the extent to which a constitutional ruling is necessary to decide the dispute.[216] As a matter of procedure, the court must allow the highest federal organs or a state government to join in the case and must also give the parties involved in the proceedings below an opportunity to be heard. The parties make their representations through written briefs.[217]

Only the FCC can decide the issue finally. The procedure allows for the ordinary courts to be involved in the process of testing the constitutionality of a law, but not in declaring it unconstitutional.[218] Approximately 1,5% of cases decided by the FCC dealt with concrete review, which seems to indicate a reluctance by ordinary judges to refer questions to the FCC. This has been attributed to the strong tradition of legal positivism which continues to hold sway in the regular judiciary. Jealous of their own limited power of judicial review, judges usually resolve doubts about the constitutional validity of laws at issue in pending cases by upholding them or interpreting them so as to avoid questions of constitutionality. By so doing they avoid the necessity of referring questions to the court.[219]

CONSTITUTIONAL COMPLAINTS

Under German law constitutional complaints are by and large the prerogative of private individuals. Any person who claims that an action of the state has violated one or more of his or her rights under the Basic Law may, after exhausting all other legal remedies,[220] file a constitutional complaint in the FCC. Certain time limits exist for these complaints to be lodged. The act or omission relied upon as well as the offending agency must be identified, and the constitutional right allegedly violated specified.[221] All state actions may be attacked, particularly executive actions, court decisions, and under certain conditions also laws, even before their application. 'Any person' within the meaning of this provision includes natural persons with legal capacity to sue, as well as corporate bodies and other 'legal persons' possessing rights under the constitution. The complainant must be personally affected and the effect must be direct and immediate as it has clearly stated that this is not an *actio popularis* or class action.[222]

The procedure for filing complaints is relatively easy and inexpensive. No filing fee or formal papers are required. Most complaints are hand written and prepared without legal assistance. Legal assistance is not required at any stage during the complaint proceeding. As a consequence of these rather permissive rules, the court has been flooded with complaints, growing from well under 1 000 per year in the 1950s to approximately 3 500 per year in the mid-1980s and making up about 55 % of the FCC's published opinions.[223]

Constitutional complaints eventually became so overwhelming and time-consuming that three screening committees (called chambers since 1986) consisting of three judges each, were established in 1957 to screen frivolous complaints. The chambers screen complaints to the court and can dismiss a complaint if they decide unanimously that it is inadmissible or offers no prospect of success. If one of the three members votes to accept the complaint, it is forwarded to the full senate for a decision. If at least two judges (i.e. a minority) of the full senate feel that the complaint raises a question of law likely to be clarified by a judicial decision, the complaint will be acceptable for scrutiny. However, a senate majority may still reject the complaint as 'trivial' or 'inadmissible'.[224] The chambers dispose of 95 % of constitutional complaints. They are neither obliged to furnish reasons for their decisions nor are such reasons published in the court's official reports. The practice has, however, developed that reasons are provided to complainants in the form of a written statement, which happens in 75 % of cases.[225]

In 1963 a further measure to discourage complaints was introduced. The imposition of a fine on complainants who 'abuse' the procedure was statutorily entrenched. Since 1985 a maximum fine of DM 5 000 may be imposed upon a frivolous petitioner, and a fee of DM 1 000 imposed upon any petitioner whose complaint is not accepted by a three-judge screening committee.[226]

The court's judicial procedures are prescribed in the FCCA and the rules of procedure developed by the FCC itself. The FCC only comes into operation when petitioned to do so. Although oral argument is supposed to be the rule, this rarely happens and formal hearings of constitutional complaints and concrete review seldom occur. The judges' deliberations are confidential. All judges prepare written opinions with supporting arguments; decisions are rendered in the court's official record in declaratory form. The court normally confines itself to declaring laws null and void and does not issue mandatory or other orders to government officials.[227]

Criticism has been levelled *inter alia* against the FCC's management of constitutional complaints.[228] First, the fact that complaints may be summarily rejected and that the reasons for the rejection are not published has the practical consequence that scholars are denied the opportunity to study the material to reveal patterns and trends in the court's management of these issues.[229] Furthermore, a veil is drawn between the FCC and the public in this area which could lead to mistrust and undermining of the court's stature and authority.

Second, section 90 of the FCCA requires that if legal remedies for an alleged violation of constitutional rights are available, they must be exhausted before a constitutional complaint may be brought. This requirement may be waived if the court is of the opinion that the matter is of general importance or the consequences (including costs) or referring the appellant to ordinary legal remedies would be unduly severe.[230] Initially, complainants often ignored the exhaustion requirement and the court frequently had to point out that the costs of bringing a normal appeal in the ordinary courts would not constitute an unduly heavy burden.[231] The power to decide matters of general importance without requiring exhaustion of legal remedies has been employed by the court when the constitutionality of a statute of wide applicability is challenged by a complainant. An important case in this regard was the complaint, in BVerfGE 1,418,[232] against the law for the punishment of Nazi crimes, where the court agreed that the question of the validity or otherwise of the punishment law was of such general importance that it invited an early constitutional decision.

Regarding the exception for cases where the ordinary legal process would be unduly burdensome, a rule of thumb has been formulated that an ordinary

appeal need only be brought when to do so is 'reasonably to be expected'.[233] This is far from a clear standard and has led to serious problems. In BVerfGE 17,252,[234] the FCC surveyed the various legal remedies available to the complainant, but admitted the complaint because the legal position was so doubtful that the appellant could not 'reasonably be expected' to pursue these avenues to their conclusion before bringing his constitutional complaint. This decision seems to have been followed in other cases[235] and the approach appears to be quite liberal. The issue is, however, not as clear as one would wish because the lack of precise guidelines leaves an appellant in the position where he has to attempt to anticipate the court's determination as to whether a particular remedy should be pursued or not.[236] If he fails to pursue a remedy which the court decides was necessary, the complaint will be rejected and the regular appeal may have become time-barred. The appellant can also not 'play it safe' by following every available legal remedy however hopeless. Section 93 of the FCCA requires that complaints against judicial decisions have to be lodged within one month after the decision has been handed down. In BVerfGE 5,17[19],[237] the court stated that the period of one month does not start afresh by lodging a patently inadmissible appeal or by the announcement of a decision in such an appeal. In BVerfGE 28,1,[238]the court stated that "[a] legal remedy is considered patently inadmissible when those pursuing it cannot, in the light of prevailing doctrine and jurisprudence, be unaware of its inadmissibility". It would seem that the FCC is of the opinion that if the appellant does not do his homework and does not know when to lodge an extra-ordinary remedy instead of an ordinary appeal, he must suffer the loss of constitutional remedies. In view of the fact that legal representation is not required in complaints, this approach appears puzzling. Without counsel it would indeed be difficult for the applicant to gauge his prospects in either the ordinary appeal courts or the FCC. To boast that anyone may approach the court for the price of a postage stamp and a sheet of paper does not mean much in this context.[239]

It is not clear whether the applicant would be able to avoid the dilemma by first lodging the complaint and then, after the matter has been concluded in the FCC, lodging an appeal in the ordinary courts. It has been suggested that an ordinary court should assist the applicant by staying its proceedings in such circumstances.[240] However, it has also been stated that such juggling will also require foresight of a kind unlikely to be found in an unrepresented appellant.[241]

Finally, the FCC has come under fire for employing the precedent system rather selectively, simply ignoring previously decided cases which it chooses not to follow; or citing 'established jurisprudence' as a prelude to announcing

quite novel decisions.[242] However, in our view such criticism should be tempered by the fact that the Anglo-American precedent system is not part of the European continental civil law systems; it is commendable that German courts operate with even reasonable consistency.

Much can be learned from the German experience, and certainly not only from its shortcomings. The procedures and processes of the FCC provide stimulating possibilities for the procedural management of constitutional issues in South Africa and needs to be given serious consideration, particularly the notion of involving lower courts in decisions relating to the constitution before the matter is referred to a constitutional court; the use of screening chambers in cases of constitutional complaints; and the requirement of exhaustion of ordinary legal remedies. These aspects will be considered below.[243]

SPAIN

INTRODUCTION

A look at the Spanish constitutional court (*Tribunal Constitucional*) is highly relevant to South Africa. In 1987 an overwhelming majority of the Spanish people approved a modern democratic constitution that ended almost four decades of fascist dictatorship and international scorn. The following words, used to describe the Spanish social predicament at the time, are regrettably equally applicable to South Africa today.

> Spain still suffers from the tragic wounds of a long and repressive dictatorship ..., [m]achine gun wielding policemen seem to outnumber citizens in many public places. Amnesty International and the Spanish press repeatedly bring accusations of police torture of suspected terrorists. The Spanish people respond to all this with pessimism and, most recently, general political apathy.[244]

Because of Spain's history of repression and the general distrust of government among the population, the *Cortes* (parliament) considered a specialised constitutional court or *Tribunal Constitucional* (TC) essential and took great pains to ensure its independence and respectability.[245]

The TC consists of 12 members or magistrates, four nominated by the Congress of Deputies and Senate (the two houses of the *Cortes*), and two each nominated by the government and General Council of the Judiciary each (the governing body of the ordinary courts). The King formally appoints them.[246] Only magistrates and prosecutors, university professors, public

officials and lawyers (all of whom must be jurists of recognised standing with at least 15 years experience), are eligible for appointment to the TC.[247]

Two areas of the TC's jurisdiction are relevant in this context. First, appeals and questions of unconstitutionality and second, *amparos* or individual appeals for protection.[248]

APPEALS AND QUESTIONS OF CONSTITUTIONALITY

The TC is authorised to rule on the constitutionality of a wide range of legal norms including laws, acts or regulations having the force of law, and internal regulations of both the national and regional parliaments. If the request for a ruling is made through the direct procedure, it is called an 'appeal' of unconstitutionality; if made through the indirect procedure, it is called a 'question' of unconstitutionality.

'Appeals' of unconstitutionality may be made by the President of the government, 50 Deputies, 50 Senators, the Defender of the People (a type of ombudsman), and the executive or legislative bodies of the Autonomous Communities.[249] 'Questions' of unconstitutionality refer to the power and duty of any court to ask the TC for a ruling on the constitutionality of any regulation with the status of law, which is applicable in a concrete case and on whose validity the judgment depends. The question is referred to the TC when the court considers that the law or regulation may be contrary to the constitution. The only requirement is that there be a doubt in the judge's mind. The power to send a question to the TC belongs entirely to the judge, not the parties, although denial of a party's request to raise a question of unconstitutionality does not prevent the party from making the same request again on every level of the appeal process. If the judge decides to refer a question *suo moto*, he must first allow the parties an opportunity to present arguments on the matter. To preclude its use as a delaying tactic, the parties may only raise a question after the trial has ended, but before the handing down of sentence. Questions are not constrained by time limits and may be raised at any time.[250]

The TC may refuse to accept an appeal or question of unconstitutionality because of deficiencies in form, provided that they may be resubmitted after the defects have been corrected. The TC may also reject questions if they are manifestly unfounded.[251] The admission of an appeal or question does not operate to suspend the application of the law or regulation attacked.[252] A law which violates a law other than the constitution may also be declared invalid, provided that the requirement is that the other law is 'higher' than the constitution. It is interesting to note in this connection that the TC has based

some of its decisions on international human rights covenants and the decisions of the European Human Rights court.[253]

A TC judgment of unconstitutionality nullifies the norms in question as well as those norms so closely connected with them that their nullification is 'logically necessary', beginning the day after publication of the judgment.[254] Although cases that are *res judicata* cannot be reopened, the jurisprudence derived from such cases is overruled (i.e. nullified) if it conflicts with a judgment of the TC. Should a supreme court refuse to apply a TC interpretation, the damaged party may raise the appeal of *amparo* against the court's decision.[255]

Finally, both appeals and questions of unconstitutionality are governed by strict time limits that require the TC to act with speed. Once the TC has accepted a case, it must hear arguments within 15 days and render its decision within 15 days thereafter. Extensions of up to 30 days are allowed, provided that the TC publishes its reasons for such delay.[256]

AMPAROS

Amparos are individual appeals for protection against acts or omissions of government bodies that violate the rights and liberties specifically protected by the articles dealing with human rights (such as free speech and free education).[257] Only **action** can be challenged through *amparos*. A party can challenge almost any government action that is not a law, whether it be an administrative or judicial act or decision.[258]

A person must be directly affected by government action to raise *amparo*. Only the parties to a specific case can raise an appeal of *amparo* when a judicial act is challenged or when exhaustion of legal remedies is a prerequisite.[259] Once again, this is no class action. Unless he is challenging legislative decisions which do not have the force of law, an applicant must exhaust all possible remedies before asking the TC for protection. In judicial acts exhaustion of remedies means exhaustion of appeals. *Amparos* may be rejected if they are raised too late, lack procedural requirements, relate to rights not protected by the relevant articles of the Constitution,[260] are substantially identical to *amparos* previously rejected on merit, or manifestly lack substance justifying a decision by the TC.[261]

Although it is still early days for the TC, it has been claimed that Spain now has the best developed system of constitutional judicial review in the world.[262] However, major threats to the TC's effectiveness have been identified such as overload and over-politicisation of its functions.[263] The requirement that 'questions' of unconstitutionality may only be raised after

conclusion of a trial but before sentence is passed as well as the exhaustion of remedies requirement relating to *amparos*, may be criticised as showing a lack of pragmatism which could lead to frustration and a waste of resources. Finally, the strict time limits governing appeals and questions of unconstitutionality may be regarded as requiring unseemly haste in constitutional litigation that may lead to serious workload problems,[264] but this potential hazard may largely be avoided through the implementation of a proper screening system to sieve out unfounded and frivolous approaches. Some of these points will be returned to in the next chapter.

On the positive side, the TC's ability to refer to 'higher laws' is commendable. The sources of human rights are international and it is only through careful study and interpretation of these that we can enjoy the benefits and the wealth of legal principles which have been established over years.

CHAPTER V

VARIOUS MODELS FOR THE PROCEDURAL MANAGEMENT OF CONSTITUTIONAL ISSUES

INTRODUCTION

Having investigated the present South African criminal procedure and with the advantage of the examples gleaned from foreign systems, it now remains to attempt to design a practical and cost-effective model for the management of human rights issues which may in future arise in criminal trials in South Africa. Different possibilities come to mind, each with its own advantages and disadvantages.

At the outset, one may imagine the following fictitious scenario. During a criminal trial the accused raises an objection to the introduction of certain evidence by the prosecution. He alleges that the evidence was obtained in violation of his right to privacy and that it should be excluded on the ground of its unconstitutionality, i.e. offending against the Bill of Rights.[265] The trial magistrate decides to rule on the admissibility of the evidence after a separate hearing on the issue (a 'trial within a trial') since he believes that the resolution of this question may resolve the whole matter and save both time and money. Furthermore, neither the accused nor the state will be prejudiced by such a separate hearing.[266] After hearing argument from both the accused's lawyer[267] and the state, the magistrate rules that the evidence be admitted and the trial continue. The accused remains convinced that her human rights were infringed and that the magistrate erred by not excluding the evidence. He wants to take the matter further. What now? There are several possibilities.

THE CONSTITUTIONAL PANEL MODEL

The first model which comes to mind borrows from the German screening chamber,[268] with some modifications. It calls for the establishment of constitutional panels throughout South Africa. Depending on workload, these panels may be convened on a regional basis, such as one for every Provincial Division of the Supreme Court or, depending on the eventual system of government, one for every federal unit of the South African Federation. The panels will meet on a regular basis to consider constitutional complaints, whether they arise from matters before the courts or not. To make the process

accessible to all there should be very few formalities to comply with apart from time limits and a requirement that complaints should be submitted in written form, but need not be prepared by a legal representative. The panels will have jurisdiction to consider complaints and rule on the validity thereof. To discourage abuse, panels will have to have the power to impose fines for frivolous complaints (*cf.* the German screening chambers).[269] If a panel holds a complaint to be of substance, it will refer the matter to the appropriate judicial body for a decision. Depending on whether a specialised Constitutional Court is introduced for South Africa, this body could either be the Constitutional Court, the particular Provincial Division of the Supreme Court where the panel sits, or even the Appellate Division or its constitutional branch if the panel regards a matter as being of sufficient national importance.

What this model would hold for the accused in our fictitious example above would be the right of immediate approach to the panel closest to him. Two considerations come into conflict at this stage. It may be that the accused is merely using the constitutional approach as a delaying tactic to avoid standing trial. If this is the case, the trial should not be postponed. On the other hand, if the trial is allowed to continue pending a final decision on the constitutional question, time and money may be wasted if the court continues in circumstances where, in retrospect, to do so would be an exercise in futility. Furthermore, the accused may have suffered irreparable damage by the time the issue is finally settled. By the time the appropriate court decides the issue, he may have already been found guilty and have been serving a jail sentence for some time. One would certainly have sympathy with him if he did not feel triumphant if and when the matter was eventually decided in his favour under these circumstances!

To avoid this rather unfair possibility, strict time limits will have to be set for complaints from unconcluded trials and the trial postponed pending the panel's decision on the viability of the constitutional question.[270] Once the panel has made the decision, the trial will either continue or be further suspended pending the higher court's decision. If a complaint is regarded as worthy by the panel, we submit that that fact *per se* should warrant delay of the lower court's proceedings pending classification of the constitutional point.

One important advantage of this model is that it is effective and speedy in weeding out vexatious and frivolous complaints. Unfortunately, it also has serious drawbacks. The composition of the panels may present problems. How big should a panel be? How should its members be selected? Will or should they be political appointments and if so, who will be eligible for selection? They may perhaps be appointed from the ranks of judges, magistrates, academics and constitutional experts, but who should have the

power to decide whether a particular person is a suitable member? The introduction and maintenance of constitutional panels will also not be inexpensive. Members will have to be remunerated and infrastructures established. These are, however not insurmountable problems; they are problems of detail that can be addressed by the draughtsmen of a new 'constitutional' chapter to be added to the Criminal Procedure Act, perhaps after recommendations by the South African Law Commission.

To require the barest minimum of formalities for a complaint to be lodged may be commendable because it allows for ready access to the panels. Unfortunately, this will also mean that a panel may be faced with the task of attempting to gauge the viability of a constitutional complaint with very little information at its disposal. This disadvantage may be avoided to some extend by giving the panels the authority to hear oral argument in appropriate cases, but that could again seriously hamper the speed of the process.

Apart from anything else, the purpose of the panels will not be to decide the issues, but to test complaints for viability or admissibility. If the panels were to hear argument on each complaint, it could soon be accused of usurping the functions of the courts. On the other hand, by limiting its functions to the testing of complaints, the process becomes drawn out since a definite obstacle is placed in the path of the accused to discourage her in the pursuit of her constitutionally guaranteed rights.

This does, of course, not mean that such a model will have no merits in a future South African criminal justice system. Experience in Germany and Spain has shown that a 'keeper of the gate' mechanism can be very useful in the successful management of constitutional complaints which do not arise directly from trials, so that the panel can act as a first line of defence against trivial and frivolous complainants. In the case of a complaint arising during the course of a criminal trial, however, the potential complainant is already inside the judicial process. Consideration should accordingly be given to possibly expanding the role of the trial court in judging the admissibility or viability of constitutional adjudication in a higher court, although a screening body may play an important role here as well. This will be further examined below.[271]

PRE-TRIAL MOTION TO SUPPRESS

The second model that we should like to consider is an adaptation of the American pre-trial motion to suppress evidence. When discussing the applicability of any American process of criminal procedure for South Africa, the differences between the two systems should be kept in mind. It would be

dangerous to introduce any model into our criminal procedure merely because it 'works' somewhere else.

In our fictitious example above, before the trial commences both the state and accused should be given the opportunity to address the court on constitutional issues which they believe may be relevant to the coming trial. The prosecutor addresses the court first and has the duty to bring any possible constitutional controversies to its attention. The accused then has the opportunity to address the court on these and any other issues which he believes to be constitutionally relevant. He may petition the court for an order declaring all evidence obtained in violation of his constitutional rights inadmissible. The trial magistrate (or judge, if the trial takes place in a superior court) rules on the issue and directs how the trial will proceed. It may happen that the prosecution stops there and then because the state's case is effectively destroyed by the court's ruling and all charges are withdrawn.

This procedure should also allow a presiding officer to order that he be addressed on particular issues not raised by the parties but which he regards as relevant. After address, he may then rule on these issues.

For different reasons, we do not believe that this model is feasible for South Africa. The main reason is that South African criminal procedure has no tradition of extensive pre-trial discovery procedures as the Americans have, although we do recognise some such discovery under certain circumstances. In some cases the prosecution is under a positive duty to disclose to the accused evidence which may exculpate him/her.[272]

In the USA the accused has a far greater spectrum of pre-trial methods for exploring the prosecution's case. Before the accused can be held for trial the prosecution must produce enough evidence at a preliminary hearing to establish a 'probable cause'. Such a preliminary hearing takes place as soon as possible after arrest and is held before a magistrate or judge of a lower court.[273] The preliminary examination *inter alia* serves to give the accused some idea of the prosecution's case. Defence counsel is entitled to cross-examine the prosecution witnesses and in effect gets a free statement from such a witness without submitting his own defence witnesses to similar examination.

In some American jurisdictions the accused is also provided with a copy of the grand jury minutes which may contain testimony of all prosecution witnesses.[274] The Bill of Particulars accompanying the indictment not only contains the details of the charges preferred against the accused as in South Africa, but usually also a short, simple statement of the facts constituting the offence charged. The accused may himself move for a Bill of Particulars,

requiring the prosecution to 'plead the details' of the alleged offence which has the practical effect of advising the accused of the prosecution's evidence.[275]

The accused in our example does not have the benefit of such comprehensive pre-trial discovery and, apart from the charge sheet, may have no idea what the state's case against him is going to be. It is possible that he may only learn of the existence of certain evidence when confronted with it at trial. He may only then attempt to obtain its exclusion. Also, unlike in the United States, South Africa is faced with a situation where the vast majority of accused persons are not represented either before or during the trial and cannot be expected to have the knowledge to identify a possible constitutional infringement and contest it. To suggest that a duty be imposed on the state to inform the accused or the court of all possible constitutional issues at some pre-trial stage, would not solve the problem since many controversies may simply not be foreseeable at pre-trial stage, particularly by a prosecutor with limited training and experience in constitutional issues.

In our view, however, the biggest disadvantage of the model is the lack of finality of the pre-trial procedure. After the lower court has ruled on the pre trial motion, its decision will have to be appealable. The limitations of interlocutory appeals have been noted. It also adds to delay. If no such appeal is permitted, the accused will, if she is convicted, have to go through with an appeal or review application in any event.

In conclusion, we submit that the pre-trial motion to suppress model is not the ideal one to incorporate into South African law.

AN ASSESSOR MODEL

A rather novel procedure, here called the assessor model, has been suggested to avoid the need to take matters out of the trial court's hands when dealing with constitutional issues.[276] The model does not remove the matter from the trial court, but in fact calls for the participation of the presiding officer in settling issues. The moment the accused in our example raises her objection to the evidence, the magistrate will stop the trial. With the assistance of both parties, a constitutional question is formulated and both the accused and the state may then each nominate an assessor. The services of the assessors are obtained, the trial resumes before the magistrate and the two assessors and argument is heard from both parties during a 'trial within a trial' on the stated question alone. After argument the court decides the issue on a simple majority vote by the magistrate and the assessors. The assessors are discharged and the trial continues.

The major advantage of this model, in our view, is that the matter is not removed from the trial court. Trial magistrates and judges will accordingly be regarded as part of the solution and not the cause of all the trouble by their making a potential unconstitutional finding in the first place. Involving trial magistrates and judges may contribute towards the growth of a culture of human rights and constitutionalism at grass roots level. The model moreover does not call for the implementation of a new process, with all the administrative red tape and costs associated with its creation. Assessors are called in on an *ad hoc* basis for a specific purpose, making the model more flexible than any of the other models mentioned so far. The costs of obtaining the services of two assessors for a day or two are far less than that of the other models, even if they are highly qualified lawyers.

Unfortunately, the model also suffers from shortcomings. First, the decision will once again have to be subject to appeal and review in the normal course so that one may well ask what has been saved in the end. After the expense of calling in two assessors and extensive argument from both sides the accused may still decide to take the decision on interlocutory appeal (if it is possible) or wait for the end of the trial to exercise the normal remedies available to him.

Second, this model may lead to rumours and perceptions that an accused can never obtain a ruling in his favour. The magistrate or judge and state-appointed assessors may be perceived to come from the same stable with the result that, in the end, most decisions will be in favour of the state, ultimately all decisions to be taken on appeal anyway. One way to avoid this would be to allow nominations only from a list of approved assessors. Such lists, however, are quagmires, fraught with potential for dispute, mistrust and conflict.

The common denominator of all three models discussed thus far is that they suffer from a lack of finality. Constitutional panels are merely gate-keeping institutions for interlocutory appeal or review procedures, decisions taken during pre-trial motions are appealable in the normal course, as are those taken by assessors. Inexpensive and speedy as they may be, they will end up being just another obstacle in the way of the final resolution of constitutional issues. Interlocutory appeals are not unknown in South African criminal procedure, and as we have seen,[277] our courts have developed fairly clear principles for their application. To introduce an unfamiliar process to deal with a very new and unfamiliar constitution with all the growing pains and time-consuming fine-tuning associated with it, is in our view, not recommendable. A proper system of interlocutory approach remains for us the preferable management solution to constitutional issues arising in criminal

procedure once a Bill of Rights has been introduced. We proceed to discuss our proposed approach.

CHAPTER VI

THE PROPOSED SOLUTION: INTERLOCUTORY CONSTITUTIONAL REMEDIES

Society invests economic resources to operate a criminal justice system. It therefore has a direct and substantial economic interest in the efficient operation of system.

One factor that affects the economic efficiency of the criminal justice system, is the time at which appeal or review is allowed. For this reason our courts have in the past been reluctant to allow interlocutory approaches.[278] If criminal defendants were permitted to appeal every adverse order before proceeding with the trial, resources would be enormously strained and trials would be significantly prolonged. The reluctance to permit interlocutory appeals produces a more economic resolution of the vast majority of criminal cases.

However, cases such as Baleka[279] and Sheehama[280] clearly illustrate that societal resources could be saved in some criminal cases, where the cost of an interlocutory appeal would be far smaller than the cost of not permitting such an appeal. To mitigate the harshness and occasional absurdity of the general rule, our courts have developed a more pragmatic approach to appealability. In Malinde the Appellate Division was speaking the language of pragmatism when it referred to a balance of divergent interests and considerations of convenience as factors to be taken into account, concluding that interlocutory approaches should be allowed if such an appeal would dispose of the matter and result in a net saving of time and money.[281] We submit that this approach is commendable and that it should be expanded upon to facilitate interlocutory approaches in cases of constitutional objections in criminal trials. In this regard, we believe that American experience with interlocutory appeals and its principles discussed above[282] is helpful.

Before we embark upon a final statement of our recommendations, we should sound a note of caution. Any model proposed for the management of constitutional issues which does not take into account that the vast majority of accused persons in this country are unrepresented at trial, would be unrealistic. To propose a solution to the dilemma does not fall within the scope of this article. We hope that the problem, which has crisis proportions, will be addressed by the drafters of a final Bill of Rights. For the purposes at hand we shall make suggestions for the management of the constitutional rights of the unrepresented accused as well. These may in future either be incorporated

into a system aimed at providing legal representation to the criminal defendant or replaced by another, more appropriate model. For convenience sake, we shall first propose a model for the represented accused and thereafter adapt this model to the unrepresented criminal defendant. We do not pretend that our proposals are perfect. A model is just that; a model, which in actual practice may need many adjustments.

It is proposed that the recommendations of the South African Law Commission[283] on the separate adjudication of disputes be incorporated into our criminal procedure as soon as possible. Statutory provision for such a procedure is long overdue and our courts should have no difficulty in applying it. To return to the accused in our fictitious example above:[284] as soon as he raises his constitutional objection, the magistrate decides the issue during a separate hearing. If the ruling is in his favour, the state has to decide whether to continue without the excluded evidence or to withdraw the charges against the accused. If the decision is against him, the defendant has to decide whether to accept the ruling or to appeal.

If he decides to appeal he informs the court of his decision. The appeal is not automatic, however. The trial court must **certify** that it is of the opinion that the order in question deals with a fundamental constitutional right of the accused, about which there is sufficient uncertainty to warrant early resolution at higher level; an immediate appeal from the order may substantially advance the ultimate completion of the criminal case. If the trial court so certifies, the matter is postponed and the constitutional question referred to the court with jurisdiction over such constitutional issues. This certification procedure involves the trial court in the resolution of constitutional disputes; an important aspect, as we pointed out above.[285]

The primary factor to be taken into account by the trial court when considering certification is the danger of prejudice to the accused's constitutional rights as a result of delay. If this is so substantial as to outweigh any countervailing interest in avoiding the negative aspects of 'piecemeal' appeal or review, the trial court is obliged to refer the matter to the higher court.

In determining whether early resolution of a constitutional dispute would substantially advance the ultimate determination of the trial, the court should balance the expected length and expense of the trial if the matter were to continue to its conclusion, against the saving in time and money that an interlocutory approach may effect. This does not entail a 'thumb-sucking' exercise by the court; being in a position to ask both the prosecution and defence questions on the number of witnesses they intend calling and how long they expect to question a witness, the court should be able to make a close

estimation of the length of the trial. In this enquiry, the court should not limit itself to financial considerations. It should consider the likelihood that the order against which the appeal is sought will be reversed on appeal. Where there is little room for doubt as to the correctness of the trial court's decision, the danger of wasted time, money and effort resulting from an eventual reversal is greatly reduced. In other words, the less likely it is that the trial court's decision will be reversed, the smaller the danger of denying justice by delay and the greater the likelihood of causing harm by a piecemeal higher approach.

Of course it would be too much to expect the trial court to make a complete examination of the merits of the attempted appeal or review. As is the case at present with applications for leave to appeal from decisions of higher courts, it is suggested that the court should ask itself whether there is a reasonable prospect of success,[286] i.e. even though the magistrate or judge may have no doubt as to the correctness of his decision, he should ask himself whether there is a reasonable prospect that the judges of the appeal will take a different view.[287]

After certification by the trial court, the matter is referred to either the appropriate division of the Supreme Court or, if a specialised Constitutional Court is introduced, to that court. The trial magistrate or judge must also forward a copy of the trial record relating to the separate hearing as well as the reasons for his decision to the higher court. It is proposed that fairly strict time limits be set for the referral, for examples within five court days after the certification.

Once the matter reaches the court of appeal or review, that court should in our view also have the discretion to refuse to hear the appeal or review. The same factors should be considered as in the lower court although the higher court will have the advantage of being relatively more objective in its decision. If the higher court decides to hear the approach, strict time limits should again be the order of the day to ensure that the matter is settled with as little waste of time as possible. However, it should be kept in mind that by this time both the lower and higher courts have indicated that the issue is of sufficient importance to warrant a delay in the trial. On a balance of interests two courts have considered an interlocutory approach appropriate; the finality rule accordingly gives way to the need to resolve an important constitutional issue speedily. If the higher court on the other hand, refuses to hear the appeal or review, it refers the matter back to the lower court and may issue instructions on the further conduct of the trial.

If the trial court in the first instance refuses to certify the issue, it is suggested that the accused should still have recourse to a higher court. In this

regard the proposed constitutional panels come into play.[288] Although we argued that the panels are not appropriate as a model for the management of constitutional objections in criminal trials,[289] we nevertheless feel that the need for a 'keeper of the gate' mechanism to guard against trivial and frivolous complaints must be denied. Therefore, if the trial magistrate or judge refuses certification and the accused wishes to continue her pursuit, it is suggested that she lodge a **complaint** against the refusal with the panel in the jurisdictional area of the trial court. The trial court is informed of this and the presiding officer should once again dispatch the record pertaining to the separate hearing and the reasons for his ruling to the panel within five court days of being notified of the accused's intention to approach the panel. Being the complainant, the accused has the opportunity to file an affidavit or merely a letter stating the reasons for his complaint and requesting the reception of the objection and the referral thereof to the appropriate court as an interlocutory appeal. The state may make written representations to the panel within five court days of being notified of the complaint. The panel then has five court days within which to decide on the viability (admissibility) of the objection.

To avoid this method being used as a delaying tactic, the trial court's proceedings as such are not stayed pending the panel's decision, but judgment is not given nor is sentence imposed before the panel's decision has been made known. If the panel resolves to admit the objection, the trial court's proceedings are suspended as if it had certified the issue for interlocutory appeal. The matter is then referred to the court of appeal or review which once again has a discretion to hear the issue or refer it back to the trial court with instructions on the further conduct of the trial.

If the panel refuses the complaint, it refers the matter back to the trial court and may, in appropriate circumstances, also impose a fine on the complainant and/or hold her liable for costs. This will serve to discourage groundless approaches. Since the trial had not been postponed, there has been a minimum waste of resources and time.

One final safety mechanism to be incorporated is designed to address the following situation: The magistrate or judge refuses to certify the issue and the accused acquiesces. At a later stage, when the matter either goes on automatic review (as is the case with certain lower court sentences[290]) or ordinary review or appeal, it appears that the magistrate or judge had intentionally (*mala fide*) or negligently refused certification of the issue for interlocutory approach. We propose that the higher court should now have the power to set the proceedings and sentence of the trial court aside and, in appropriate cases, award compensation to the convicted person. This may seem unorthodox but we submit that the potential of such a drastic reprimand hanging over the head

of the trial magistrate or judge like Damocles's sword is necessary to ensure that constitutional issues are dealt with seriously and responsibly by our lower courts, especially in the initial phases of a new dispensation when a human rights *cum* constitutionalism *cum* Bill of Rights 'culture' still has to be established in South African legal philosophy and practice.

We believe that this model is preferable *inter alia* due to the fact that it involves the trial court in the decision to allow or refuse interlocutory appeals or review, thus avoiding alienating exactly those upon whom we shall have to rely to deal with a new constitution on a daily basis and foster the much-needed 'culture of human rights'. If we are ever to reach the stage where we can safely trust our courts in a new dispensation to deal with human rights issues seriously, responsibly and with the necessary passion, we cannot afford to create perceptions of a moralising and patronising attitude by removing constitutional issues from the exact forum where they are voiced for the first time for fear of the court's 'inability' or 'incompetence' to deal with these issues. In our view, every magistrate and judge should be a part of the development of constitutional litigation right from the start. We should courageously put trust in the willingness and competence of our courts to adapt to a new dispensation and help make it work.

We finally have to deal with the very difficult issue of the unrepresented criminal defendant who does not have a lawyer to initiate constitutional attacks against infringements of his client's fundamental rights. Human rights issues will, by their nature, not be naturally or easily apparent to the average criminal defendant. Informing the accused of his rights at the start of the trial will have very little effect. What should be done? Hand the accused a copy of the Bill of Rights when he is charged, knowing full well that the language of statutes is not the most 'user friendly' and accessible to the public? We trust, perhaps naïvely, that the crisis which we are currently experiencing with legal representation will soon be effectively addressed through the implementation of a proper public defence system and other legal aid mechanisms — but until then, we venture the following suggestions to deal with the unrepresented accused in matters where constitutional issues emerge.

It seems to be broadly accepted that a Bill of Rights will not be worth much if the basic, social, educational, economic and welfare rights enunciated therein are not respected and effectively enforced. In this regard it has been proposed that parliament should establish a 'watchdog' body, called the Human Rights Commission, to promote observance of the Bill of Rights.[291] Such a commission should have the right to establish agencies for investigating instances and patterns of violation of the bill, to receive complaints and bring proceedings in court where applicable, and to monitor proposed legislation.

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We believe that such a commission could play a vital role in ensuring that the aims and ideals of the Bill are realised. For this reason the composition, infrastructure and budget of the commission will be crucial. Extreme care should be taken to ensure that it has legitimacy and the respect of the community at large. We assume that this will be achieved.

We propose that the commission should have the power to appoint legal representation in appropriate cases. Let us assume that in our fictitious example, where during a criminal trial in the magistrate's court a constitutional point arises, our accused is not represented by a lawyer. We believe that the magistrate should be under a statutory duty to notify the local branch of the Human Rights Commission immediately of the nature of the issue. The commission then has the power to appoint legal representation for the accused for the purposes of a separate hearing of the issue. The commission may draw upon the services of lawyers from its own ranks or the ranks of the local bar, attorneys, legal aid centres or law academies.

From this point on the trial will continue as previously described with the unrepresented accused now having the advantage of legal representation. If the matter proceeds to a higher court for interlocutory proceedings, it is proposed that the management of the approach be left in the hands of the Human Rights Commission who will provide the services of its infrastructure and decide on the representation of the accused as well as the conduct and management of the appeal or review.

It should again be emphasised that this would merely be a temporary solution since it has definite shortcomings. For one, the legal representative will enter the trial at a stage when it may already have been in progress for some time. It may be countered that the lawyer is only there for the purposes of the separate hearing and that if a proper question to be decided is formulated for this purpose there will be very little prejudice, if any, to the accused. However, we concede that there is no real substitute for legal representation from start to finish of a trial, and up to the final appeal or review.

Another shortcoming may be our assumption that the trial court will *mero motu* note potential constitutional infringements. We have to concede that without the balancing effect of defence counsel from the outset, it may be all too easy for both the court and the state to overlook the existence of such issues. This problem may be obviated by strict measures analogous to those proposed above in the case of the represented accused when an objection is not certified by the trial court.[292] If a constitutional issue emerges on automatic review or ordinary appeal or review, and the higher court believes that it should reasonably have been noticed by the lower court, the higher court may

set the conviction and sentence aside and order compensation to be paid to the convicted accused. The strictness of this measure could ensure careful consideration of all issues by trial courts which will, in turn, lead to a respect for constitutionally guaranteed rights and freedoms.

CONCLUSION

South African society is currently undergoing fundamental and radical change. It may be described as a controlled revolution or drastic evolution although, sadly, the term bloody revolution becomes more appropriate daily as we struggle forward in our quest for a just, responsible and, above all, peaceful society. This (r)evolution affects every aspect of every individual's daily existence: social, political, cultural and economic.

Our criminal justice system will not escape this transition. In fact, its role will become increasingly important since, with the advent of the Bill of Rights, it will be entrusted with a new duty to protect the individual in terms of the Bill of Rights against state action which deprives him of his constitutionally guaranteed rights. In these uncertain, yet exciting times, many are tempted to say that, in ridding ourselves of the shackles of apartheid, we should also get rid of its institutions. However, we should take care not to cast the baby out with the bathwater. It is our belief that the existing criminal justice system has most of what is required to deal with a new constitution. A proper system of interlocutory appeals as we propose in this report, which should be statutorily accommodated, will in our view prove the most cost-effective solution to the management of constitutional issues in criminal trials.

NOTES

1 J van der Westhuizen "The protection of human rights and a constitutional court for South Africa, some questions and ideas, with reference to the German experience" 1991 *De Jure* 1.

2 HJ Fabricius "The proposed bill on human rights: the practical implications" 1992 *Consultus* 106 at 118.

3 In this paper the term 'interlocutory' relief refers to any form of relief obtained from a higher court in the course of **uncompleted proceedings** in a trial court, i.e. before finality has been reached at trial level. It amounts to extraordinary relief procedures which take place before normal appeal or review procedures can be implemented.

4 B Currin "A bill of rights and criminal practice" 1992(3)(c) *The Association of Law Societies of the RSA, continuing legal education seminars* 1 at 4.

5 See in this respect: The South African Law Commission's report on group and human rights; 1989 *Working Paper 25* 445-450; as well *Government proposals on a bill of fundamental rights* 2 February 1993; *The ANC draft bill of rights, preliminary revised version* February 1993; the Centre for Development Studies; as well as *The Democratic Party's draft bill of rights* May 1993 in general. Also, J Kruger "Die regbank in 'n nuwe Suid-Afrika" 1991 *Stellenbosch Law Journal* 352-369; J van der Westhuizen *op. cit.*; HJ Fabricius *op. cit.* and C Rickard "Legal scrutiny for SA's future" *Sunday Times* 15 August 1993 5 for the views of the General Council of the Bar on the draft interim bill of rights and the role of the courts in adjudicating the bill.

6 See for example the draft constitution tabled at the multiparty conference at the World Trade Centre on 26 July 1993, which refers to a constitutional court to oversee the constitution writing process discussed by D Lautenbach "Constitution '93. A solemn pact of trust" *The Pretoria News* supplement 27 July 1993 1.

7 Unreported judgment of the Transvaal Provincial Division under case number cc 482/85 handed down on 15 November 1988.

8 P Fick "'n Maraton verhoor: *S v Baleka and others*" 1987 *Consultus* 79-86.

9 Justice J Van Dijkhorst.

10 Act 51 of 1977.

11 This application was reported as *S v Malinde* 1990 1 SA 57 (A) and is referred to in more detail *infra* text at note 89.

12 In final analysis the decision turned only on this point.

13 The judgment was delivered by Justice Corbett CJ and reported as *S v Malinde* 1990 1 SA 962 (A).

14 At 976E.

15 See in general "The Delmas trial", 1990 *Consultus* 5.

16 1991(2) SA 860 (A).

17 In doing so the court overruled a number of decisions in which our courts, including the Appellate Division, had taken the view that a relevant pointing out does not amount to an extra-judicial admission.

18 Section 218(2) reads: "Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings."

19 "The Delmas trial", *op. cit.* 5.

20 The South African Law Commission "Working Paper on Appeal Procedures" 1992 *Working Paper 42, Project 73*, 49-62.

21 SALC *Working Paper 42, Project 73, ibid.* 50.

22 *Working Paper 42, Project 73, ibid.* 50. The principle was enunciated in *Minister of Agriculture v Tongaat Group* 1976 2 SA 357 (D) at 362G-H.

23 *Ibid.* 54.

24 *S v Baleka, op. cit.* See also *S v Malinde, op. cit.* at 68A-G.

25 Rule 33(4) reads: "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such a manner as it

may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on application of any party make such order unless it appears that the question cannot be conveniently decided separately."

26 Where the separate hearing of disputes are allowed in criminal trials.

27 SALC *Working Paper 42, Project 73, op. cit.* 62.

28 This rule was clearly stated in *McComb v Assistant Resident Magistrate of Johannesburg and the Attorney-General* 1917 TPD 717 at 719 and is discussed in more detail *infra* at note 37.

29 *Op. cit.* 67B.

30 *Rascher v Minister of Justice* 1930 TPD 810, *Pitso v Additional Magistrate Krugersdorp* 1976 4 SA 553 (T), *S v Lubisi* 1980 1 SA 187 (T).

31 See *R v Adams* 1959(3) SA 751(A) and the discussion *infra* at note 58 on what constitutes 'unusual circumstances'. It should be noted that the commission also added that the same principles should apply in cases in review.

32 *Op. cit.* 54.

33 J van der Westhuizen, *op. cit.* 8.

34 See discussion that follows *infra*.

35 The methods used in the different cases varied from appeals, review applications, *mandamus* applications and interdicts all generically referred to as review procedures below.

36 *S v Jones* 1987(3) SA 823 (N).

37 1917 TPD 717.

38 *Ibid.* 719.

39 See for example *Goncalves v Addisionele Landdros Pretoria* 1973 4 SA 587 (T) at 594D, *Ellis v Visser* 1956 2 SA 117 (W), *Wahlhaus v Additional Magistrate Johannesburg* 1959 3 SA 113 (A) at 120A, *The State v Bailey* 1962 4 SA 514 (EC), *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357 at 360, *Rascher v Minister of Justice, op. cit. supra* note 30, *Francis v Rex* 1919 NPD 255 at 256, *R v Marais* 1958 1 SA 98 (T) at 101D, *S v Van Heerden* 1972 2 PH H 74 EC, *R v Adams, op. cit.* 762C *supra* note 31, *S v*

Majola 1982 1 SA 125 (A) at 132D, *S v Malinde, op. cit.* 67E *supra* note 11, *S v Jones, op. cit.* 824G-J *supra* note 36, *Zweni v Minister of Law and Order* 1993 1 SA 523 (A) at 531I-532A.

40 1908 TS 525.

41 *Op. cit. supra* note 39.

42 At 360.

43 *Op. cit. supra* note 39.

44 During interdict proceedings.

45 At 123.

46 This argument has subsequently confirmed in *R v Marais, op. cit. supra* note 39.

47 *Op. cit. supra* note 38.

48 6 ed vol 1.

49 At 750, emphasis in original.

50 At 120C.

51 See for example *Concalves v Addisionele Landdros, Pretoria, op. cit. supra* note 39; *S v Rascher v Minister of Justice, op. cit. supra* note 30; *R v Marais, op. cit. supra* note 39.

52 *Op. cit. supra* note 39.

53 At 101H-102A.

54 *Op. cit. supra* note 39.

55 Our italics.

56 *Op. cit.* 132D-133B, *supra* note 39.

57 Act 32 of 1944.

58 *Op. cit. supra* note 39.

59 The court based its decision on an interpretation of section 372 of Act 37 of 1948, now section 319 of Act 51 of 1977. This approach has also been followed in later judgments such as *S v Groesbeek* 1969 4 SA 445 (O) and *S v Mene* 1978 1 SA 832 (A).

60 At 763C-763F.

61 At 762D.

62 At 762G.

63 Act 30 of 1910.

64 At 763F-H.

65 Discussed *supra* note 47.

66 *Ibid.*

67 *Op. cit. supra* note 39.

68 At 516C-517F.

69 *Op. cit.* 515H-516A *supra* note 39.

70 At 516A-B.

71 *Op. cit. supra* note 39.

72 At 132E.

73 At 133F.

74 1968 1 SA 140 (EC).

75 The facts are set out at 141D-142C.

76 Quoted *supra* note 48.

77 See discussion *supra* note 47.

78 At 143E-G.

79 At 144.

80 Discussed *supra* note 67.

81 At 144C.

82 *Op. cit. supra* note 39.

83 At 815.

84 At 816. The argument is based on an interpretation of the fact of the matter *Tranter v Attorney-General* 1907 TS 415, where the point did indeed arise from a question put to a witness.

85 At 816.

86 At 817.

87 At 818.

88 See discussion *supra* note 58.

89 *Op. cit.* The facts are discussed *supra* text at note 7.

90 *Op. cit. supra* note 11.

91 At 65D-66C.

92 The rule states: "The court may, for sufficient cause shown, excuse the parties from compliance with any of the foregoing Rules and may give such directions in matters of practise and procedure as it may consider just and expedient."

93 At 67A-E.

94 The court came to this conclusion with reference to the matter of *Minister of Agriculture v Tongaat Group Ltd, op. cit. supra* at note 22, where these principles were stated in relation to an analogous situation in civil trial actions.

95 At 75C.

96 This judgment was reported at *S v Malinde* 1990 1 SA 962 (A) and is discussed in detail *supra* text at note 13.

97 See for example *S v Adams, op. cit.*, discussed *supra* at note 31.

98 See discussion *infra* par 3.1.3 note 167.

99 *Wahlhaus v Additional Magistrate of Johannesburg, op. cit. supra* note 39.

100 *Ginsberg v Additional Magistrate of Cape Town, op. cit. supra* note 39.

101 Gardiner and Landsdown, *op. cit. supra* note 48.

102 *R v Marais, op. cit. supra* note 39, *Rascher v Minister of Justice, op. cit. supra* note 30.

103 *McComb v Assistant Resident Magistrate of Johannesburg and the Attorney-General, op. cit. supra* note 28, *Ginsberg v Additional Magistrate of Cape Town, op. cit. supra* note 39, *Rascher v Minister of Justice, op. cit. supra* note 30, *Francis v Rex, op. cit. supra* note 39 and *R v Marais, op. cit. supra* note 39.

104 *Rascher v Minister of Justice, ibid. supra* note 30.

105 *S v Majola, op. cit. supra* note 39.

106 See *S v Malinde, op. cit. supra* note 11.

107 See *infra* par 11.

108 See J van der Westhuizen, *op. cit.* 9.

109 JH Israel and WR LaFave *Criminal procedure in a nutshell. Constitutional limitations* (3 ed 1980) 1.

110 JH Israel and WR LaFave, *ibid.* 2.

111 JH Israel and WR LaFave, *ibid.* 3.

112 JH Israel and WR LaFave, *ibid.* 4.

113 JH Israel and WR LaFave, *ibid.* 5.

114 See for example *Lisbena v California* 314 US 219 236 (1941), *Palco v Connecticut* 302 US 319 (1937) for the so-called 'fundamental rights approach'. The inclusion of a right in the bill of rights was viewed as a likely indicator that the right was fundamental, but it depended on the circumstances of each case whether the right was in fact fundamental. During the 1960s a new approach emerged. See for example *Cohen v Hurly* 366 US 117 (1961) for the 'selective incorporation' doctrine. The Fourteenth Amendment was regarded to encompass all rights that are "of the very essence of the scheme of ordered liberty" and rights were selectively incorporated into the Fourteenth

Amendment; the very presence of the right within the bill of rights being strong evidence of its fundamental nature.

115 *Mapp v Ohio* 367 US 643 (1961), *Ker v California* 374 US 29 (1963).

116 *Malloy v Hogan* 378 US 1 (1964).

117 *Benton v Md* 395 US 784 (1969).

118 *Gideon v Wainright* 372 US 335 (1963).

119 *Klopfer v NC* 386 US 213 (1967).

120 *Duncan v La* 391 US 145 (1968).

121 *Washington v Texas* 388 US 14 (1967).

122 *Robinson v Cal* 370 OS 660 (1962).

123 *In re Oliver* 333 US 257 (1948) cited in *Duncan supra* at note 120.

124 *Cole v Ark* 333 US 196 (1948).

125 JH Israel and WR LaFave, *op. cit.* 19. Of course, the vast majority of decisions did not involve dramatic new application of constitutional limitation. Most new rulings moved only a slight step beyond previous limitations and in a number of cases the court refused to impose new limitations and even overturned existing limitations. However, the general trend was towards further constitutionalisation of criminal procedure.

126 JH Israel and WR LaFave, *ibid.* 21.

127 See discussion *infra* note 155.

128 *Supra* note 115.

129 382 US 436 (1966).

130 JH Israel and WR LaFave, *op. cit.* 26. See *Stack v Boyle* 342 US 1 (1951) where it was held that bail set "at a figure higher than an amount reasonably calculated" to assure the accused's presence at trial was excessive under the Eighth Amendment.

131 SH Kadish and SJ Schulhofer *Criminal law and its processes — cases and materials* (5 ed 1989) 9-11.

132 *US v Bachelor* 442 US 114 (1979).

133 *Wood v Ga* 370 US 390 (1962) where the court stated the function of the Grand Jury is to stand between the accusor and the accused "... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will".

134 See for example *Blockburg v US* 284 US 299 (1932), *Brown v Ohio* 432 U2 US (1977) and *Ashe v Swenson* 397 US 436 (1970).

135 *Strunk v US* 412 US 434 (1973), *Barker v Wingo* 407 US 514 (1972).

136 *Russel v US* 369 US 749 (1962), *Waley v Johnston* 316 US 101 (1942), *Henderson v Morgan* 426 US 637 (1976).

137 *Brady v US* 397 US 742 (1970).

138 *Russel v US supra* at note 134, *US v Debrow* 346 US 374 (1959), *Brady v Md* 373 US 83 (1963), *US v Glason* 265 F Supp 800 (SDNY 1967).

139 *DC v Clawsons* 300 US 617 (1973), *Strander v W Va* 100 US 303 (1880), *Turner v Fouche* 396 US 346 (1970), *Carter v Jury Comm* 396 US 320 (1970), *Taylor v La* 4199 US 522 (1975) and *Witherspoon v Ill* 391 US 510 (1968).

140 *Ward v Village of Monroeville* 409 US 57 (1972).

141 *Withrow v Larkin* 421 US 35 (1975).

142 *Ill v Allen* 397 US 337 (1970). This right is however, subject to certain limitations such as consent to waive the rights — *Taylor v US* 414 17 (1973) and misconduct *Ill v Allen, ibid.*

143 *Smith v Ill* 390 US 129 (1968), *Davis v Alaska* 415 US 308 (1974), *Chambers v Miss* 410 US 284 (1973).

144 In *Griffin v Cal* 380 US 609 (1965). See also *Lakeside v Or* 435 US 333 (1978) where it was stated that the court may also instruct the jury to disregard the accused's silence.

145 *Brooks v Tenn* 406 US 605 (1972).

146 See for example *Williams v Okla* 358 US 576 (1959), *Williams v NY* 337 US 241 (1949) and *US v Grayson* 438 US 41 (1978).

147 *Mempa v Rhay* 389 US 128 (1968).

148 *Gagnou v Scarpelli* 411 US 778 (1973).

149 *Morrisey v Brewer* 408 US 471 (1972).

150 *McKane v Durston*, 153 US 684 (1894) and *Ross v Moffit* 417 US 600.

151 *Griffin v Ill* 351 US 12 (1956).

152 *Douglas v Cal* 372 US 353 (1963).

153 JH Israel and WR LaFave, *op. cit.* 84-89.

154 JH Israel and WR LaFave, *ibid.* 92-99.

155 JH Israel and WR LaFave, *ibid.* 392.

156 The 'exclusionary rule'.

157 BJ George *Constitutional limitations on evidence in criminal trials* 1973 Practising Law Institute New York City 121.

158 See for example Fed R Crim P 41(E).

159 See for example *Law v State* 204 So 2d 741 (Fla App 1967), *State v Fox* 251 La 464 205 So 2d UZ (1967) and *Watts v State* 240 A 2d 317 (Md App 1968).

160 *Jones v US* 362 US 257 (1960).

161 38 Ill 2d 399 231 NE 2d 447 (1967).

162 BJ George, *op. cit.* 122.

163 JL LeGrande *The basic processes of criminal justice* 1973 105-106.

164 JL LeGrande, *ibid.* 105.

165 BJ George, *op. cit.* 409.

166 JL LeGrande, *op. cit.* 105.

167 BJ George, *op. cit.* 413.

168 In American Criminal Procedure there is no difference between Appeal and Review Applications as we know it. Appeal considered the review of lower court proceedings by a court of appeals.

169 28 USC sections 1291-1294 (1988).

170 Title 28 1988.

171 See *Coopers and Leybrand v Livesay* 437 US 463 474 (1978).

172 See *Berman v US* 302 US 211 212 (1937). A final judgment is defined as "one which ends the litigation ... and leaves nothing for the court to do but execute the judgement". *Catlin v US* 324 US 229 (1945).

173 SE Vickers 'Interlocutory appeals in bankruptcy cases: The conflict between Judicial Code sections 158 and 1292' 1991 *Bankruptcy Development Journal* 519-52 at 523.

174 *Cohen v Beneficial Industrial Loan Corp* 337 US 541 546 (1949).

175 *In re Gould and Eberhardt Gear Mach Corp* 852 F 2d 26 29 (1st Cir 1988).

176 *Taylor v Board of Educ* 288 F 2d 600 605 (2d Cir 1961).

177 *Magic Circle Energy* 1981 — A Drilling Program v Lindsey (In re Magic Circle Energy Corp) 889 F 2d 950 951 (10th Cir 1989).

178 *Coopers and Leybrand v Livesay, supra* note 171.

179 *In re San Juan Dufont Plaza Hotel Fire Litig* 859 F 2d 1000 1006 (1st Cir 1988).

180 Other procedural exceptions exists to allow interlocutory appeals, but these are largely confined to Civil Proceedings. In *Gillespie v United States Steel Corp* 379 US 148 (1964), the court used a balancing approach to determine whether a judgment was final. Although at least one circuit court has relied on *Gillespie* to assume jurisdiction for an interlocutory order in a criminal matter it has been stated that *Gillespie* is of dubious validity in criminal hearings and has failed to lead to any dramatic shift in attitudes towards appealability. For a detailed discussion in this regard see MH Redish 'The pragmatic approach to appealability in the Federal Courts' 1975 *Columbia Law Review* 89 at 116-120.

181 *Supra* note 174.

182 At 546.

183 *Op. cit. supra* note 130.

184 *Abney v US* 431 US 651 662 (1977).

185 *Hestoski v Meanor* 442 US 500 508 (1978).

186 As stated in *Abney v US, op. cit. supra* note 181 and in *Coopers and Leybrand v Livesay, op. cit. supra* note 171.

187 See *Firestone Tire and Rubber Co v Risjord* 449 US 368 375-76 (1981) and *US v Mehrmanesh* 652 F. 2d 766 769-770 (9th Cir 1980).

188 531 F 2d 196 (4th Cir 1976).

189 At 199-200.

190 435 US 850, 857 and note 6 (1978).

191 28 USC (1988).

192 Section 1651(a).

193 See MH Redish, *op. cit.* 114.

194 218 F 2d 174 177 (1st Cir 1954).

195 See for example *Labuy v Howes Leather Co* 352 US 249 (1957).

196 389 US 90 (1967).

197 *In re Ellsberg* 466 F 2d 954 956 (1st Cir 1971).

198 RH Hayward "Amending 28 USC section 1292(b) to permit interlocutory appeals in federal criminal proceedings — an economical analysis" 1982 *Iowa Law Review* 1037-1055.

199 RA Hayward, *ibid.* 1050.

200 28 USC section 1292(b) (1988).

201 28 USC, *ibid.*

202 RA Hayward, *op. cit.* 1051.

203 RA Hayward, *ibid.* 1052-53.

204 See discussion *supra* note 155.

205 *Dickinson v Petroleum Conversion Corp* 338 US 507 511 (1950).

206 *Brown Shoe Co Inc v US* 370 US 294 306 (1962).

207 *Gillespie v United States Steel Corp, op. cit. supra* note 180, quoting *Cohen v Beneficial Industrial Loan Corp, op. cit. supra* note 174.

208 *Norman v Makee* 431 F 2d 769 774 (9th Cir 1070).

209 MH Redish, *op. cit.* 100.

210 MH Redish, *ibid.* 101.

211 See discussion *infra* text at "Pre-trial motion to suppress".

212 This issue is discussed in detail *infra* Chapter 6.

213 J van der Westhuizen, *op. cit.* 10.

214 Originally the first senate was intended to review the constitutionality of laws, resolve constitutional questions arising out of ordinary legislation and complaints from citizens. The second senate would decide political disputes between branches of government, settle contested elections *etc*. Because the first senate was flooded with complaints while the second only has a small number of cases, the work was redistributed, eroding much of the rational behind the twin system, the second senate retained its political docket, but now also deices all complaints. See DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 19-21.

215 DP Kommers, *ibid.* 11-15 discusses these areas in detail.

216 FCCA sections 63-67.

217 DP Kommers, *op. cit.* 15.

218 J van der Westhuizen, *op. cit.* 18.

219 DP Kommers, *op. cit.* 32.

220 The issue is discussed in more detail *infra* note 230.

221 FCCA section 93(a).

222 J van der Westhuizen, *op. cit.* 19.

223 DP Kommers, *op. cit.* 16.

224 DP Kommers, *ibid.* 21-22.

225 DP Kommers, *ibid.*

226 J van der Westhuizen, *op. cit.* 20.

227 DP Kommers, *op. cit.* 27-31 and J van der Westhuizen, *ibid.* 21-22.

228 M Singer "The constitutional court of the German Federal Republic: Jurisdiction over individual complaints" 1982 *International and Comparative Law Quarterly* 331-356.

229 M Singer, *ibid.* 334.

230 FCCA section 90(2).

231 In BVerfGE 1, 69.

232 As discussed by M Singer, *op. cit.* 346.

233 M Singer, *ibid.*

234 In M Singer, *ibid.*

235 See *BVerfGE 21, 160* and *BVerfGE 38, 139.*

236 M Singer, *op. cit.* 347.

237 In M Singer, *ibid.*

238 M Singer, *ibid.*

239 M Singer, *ibid.* 348.

240 In *BVerfGE 3, 58.*

241 M Singer, *op. cit.* 348.

242 M Singer, *ibid.* 355.

243 *Infra* Chapter 6.

244 ME Eibert "The Spanish Constitutional Tribunal in theory and practice" 1982 *Stanford Journal of International Law* 435-70 at 437.

245 It may be useful for South Africa's constitution drafters to keep this aspect in mind when deciding on the proper judicial forum for a new constitution although it should be remembered that South Africa will also have a new parliament which should hopefully enjoy a high degree of legitimacy.

246 ME Eibert, *op. cit.* 439.

247 J van der Westhuizen "The protection of human rights and a constitutional court for South Africa: Some questions and ideas, with reference to the German experience (Part 2)" 1991 *De Jure* 254-267, at 260.

248 For a full discussion on the TC's powers see ME Eibert, *ibid.* 442-450.

249 ME Eibert, *ibid.* 442.

250 Section 35(2) of the Organic Law of the Constitutional Tribunal (LOTC) as discussed in ME Eibert, *ibid.*

251 LOTC section 37(1) in ME Eibert, *ibid.*

252 LOTC section 30 in ME Eibert, *ibid.*

253 J van der Westhuizen, *op. cit.* 262.

254 LOTC section 164 in ME Eibert, *op. cit.* 444.

255 ME Eibert, *ibid.*

256 LOTC section 37(2) in ME Eibert, *ibid.* 445.

257 ME Eibert, *ibid.* 448.

258 Laws itself must be challenged through 'appeals' or 'questions' of unconstitutionality.

259 LOTC section 46(1)(b) in ME Eibert, *ibid.* 448. The defender of the people and public prosecutor may act on behalf of the citizen in *amparos*.

260 Articles 14 through 30 of the constitution.

261 ME Eibert, *op. cit.* 449.

262 Judge Garcia de Enterria as paraphrased in J van der Westhuizen, *op. cit.* 260.

263 ME Eibert, *op. cit.* 470.

264 ME Eibert, *ibid.* 445.

265 There are, of course, a myriad of examples of constitutional objections and the one mentioned is only one rather obvious example.

266 For the purposes of this paper it is assumed that the South African Law Commissions recommendations on the separate adjudication of issues (factual or legal) will be incorporated into the Criminal Procedure Act 51 of 1977 within the not too distant future. See discussion *supra* at note 20 of Working Paper 43, Project 73.

267 We accept, for the moment that we are dealing with an accused who is represented by a lawyer at trial. The issue of the unrepresented accused is discussed separately *infra* note 291.

268 See discussion *supra* note 224.

269 See discussion *supra* note 226.

270 See, for example, the time limits set for the Spanish TC in 'appeals' or 'questions' of unconstitutionality discussed *supra* note 256.

271 See discussion *infra* note 288.

272 *Brady v Maryland* 373 US 83 (1963) quoted by WA Rutter *Criminal procedure* (5 ed 1973) 63.

273 WA Rutter, *ibid.* 50.

274 WA Rutter, *ibid.* 64.

275 WA Rutter, *ibid.* 68

276 This model is discussed with gratitude to Mr WF Krugel retired Regional Court President, who suggested this model during an interview on 9 March 1993.

277 See discussion *supra* note 99.

278 See discussion *supra* note 35.

279 Discussed *supra* text at note 7.

280 *Op. cit.* discussed *supra* text at note 7.

281 *Op. cit. supra* note 89.

282 *Supra* text at note 180.

283 Working Paper 42 Project 73 discussed *supra* note 22.

284 *Supra* Chapter 5.

285 See discussion *supra* text at "An assessor model".

286 See *S v Shafee* 1952 2 SA 484 (A), *S v Boloi* 1949 1 SA 523 (A), *S v Ackerman* 1973 1 SA 765 (A), *S v Swanepoel* 1978 2 SA 410 (A).

287 *S v Kuzwayo* 1949 3 SA 761 (A).

288 See discussion *supra* text at note 271.

289 See discussion *supra* text at "The constitutional panel model".

290 Section 302 of the Criminal Procedure Act.

291 HJ Fabricius, *op. cit.* 114.

292 See discussion *supra* note 290.