CHAPTER SEVEN

THE RIGHT TO BE PREPARED FOR ONE'S TRIAL

7.1 INTRODUCTION

Section 35(3)(b) of the Constitution provides that "every accused person has a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence".[1] Therefore, the right to be prepared for one's trial embodies the right to have adequate time and facilities to prepare an effective defence.[2] It is not only the right to a not-too-speedy trial that is involved here. This right is also linked to the time to prepare oneself, and the quality of such preparation. Thus, the right to be prepared for one's trial is linked to the right not to be subjected to an unduly hasty trial and an entitlement to state assistance for the preparation of one's defence. Therefore, the right is connected to the right to bail, the right to legal assistance and the right to information regarding criminal proceedings.[3] This means that an accused must have adequate legal representation, so that he can prepare an effective defence for his case. Similarly, an accused must receive adequate information from the prosecution regarding the state's case against him, so that he can prepare an effective defence. The right to be prepared for one's case is thus an important component of the composite right to meaningful and informed participation in the criminal process. The purpose of this right is to ensure "equality of arms".[4] The "equality of arms" principle represents those procedural mechanisms with which the vast inequality in

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1 According to Steytler, the term "a defence" in s 35(3)(b) should be extensively interpreted. It should include all proceedings where an accused's interests may be adversely affected, namely plea proceedings, the conduct of the trial, presentation of evidence in mitigation of sentence, and appeal or review proceedings. See Steytler *Constitutional criminal procedure* 234.

2 These rights are interrelated and interdependent, in that a proper defence cannot be prepared if there is inadequate time. The availability of facilities will be irrelevant. Similarly, a proper defence cannot be prepared if there is adequate time, but no facilities.

3 It should be noted that the right to bail is an example of a classic right whilst the right to legal assistance is an example of an overarching right. Please refer to chapters 1 and 2 for a discussion of classic rights and overarching rights.

4 The principle of "equality of arms" is an essential guarantee of adversarial proceedings. See *Ruiz-Mateos v Spain* (1993) 16 EHRR 505. Also see *Robinson v Jamaica*, Communications No 223/1987, UN Doc A/44/40 at 241 (1989), where the Human Rights Committee (hereinafter referred to as the "HRC") found that a refusal of the accused's request for adjournment in a murder trial in order to arrange for legal representation, raised issues of fairness and violated art 14(1) because of the "inequality of arms" between the parties. Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals. See Weissbrodt (2001) *op cit* 130.

power between the state and the accused is sought to be addressed.[5] The principle of "equality of arms" implies *inter alia*, that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he will be given adequate time to prepare his case; and that he will be given access to all material evidence held by the prosecution authorities which bears on his guilt or innocence.[6] The right to be prepared for one's trial also forms part of the rules of natural justice.[7] These rules include the *audi alteram partem* principle.[8] Therefore, Taitz argues that an accused has the right to fair notice of the criminal proceedings against him, even if the Criminal Procedure Act does not prescribe a specific period.[9] Therefore, if the *audi alteram partem* principle is to have any meaning in our criminal procedure, the trial court should forbid unreasonably hasty pleas and/or trials.[10]

This chapter will first examine the implications of the right to be prepared for one's trial. Thereafter, it will address the right to have adequate time to prepare a defence. The right to have adequate facilities to prepare a defence, will be examined next. Principles extracted from comparative law will be applied where it is relevant. Finally, the conclusion will consider the impact and influence of comparative law on our law,

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5 This entails that there should be a level playing field between the state and the ordinary people of unequal financial or other resources. A problem arises when the state has an easily available source of expertise to which the accused does not have access. See Mbodla "Leveling the playing field: the accused's right to an expert witness at the state's expense" (2001) *South African Journal of Criminal Justice* 81-82.

6 See Leigh "European Convention on Human Rights" in Weissbrodt and Wolfrum (1998) *op cit* 664.

7 See Taitz "The right to reasonable and adequate notice of criminal proceedings – an essential aspect of procedural justice" (1992) *South African Journal of Criminal Justice* 132 at 138-9. Taitz criticises the review courts for not considering the rules of natural justice when considering unreasonably hasty arraignments and/or trials before lower criminal courts. He states that the review court should apply the rules of natural justice and more particularly, the *audi alteram partem* principle and its requirement of proper and adequate notice of trial, to avoid much contention in the resolution of these cases. This may also assist the court in establishing a procedure to be followed by the lower courts.

8 This principle literally means "hear the other side". This means that no important ruling, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. However, see *S v Suliman* 1969 (2) SA 385 (A), where the court held that no failure of justice had resulted from the judge's failure to "afford the defence an opportunity of being heard regarding the expediency of a recusal", even though such recusal causes expense and inconvenience to the accused concerned. Also see *R v Bidi* 1969 (2) SA 55 (R), where the court remarked that the failure to give an accused an opportunity to put forward any defence is a serious defect.

9 However, s 54(3) of the Act provides that the summons must be served on an accused so that he is in possession thereof atleast fourteen days before the date set for the trial. See Taitz *op cit* 139.

10 Taitz also argues that the requirement of a serious charge and/or penalty as a precondition, before the review court is prepared to set aside a conviction resulting from an unreasonably hasty plea or trial, does not reflect procedural justice. Rather, there should be no distinction regarding the seriousness of offences and penalties, and all accused who are prejudiced should be entitled to relief by the reviewing court. This will be in line with the *audi alteram partem* principle. See Taitz *op cit* 139-141.

and present proposals and recommendations.

7.2 THE IMPLICATIONS OF THE RIGHT TO BE PREPARED

The right to be prepared is a fundamental principle of a fair trial, and can only be exercised by an accused if he is aware of his rights, or is informed by his lawyer.[11] In *Siqodolo v Attorney-General*[12] an unrepresented accused who was summarily tried on his first appearance, thereafter complained that he was denied his right to legal representation, and the opportunity to prepare his defence. The court held that the haste with which the applicant was brought before the magistrate, may have resulted in a serious miscarriage of justice. Thus, in *Siqodolo*, the conviction was set aside because the accused was not aware of his legal rights, and he did not appreciate the consequences of a conviction. Steytler rejects the notion that the police or prosecutor is the appropriate agent to disseminate information to the accused. Rather, he maintains that the presiding judicial officer is the appropriate agent to explain his legal rights to the accused.[13]

An accused may invoke the right to justify a postponement if more time is required for purposes of preparing a defence. A corollary of this right is that the accused is entitled to postponement of the criminal proceedings against him, when the proper preparation of his defence so requires.[14] The accused's right to legal representation is a very important right to which he should not be lightly deprived. Postponement for this purpose should not be hastily refused.[15] Failure to grant a postponement for a reasonable period constitutes a gross irregularity resulting in an appellant not having

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11 See Steytler "The too speedy trial – or the right to be prepared for trial" (1985) *South African Journal of Criminal Law and Criminology* 158 at 159.

12 1985 (2) SA 172 (E). The applicant argued on review, that he was not given timeous and adequate notice of the trial, and that he was not advised that his vehicle would be forfeited to the state upon conviction. The court found that although no irregularity was committed by or in the magistrate's presence, the proceedings were not in accordance with justice, and set aside the conviction and forfeiture. This decision referred to a number of decisions, where the court also came to the assistance of accused persons who had suffered an unduly speedy trial. See *R v Thane supra* at 850 and *Khumbusa v The State* 1977 (1) SA 394 (N).

13 See Steytler (*SACC*) 162, where the writer recommends that the judicial officer should inform every unrepresented accused that he may seek a remand to obtain legal assistance or to prepare his defence, and further that he may be released on bail if a remand is granted. These rights must be communicated to the accused. Steytler's comments have been endorsed in the Constitution and the case law. The obligation on the presiding officer to assist an unrepresented accused is part of the accused's right to a fair trial in terms of s 25(3) of the Interim Constitution. See *S v Simxadi* 1997 (1) SACR 169 (C). Also see Bekker "The right to legal counsel and the Constitution" 2 (1997) *De Jure* 213 at 218.

14 See Steytler (*SACC*) 162. In **Australia**, the trial judge has an obligation to grant an adjournment wherever the circumstances suggest that it would be unfair to the accused for the trial to proceed. See *Walker v The Queen* (1998) A Crim R 152 (WA Sup Ct FC), where an unrepresented accused alleged that, due to recurring mental ill-health, he had not been able to prepare his defence. The court held that serious doubt arose as to the fairness of proceeding with the trial, with the result that an adjournment ought to have been granted to remove the doubt.

15 See *S v Oakers* 1990 (1) SACR 147 (C).

had a fair trial. Therefore, the conviction and sentence will be set aside.[16] If the accused requests an adjournment at his first appearance in court, it would be a fatal irregularity for the court to refuse it.[17] Therefore, once an accused indicates to the court that he desires to consult with a lawyer, it would be a gross irregularity to insist that he pleads to the charge.[18] It is in the context of postponement of the trial, that the delicate balance between this right and the right to a speedy trial becomes obvious. Thus, the right to be prepared for one's trial should take precedence over the right to a speedy trial, if the accused's lawyers require postponement of the trial in order to prepare an effective defence.

An accused should not be jeopardised in the preparation of his defence. By the same token, the accused cannot request a postponement to try to delay the case unnecessarily. Indeed, a fundamental principle which the courts seek to uphold is that justice shall be done without unnecessary delay.[19] Similarly, a judicial officer may refuse an application by the prosecution for a further adjournment of the proceedings in order to subpoena state witnesses, if it failed to do so timeously.[20] Therefore, the court will have to determine whether the request is in order. The right to adequate time and facilities also applies to appeal proceedings. Therefore, courts must supply convicted persons with reasons which indicate with sufficient clarity, the grounds for their decision in order to make the right of appeal meaningful.[21] Where a person is in custody, the prison authorities must take all reasonable steps to supply legal materials for the preparation of the appeal.[22]

Article 14(3)(b) of the ICCPR guarantees that every accused has the right "to have

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16 See *S v Manguanyana* 1996 (2) SACR 283 (E). A similar position is followed in **Australian** law. In *Dietrich v The Queen* (1992) 177 CLR 292 at 326, the court identified the approach to be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence, who is unable to obtain legal representation through no fault on his or her part. The court held that in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If an application to delay the trial is refused in those circumstances, and the trial is not fair as a result of the lack of representation of the accused, then any conviction of the accused must be squashed by an appellate court because there has been a miscarriage of justice in that the accused has been convicted without a fair trial. Also see Duggan "Reform of the criminal law with fair trial as the guiding star" (1995) *Criminal Law Journal* 258, where the writer discusses, *inter alia*, some of the more important practical issues concerning the unrepresented accused.

17 See, *inter alia*, *S v Blooms* 1966 (4) SA 417 (C) and *S v Nel* 1974 (2) SA 445 (NC).

18 See *S v Mkize* 1978 (3) SA 1065 (T). Steytler submits that the same rules apply where the accused applies for a remand in order to prepare for his plea or defence. An accused may request further particulars to the charge before he pleads in terms of s 87(1) of the Act. See Steytler (*SACC*) 159. The aim of particulars is to enable the accused to know the case that he has to meet. See *R v Mokgoetsi supra* at 627.

19 See *R v Rashiane* 1941 (2) PH F76.

20 See *S v Magoda* 1984 (4) SA 462 (C).

21 See *Hadjianastassiou v Greece* (1993) 16 EHRR 219.

22 See Steytler *Constitutional criminal procedure* 233.

adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".[23] According to the HRC, "adequate time" depends on the circumstances of each case.[24] In *Harward v Norway*[25] the Committee held that if the accused's lawyer had found the time available to prepare the defence to be inadequate, he could have requested a postponement of the trial, which he did not do. Therefore, the Committee found no violation of article 14(3)(b) of the ICCPR. The phrase "adequate facilities" means that an accused should be granted access to documents, records and other evidence necessary for the preparation of the accused's defence, as well as an opportunity to engage and communicate with counsel.[26] However, this does not entitle an accused to be furnished with copies of **all** relevant documents.[27] Complaints have been lodged with the HRC, that certain state parties have failed to provide translations of documents which they claim to have needed for their defence. The Committee has made the following pertinent comments:

> "It is important for the guarantee of a fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against the accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel."[28]

Thus, the above discussion demonstrates that the right to adequate time and facilities is fundamental to a fair trial. An accused should be informed of his legal rights and

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23 Article 6(3)(b) of the ECHR has the same wording. However, there is no reference to counsel. The principle of "equality of arms" underlies the right against undue haste in prosecutions and the right to adequate facilities for the preparation of a defence. An applicant's access to evidence, facilities and lawyers is restricted to what is necessary for the defence. In *Larry v Belgium* (1989) 11 EHRR 529, the applicant's inability to consult the investigation file for the first 30 days did not affect the preparation of his defence. Therefore, the European Commission found that art 6(3)(b) was not applicable. The **Canadian Charter of Rights and Freedoms** contains no specific guarantee of the principle of "equality of arms". However, the right to make full answer and defence is contained in the Criminal Code, and has "acquired new vigour" through s 7 of the Charter. Thus, the right to make full answer and defence, provides the Canadian foundation for arguments raised under the banner of the international right to adequate facilities to prepare a defence. See Mahoney "Adequate facilities to prepare a defence: beyond disclosure" (1996) *Criminal Law Quarterly* 33 at 33-34.

24 See General Comment 13, art 14. Also see Weissbrodt (2001) *op cit* 121.

25 See *Harward v Norway supra* at 451/1991. The Committee noted that the accused Mr Harward (a British national), was represented by a Norwegian lawyer of his choice, who had access to the file, and the lawyer was assisted by an interpreter during his meetings with Mr Harward.

26 The Committee has also remarked regarding facilities, that there should be full respect for the confidentiality of lawyer-client communications; and that lawyers should be able to represent their clients without any "restrictions, influences, pressures or undue interference from any quarter". See General Comment 13, para 9. Also see Harris and Joseph *op cit* 223.

27 It has been held that access to documents does not necessarily entail a right to take away copies of documents. See General Comment 13/21 of 12 April 1984. Also see *OF v Norway* (158/1983).

28 1994 report of the HRC to the General Assembly.

the consequences of a conviction, in order for him to prepare an adequate defence. He is entitled to request a postponement of the trial to prepare his defence. He is also entitled to be furnished with copies of relevant documents. The right to be prepared applies to all proceedings where the accused's rights are adversely affected.

7.3 THE RIGHT TO HAVE ADEQUATE TIME TO PREPARE A DEFENCE

The right against an unduly hasty trial, is a well-recognised common law principle of a fair trial.[29] The Supreme Court (review court) has set aside convictions and sentences in a number of cases on review, where the accused was hastily brought before a lower court, and had pleaded guilty and/or had been tried without being given reasonable notice of the proceedings against him.[30] The review court has regarded such trials to be highly irregular and a miscarriage of justice. The principle underlying this right (right to be prepared) was laid down in *S v Yantolo*[31] where the court held that:

> "It is a commendable principle that justice should be done without unnecessary delay, but it is more important that a person accused of a serious crime carrying a heavy sentence or of any crime carrying a sentence, should not be placed in a position where he may be unable to assess and weigh his position, the gravity of the offence against him, the nature of the facts with which he is faced and the consequences of a plea of guilty."

The court stated further, that these considerations would apply to an educated, literate person, represented by a legal adviser. Therefore, they must apply with even greater force to an elderly, illiterate, uneducated woman, who does not enjoy the support of her friends and family. The court also found that the accused does not appear to have had a reasonable opportunity to weigh her position, to seek advise if she wanted to, and come to a mature decision with full knowledge of the implications of that decision.

A different conclusion was reached in *S v Baloyi*[32] where the accused was brought before a court on a charge of reckless driving. He was not informed by the magistrate of his right to seek legal assistance, nor was he asked if he wanted a postponement

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29 See Steytler *Constitutional criminal procedure* 233.

30 See, *inter alia*, *Khumbasa v State supra* and *Siqodolo v Attorney-General supra*.

31 See *S v Yantolo supra* at 149 H. The applicant was an illiterate female of about 65 years of age, who within two hours of her arrest, had been brought before the court and convicted of dealing in dagga in contravention of s 2(a) of Act 41 of 1971. The court on review, set aside the proceedings when it concluded that it was possible that a serious miscarriage of justice might have resulted from the procedure which had been followed. The court remarked that it is essential that when an accused is brought to court to face such a possible sentence, the procedure which is followed must leave no room for doubt as to whether such an accused has had an opportunity to understand and appreciate the seriousness of a charge and its consequences. The court found that the applicant did not understand the real nature of the charge. Therefore, the proceedings and the conviction were irregular.

32 1978 (3) SA 290 (T).

to consider his position or to obtain legal assistance. Nevertheless, the court found that there was no irregularity in the proceedings.[33] This case has been distinguished from *Yantolo* on the basis of the gravity of the offence, the complicated presumption, the short time span and the fact that the accused was illiterate and elderly in *Yantolo*. However, in *S v Chabalala* [34] the court set aside the conviction and sentence because it found that the accused had not been given sufficient time from arrest to conviction to consider his various options.

The state being the *dominus litus*, usually determines when the trial should commence. The state may proceed when an accused first appears in court, by asking the accused to plead. Steytler maintains that the same principles should apply to the accused, in that the trial, including the plea proceedings, should only commence when the accused is adequately prepared to proceed.[35] According to Taitz, many accused are in a state of shock or distress at the time of their arrest, with the result that they are easily persuaded to plead guilty especially if they are unrepresented, and where some advantage is held out or even suggested to them.[36] This leads to a hasty arraignment of an accused who has been given little or no opportunity to consider his position and the consequences of his plea. It is unfortunate that this type of practice usually occurs in cases against unsophisticated or illiterate accused.[37]

An accused should be given an opportunity to consider his position before pleading or facing a trial. Therefore, when an accused requests a postponement for this purpose, a court should exercise its discretion in terms of section 168 of the Act. Steytler submits that to make this right meaningful to all accused persons, the trial court should enquire at the commencement of proceedings which appear to be unduly hasty, whether the undefended accused has had an opportunity to consider his plea or prepare for trial.[38] The aim of the right is thus to ensure that an accused has adequate time "to arrive at a mature and unhurried decision on how to plead and to

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33 Relief was not granted on the basis of certain allegations which were not made by the accused. The accused did not allege that he wished to be legally represented nor that he was prevented from obtaining legal assistance. He did not also allege that he was unable to appreciate the charge or prepare his defence. This decision has been criticised by Steytler. See Steytler (*SACJ*) 161-162.

34 2002 (1) SACR 5 (T). The accused was arrested, charged, pleaded and convicted on the same day.

35 See Steytler *Constitutional criminal procedure* 233.

36 Taitz *op cit* 134.

37 See *Van Niekerk v Attorney-General, Transvaal* 1990 (4) SA 806 (A), where an unrepresented accused pleaded guilty because she believed that she would receive a suspended sentence. The court found that the accused had been prejudiced by having been too hastily arraigned, and this had resulted in a failure of justice. The court also held that the magistrate had committed an irregularity by not explaining the possible consequences of a conviction to the accused, and by determining whether she did not require a greater opportunity to consider her position as was his duty.

38 Steytler *Constitutional criminal procedure* 234.

conduct his case".[39] However, a violation of this right occurs when the court exercises its summary power to convict and punish a person for contempt of court *in facie curiae*.[40] Therefore, summary proceedings do not afford the accused adequate time to prepare a defence.[41]

Section 35(3)(f) of the Constitution provides that an accused has the right to be informed promptly that he has the right to legal representation.[42] The right to legal representation must also include the right to be afforded a reasonable opportunity of securing it.[43] Therefore, the court must be careful when it considers an application by an accused for a postponement in order to enable him to obtain legal representation. A refusal to grant such a postponement may amount to an irregularity.[44] Where an accused's legal representative withdraws from the case, the court should ask the accused whether he wishes to have the opportunity to instruct another legal representative and/or whether he wishes to undertake his own defence, as a failure to

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39 See *S v Yantolo supra* and *Van Niekerk v Attorney-General, Transvaal supra*.

40 See s 108 of the Magistrates' Courts Act 32 of 1944, which empowers the presiding officer to act summarily against an accused person. The High Court is vested with a similar power in terms of the common law. Also see *S v Nel* 1991 (1) SA 730 (A), where the Appellate Court held that in exceptional circumstances, a court may deviate from the most fundamental principles of the administration of justice by convicting an accused without giving the latter an opportunity to address the court. The rationale of the summary procedure was to uphold the status and dignity of the court and the orderly conduct of the proceedings.

41 Steytler questions the justification of this summary procedure. He argues that unless an immediate and compelling need to act summarily can be shown, there should be no deviation from full compliance with fair trial rights. See Steytler *Constitutional criminal procedure* 235. It should be noted that in the **United Kingdom**, a summary trial must be adjourned to give the accused a reasonable opportunity to prepare his case. See *R v Thames Magistrates' Court ex parte Polemis* [1974] 1 WLR 1371. Thus, it would appear that the accused is afforded greater protection in the United Kingdom.

42 Also see s 35(3)(g) of the Constitution which provides that an accused must be informed promptly that he has a right to have a legal representative assigned to him at state expense if substantial injustice would otherwise occur. The principle that the state should in certain circumstances provide indigent accused with legal representation was first laid down in *S v Khanyile supra* at 795. See Cowling "Revisiting the right to legal representation" (1995) *The South African Law Journal* 11, where the writer discusses the circumstances in which an indigent accused would be entitled to legal representation at state expense. For a discussion of the crisis in indigent criminal defence in the United States, see Drecksel "The crisis in indigent criminal defence" (1991) *Arkansas Law Review* 363-408. The writer concludes that any solution to the crisis in indigent defence will require the active participation of members of the bar.

43 See *S v McKenna supra* at 106. The court held that the right guaranteed by s 35(3)(g) of the Constitution includes the right to be given a reasonable opportunity of securing legal representation. The denial of such opportunity is a denial of the right to legal representation, and thus of the constitutionally guaranteed right to a fair trial. Also see *S v Philemon* 1997 (2) SACR 651 (W), where the issue concerned the extent to which an accused is given an opportunity to secure the services of a legal representative. The court concluded that the presiding officer had failed to give the accused a reasonable opportunity to obtain a legal representative, and this constituted a gross irregularity. This amounted to a denial of a fair trial as guaranteed in the Constitution.

44 See *S v Van Wyk* 1972 (1) SA 787 (A).

do so is irregular and invalidates the proceedings.[45] However, where an accused has sufficient opportunity to obtain legal representation and fails to arrange this, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure.[46] If a refusal to grant a postponement for the purpose of enabling the accused to obtain counsel is found to have been irregular, then the irregularity must *per se* have prejudiced the accused for the conviction to be set aside by the court of higher instance.[47]

In other jurisdictions, the adequacy of time will depend on the circumstances of each case. The European Court and Commission have regarded many factors to be relevant to the inquiry, such as the complexity of the case, the sufficiency of time for the appointment of a lawyer and the stage of the proceedings.[48] Article 14(3)(a) of the ICCPR, provides that everyone charged with a criminal offence has the right to be informed promptly, in detail, and in a language he understands of the nature and cause of the charge. This entails, *inter alia*, that notice of the charges must be timely so as to allow the accused time to prepare a defence. The HRC has held that a summons issued three days before the start of the trial did not provide sufficient notice.[49] Therefore, a notice must be provided in time, to allow the accused sufficient opportunity to examine the witness against him, and to secure the attendance and examination of witnesses on his behalf.[50]

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45 See *S v Khoali* 1990 (1) SACR 276 (O).

46 See *S v Nongila* 1970 (3) SA 97 (E).

47 See *S v Nel supra* at 730. When the absence of the accused's legal representative is not due to his fault, then the case must be postponed or the subsequent conviction will be set aside. See *S v Seheri* 1964 (1) SA 29 (A). However, a request for a postponement of the trial in order to enable the accused to obtain work to pay for the services of the legal representative of his choice, is unacceptable. See *Swanepoel en Andere* 2000 (1) SACR 384 (O).

48 See *Campbell and Fell v United Kingdom* 28 June 1984 Series A no 80 and 89, where the court found that five days' notice of a prison disciplinary hearing was adequate time for the preparation of a defence. It appears that the Convention requires actual prejudice for a violation of the provision. Also see Steytler *Constitutional criminal procedure* 232. Also see *Hadjianastassiou v Greece supra* at 219, where the European Court found that there was a violation of art 6(3)(b) taken together with art 6(1) because the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. However, in *Padin Gestoso v Spain* No 39519/98 8 Dec 1998, the applicant had alleged insufficiency of time for the preparation of his defence. The European Court held that the applicant's allegation was manifestly ill-founded as he had every opportunity to prepare his defence without any hindrance from the authorities.

49 See *Mbenge v Zaire* Communications No 16/1977 UN Doc A/38/40 at 134 (1983). The Committee stated that the purpose of the notice was to inform the accused in a manner which would allow him to prepare a defence, and that three days was insufficient time for this purpose. It also held that the notice must comply with all the requirements of art 14(3)(a).

50 The notice must also inform the accused of the date and place of trial, and request his attendance. See Weissbrodt (2001) *op cit* 113. Also see *Simmonds v Jamaica* Communications No 338/1988 UN Doc CCPR/C/46/D/338/1988 (1992), where the Committee found a violation of art 14(3)(b) and (d), because the accused was not informed with sufficient advance notice about the date of the hearing of his appeal. This jeopardised his opportunity to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself.

The HRC has also remarked in *Perkins v Jamaica*[51] that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the principle of "equality of arms". Where a capital offence may be pronounced on an accused, sufficient time must be granted to the accused and his counsel to prepare a defence.[52] However, the Committee found no violation of article 14(3)(b) or (d) in *Perkins supra*, because the accused Mr Perkins had met with his lawyer on at least two occasions before the trial, and neither the accused nor his lawyer had complained to the court of inadequate time for preparation. Therefore, the Committee found that in such a situation, it was incumbent upon counsel or the accused to request an adjournment if either felt inadequately prepared. Similarly, in *Wright v Jamaica*[53] the accused's counsel had less than one day to prepare the defence and the cross-examination of witnesses. However, counsel had not requested adjournment of the trial. Therefore, the Committee held that the inadequate preparation of the defence could not be attributed to the judicial authorities, because it was incumbent upon counsel to request the adjournment of the trial, if counsel felt that they were not properly prepared.

Similarly, in *Henry v Jamaica*[54] the Committee found no violation of articles 14(3)(b) and (e), because of insufficient evidence. The issue arose in *Tomlin v Jamaica*[55] whether a delay of two and a half months in the transmission of a letter from a convicted murderer to his lawyer, constituted a breach of the accused's right to freely communicate with counsel. The Committee held that the delay did not adversely affect the accused's right to adequately prepare his defence. Therefore, there was no violation of article 14(3)(b). However, a violation of article 14(3)(b) was found in *Smith v Jamaica*[56] where counsel was only given a mere four hours to seek an assistant and to communicate with the accused (a murder suspect), which he could only do in a perfunctory manner. The Committee found that this was insufficient time to adequately prepare the defence in a capital case.[57]

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51 Communications No 733/1997 UN Doc CCPR/C/63/D/733/1977 (1998).

52 The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. Also see *Berry v Jamaica* Communications No 330/1988 UN Doc CCPR/C/50/D/330/1988 (1994).

53 Communications No 459/1991 UN Doc CCPR/C/55/D/459/1991 (1995).

54 Communications No 230/1987 UN Doc CCPR/C/43/D/230/1987 (1991). The Committee found that Jamaica had not denied the accused's claim that he did not have adequate time for the preparation of his defence, that his opportunities to consult with counsel prior to his trial were minimal, and that his defence actually was prepared on the first day of the trial. Nevertheless, the accused's claim was unsuccessful because of lack of sufficient evidence.

55 Communications No 589/1994 UN Doc CCPR/C/57/D/589/1994 (1996). The evidence did not reveal whether the state authorities or the prison administration had withheld the letter for this period.

56 Communications No 282/1988 UN Doc CCPR/C/47/D/282/1988 (1993).

57 Also see *Little v Jamaica* Communications No 283/1988 UN Doc CCPR/C/43/D/283/1988 (1991), where the Committee found that a mere half hour to meet one's lawyer and to consult with him regarding the defence, is insufficient to satisfy the requirements of art 14(3)(b). Similarly, in *Reid v Jamaica*, Communications No 250/1987 UN Doc A/45/40 vol 2 at 85 (1990), the Committee

The right to prepare a defence also includes the right to private communication with counsel. In *Gomez de Voituret v Uruguay*[58] a woman awaiting trial on charges of subversive association was only allowed to speak with her defence lawyer through a glass wall, over the prison's telephone, and while guards stood at their side. The Committee found that the accused's rights appeared to be violated. However, it was procedurally barred from ruling on the issue because the facts were disputed by Uruguay.[59] Where an accused is legal represented, authorities may not try a person without notifying his attorney of the proceedings in time to allow adequate preparation for the defence. The accused was tried by a military court on charges of subversive association, without notifying his attorney in *Nieto v Uruguay*.[60] The court only informed the attorney of the results after the conviction. The Committee held that failing to notify the defence counsel barred the lawyer from participating in the defence, and violated articles 14(3)(b) and (d).

In *Kelly v Jamaica*[61] a murder suspect had told the arresting officers that he wanted to speak to his lawyer. His request was ignored and he could not reach a legal representative for five days. The Committee held that this procedure had violated the accused's right to communicate with counsel of his choice as protected by article 14(3)(b).[62] The Committee also maintains that an accused has the right to see an attorney at all times during the pre-trial period. The Committee found in *Lluberas v Uruguay*[63] that Mr Lluberas was not allowed access to his lawyer for two years, and

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found a violation of art 14(3)(b) in the court's failure to grant a postponement, where a legal aid attorney was not able to communicate with the accused until the opening day of the trial.

58 Communications No 109/1981 UN Doc A/39/40 at 164 (1984). Also see *Caldas v Uruguay* Communications No 43/1979 UN Doc A/38/40 at 192 (1983), where the Committee found that incommunicado detention of a Uruguayan union official during a time of "prompt security measures" when *habeas corpus* was inoperative, deprived him of the possibility of communicating with counsel at a critical pre-trial stage, and thus of one of the most important facilities for the preparation of a defence in terms of art 14(3)(b). Also see *Domenichini v Italy* ECHR (2001) 32 EHRR 4, which concerned the monitoring of a prisoner's correspondence, including with his lawyer. The prisoner's letter to his lawyer concerned an appeal in respect of which the lawyer had 10 days to file grounds to support the appeal. It was intercepted and forwarded to the applicant after the 10 days had elapsed. The European Commission found that the monitoring of this letter infringed the applicant's defence rights. Therefore, there was a breach of art 6(3)(b).

59 See Weissbrodt (2001) *op cit* 124.

60 Communications No 92/1981 UN Doc A/38/40 at 201 (1983).

61 Communication No 537/1993 UN Doc CCPR/C/57/D/537/1993 (1996).

62 Also see *Marais v Madagascar* Communication No 49/1979 UN Doc A 138/40 at 141 (1983), where the Malagasy authorities created circumstances which made it difficult or impossible for Marais, a South African national to speak with his legal representative. The Committee found that the accused was not provided with conditions that allowed him to exercise his right to counsel effectively. The interference by the Malagasy authorities was found to have violated arts 14(3)(b) and (d).

63 Communication No 123/1982 UN Doc A/39/40 at 175 (1984). Mr Lluberas, a civil engineer, alleged founder of a guerrilla group in Uruguay, was arrested in July 1972 on charges of subversion, storage of explosives, and manslaughter. He was indicted by a military tribunal in January 1973, but he was not allowed to see his defence lawyer for two years from March 1975

he was also tried with undue delay. The Committee held that denying him the right to see his attorney for two years violated his right under article 14(3)(b).

Therefore, the above discussion illustrates that it is a miscarriage of justice to hastily try an accused before giving him sufficient time to adequately prepare a defence. An accused can only prepare an effective defence if he is adequately prepared. An accused's right to legal representation includes the right to be given a reasonable opportunity to secure such representation. This entails that the accused has the right to request postponement of the trial, in order to obtain legal representation. A refusal to grant such postponement will be irregular and will lead to the conviction being set aside. It is also incumbent upon the legal representative or the accused to request a postponement, if they feel that they are not properly prepared for the trial.

7.4 THE RIGHT TO HAVE ADEQUATE FACILITIES TO PREPARE A DEFENCE

The principle of "equality of arms" cannot be complied with if there is a vast disparity of resources between the prosecution and the defence.[64] The prosecution is in an advantageous position because it has the state's financial resources at its disposal. The state has resources which are denied to most accused, which include forensic pathologists and other expert witnesses to assist in obtaining a conviction. The state also has recourse to funds of taxpayers to finance the prosecution.[65] On the other hand, the accused only has those resources which he can afford. The disparity of resources is greater when the accused is indigent and in custody.[66] Therefore, any evidence in the prosecution's possession which may assist the accused, must be furnished to the accused, in order to facilitate the preparation of his defence. Access to other state facilities will also improve the position of the indigent accused.[67]

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to mid 1977. He was sentenced to 30 years' imprisonment by a military tribunal six years later.

64 According to Meintjies-Van der Walt, the ability to challenge expert evidence and access to defence experts are inseparably linked to establishing "equality of arms". The problems inherent in scientific testimony are more acute when the testimony is directed against an indigent accused. People with financial resources have greater access to forensic support than poor people. See Meintjies-Van der Walt (*SAJHR*) *op cit* 309.

65 See *S v M* 2000 (8) BCLR 930 (N) at 939.

66 An "indigent defendant" has been defined as "a person indicted or complained of, who is without funds or ability to hire a lawyer to defend him, entitled to appointed counsel to represent him at every stage of the criminal proceedings". See *Black's Law Dictionary* 6th ed (1990) at 773. A well-known principle was laid down in *Griffin v Illinois supra* at 19, that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has". The case referred to the right of a defendant to receive the same access to appellate review as defendants who are better situated economically. Also see *Gideon v Wainwright* 372 US 335 (1963) at 344, where it was held that "in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." In the United States, to satisfy the sixth amendment, an attorney must perform to a reasonable level under prevailing professional norms. See *Strickland v Washington* 466 US (1984) 668 at 688. However, according to Drecksel, not only must a state provide an indigent criminal accused with an attorney, it must provide an effective attorney. See Drecksel *op cit* 369.

67 The term "facilities" covers psychiatric, medical, ballistic and other expert witnesses. It should be noted that in the **United States**, states have introduced low-bid contracts for indigent accused. These contracts refer to systems whereby the state or locality's indigent defence work

7.4.1 THE INTERPRETATION OF THE TERM "FACILITIES"

The word "facilities" has been described as "facilitating or making easier the performance of an action".[68] The right to "have facilities" implies that a claim rests against someone or somebody to facilitate or assist the preparation of a defence.[69] This claim is said to rest against the state in terms of the Constitution, in that a positive duty is imposed on it to assist. In *S v Nkabinde*[70] the only facilities provided to the accused to prepare his defence, were a telephone line which was monitored, and a consulting area which was also compromised. The court held that this amounted to a violation of the accused's section 35(3)(b) right to be afforded adequate "facilities" as well as his right to privacy. The word "facilities" is also capable of an expansive interpretation, in that it places the accused in a similar position to the prosecution by entitling the accused to state-appointed investigators, access to laboratory expertise and expert witnesses.[71] The word "facilities" also relates to access to information.[72] If the prosecution furnishes an accused with evidence which will assist his case, this will facilitate the preparation of his defence.

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is assigned to the attorney willing to accept the lowest fee. See Lemos "Civil challenges to the use of low-bid contracts for indigent defence" 75 (2000) *New York University Law Review* at 1808, where the writer discusses how low-bid contract systems pose serious obstacles to effective representation. She argues that systematic defects in the state or locality's chosen method for providing indigent defence services constitutes a violation of an indigent defendant's constitutional right to effective assistance of counsel.

68 See *S v Nassar supra* at 239b.

69 See Steytler *Constitutional criminal procedure* 235.

70 1998 (8) BCLR 996 (N). The court stated that it could not convict where it found that the fairness of the trial had been compromised because it was tainted by irregularities and unfairness characterising the investigation preceding the trial. The court found that in the instant case, the infringement of the accused's rights had been so gross that it had vitiated the fairness of the trial.

71 According to Steytler, the state's obligations are limited in three ways. Firstly, the right arises only when the accused shows a particular need for a particular facility, such as the case of an indigent and imprisoned accused. Secondly, the need must relate to the preparation of a defence. Thus, the onus will rest on an accused to prove that he requires a particular facility. Thirdly, the state's obligation depends on "adequate" facilities. The court will determine whether the particular facility is adequate or not. See Steytler *Constitutional criminal procedure* 235-236.

72 Therefore, the right to adequate facilities encapsulates the right of access to adequate information. If an accused is furnished with adequate information about his case, he can prepare a meaningful defence.

7.4.2 ACCESS TO INFORMATION[73]

7.4.2.1 THE RIGHT TO KNOW THE TRUE NATURE OF THE CASE ONE HAS TO MEET

Strict requirements have to be complied with when an indictment or charge sheet is drawn up.[74] Section 35(3)(a) of the Constitution provides that an accused has the right to be informed of the charge with sufficient detail to answer it.[75] It is important that the accused should know exactly what the charge against him is.[76] Thus, the indictment or charge sheet should disclose an offence as this will facilitate the preparation of the accused's defence.

If the accused feels that the particulars in the indictment are insufficient to inform the accused properly of the charge against him, he or his legal representative may request further particulars from the prosecutor.[77] The court also has a discretion to direct further particulars to be delivered to the accused either before or at the trial, but before evidence has been led. Where the accused genuinely requires particulars against him to ascertain the true nature of the case he has to meet, the court will order the prosecution to furnish such particulars unless this is shown to be impracticable.[78] To this end, a court may grant a *mandamus* directing the furnishing of

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73 It is re-iterated that an accused requires information to prepare a meaningful defence. Accordingly, "Access to Information" is discussed under the sub-right "The Right to be Prepared for One's Trial." Also see s 32 of the Constitution, which provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. Please refer to chapter five on "The Right to Information" for a more detailed discussion on access to information.

74 The term "indictment" refers to prosecutions in a superior court, whilst the term "charge sheet" refers to prosecutions in the lower courts. These documents allege that an accused is guilty of a specific crime/s and provide specific information regarding the alleged offence.

75 This is part of the accused's right to a fair trial. Section 84(1) sets out the requirements with which a charge sheet should comply. It provides that the relevant offence should be set forth in a charge sheet in such a manner that the accused is sufficiently informed of the nature of the charge brought against him. Section 35(3)(a) clearly encapsulates s 84. Similarly, in **Canada** a count or indictment must contain sufficient details of the circumstances of the alleged offence to provide the accused with reasonable information as to the act or omission of the offence, and to identify the transaction referred to so as to enable him or her to prepare a defence accordingly. See s 581(2)(c)(3) of the Criminal Code. Also see *R v Sault Ste. Marie (City)* [1978] 2 SCR 1299 (SCC) [Ont]. An indictment which reasonably informs the accused of the case to be met will be upheld and the court will order amendments or particulars. See s 601 and s 587 of the Criminal Code respectively.

76 See *S v Hugo supra* at 536. Also see *S v Pillay supra* at 919, where it was held that an indictment or charge sheet should inform the accused in clear and unmistakable language of the charge that he has to meet.

77 See s 87 of the Act.

78 See *S v Abbass supra* at 233.

further particulars.[79] However, courts are generally reluctant to issue a *mandamus*.[80] The aim of particulars is merely to define the issues and not to enlarge them. Therefore, the prosecutor is merely entitled to give particulars regarding the evidence to be led, and he is not entitled to furnish alternatives.[81] The court will set aside the accused's conviction, if it appears on appeal, that the accused was prejudiced by the trial court's refusal to grant an application for particulars.[82]

The position prior to 1959 was that an indictment could not be amended unless it disclosed an offence.[83] Therefore, section 88 was introduced, which means that the accused can now be found guilty even though the indictment does not disclose an offence, as long as the evidence proves the offence.[84] Section 88 indicates that the offence with which the accused is charged should be named in the indictment.[85] Thus, the charge must contain some recognisable offence, although no offence is disclosed.[86] However, the prosecutor is obliged to be cautious when describing the indictment so that it does disclose an offence, because his failure can lead to the accused raising an exception before pleading against the charge. A defect can only be cured by proper evidence, and not by using statutory provisions and presumptions.[87] Section 86(1) provides for the amendment of an indictment.[88] The court may only order an amendment if it finds that the making of the amendment will

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79 See *Weber v Regional Magistrate Windhoek supra* at 394, where a mandamus was granted.

80 See *Goncalves v Addisionale Landdros, Pretoria supra* at 587.

81 See *S v Sadeke supra* and *S v Mpetha supra*.

82 See, *inter alia*, *S v De Coning supra* and *S v C supra*.

83 This led to prosecutions being aborted because of technical errors being made by persons drawing up charges.

84 Section 88 provides that where a charge is defective because it does not contain an averment which is an essential ingredient of the relevant offence, the defect shall, unless it is brought to the court's notice before judgment, be cured by evidence at the trial. This amendment was said to alleviate the burden of the prosecutors. See *Joubert* (2001) *et al op cit* 176, for a detailed discussion on s 88.

85 See *S v Mcwera supra*.

86 See *S v Dhludhla supra* and *S v Mayongo supra* at 443.

87 See *S v AR Wholesalers supra*. However, s 88 does not entail replacing one offence by another offence proved by evidence. See *S v Sarjoo supra*.

88 Section 86(1) caters for three situations, namely where the indictment is defective because it does not contain an essential averment; where there is a variance between the averment in the charge and the evidence offered in proof of such averment; or where words have been omitted, or unnecessarily inserted, or any other error is made. It should be noted that s 86 merely provides for an amendment of the charge and not for replacement of the charge by a new charge. See *S v Barkett's Transport (Edms) Bpk supra* at 157. If the accused comes to court prepared to meet a particular charge, and he is now faced with a new charge, the possibility of prejudice to the accused is strong. See *S v Slabbert supra*.

not prejudice the accused in his defence.[89] The question of prejudice is said to depend upon an examination of the facts and circumstance of each case.[90]

7.4.2.2 ACCESS TO DOCUMENTS IN THE PROSECUTION'S POSSESSION

The question has arisen whether the accused is entitled to access to documents in the police file to facilitate the preparation of his defence. The common law position was that most documents in the police docket were privileged.[91] The courts wrestled with the question whether the "blanket docket privilege" as enunciated in *Steyn*, passed constitutional muster.[92] However, in *Shabalala v Attorney-General of the Transvaal*[93] the Constitutional Court held that the right to a fair trial required disclosure of information in the police docket. The court thus rejected the "blanket docket privilege" enunciated in *Steyn*.[94] Steytler approves of the Constitutional Court's decision to base the prosecutorial duty to disclose on the right to a fair trial.[95]

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89 See *S v Taitz supra*. Also see *S v F supra* at 167, where it was held on appeal, that the court would accede to an application for an amendment of a charge only if it were satisfied that there was no reasonable doubt that the appellant would not be prejudiced.

90 See *S v Pillay supra* and *S v Coetzer supra*.

91 See *R v Steyn supra*, where a "blanket privilege" was granted in respect of statements in the police docket. This "blanket privilege" protected all documents in the police docket from disclosure to the accused. A police docket contains the following information namely, statements of potential state witnesses, expert reports and documentary exhibits, internal reports and correspondences between the police and the prosecution, and the investigating officer's diary.

92 See, *inter alia*, *S v Thobejane supra* and *Nortje v Attorney-General, Cape supra*. Please refer to subsection 5.3.3.1 for a detailed discussion about these cases.

93 See *Shabalala v Attorney-General of the Transvaal supra* at 1593. The issue arose whether the s 23 right to information and the s 25 right to a fair trial in terms of the Interim Constitution, afforded an accused a right of access to police dockets and a right to consult with state witnesses, without permission of the prosecuting authorities. The Constitutional Court held that the primary reason for disclosure is that an accused may prepare a defence by being fully informed of the case he has to meet, and that disclosure should take place at a time "when the accused is acquainted with the charge or the indictment or immediately thereafter". Please note that this case has been discussed in detail in subsection 5.3.3.2.

94 The case of *S v Makiti supra* at 291, implements the decision in *Shabalala*. The court held that although the *Shabalala* decision does not require witness statements to be handed over to the defence in all cases, if the matter appeared not to be trivial and there was no prejudice to the state, the statements should be made available to the defence in order to give effect to the spirit and tenor of the Constitution.

95 See Steytler *Constitutional criminal procedure* 238. Steytler maintains that approaching the issue from the fair trial angle also conforms with international and comparative jurisprudence. See, *inter alia*, *Edwards v United Kingdom supra*. Also see *R v Stinchcombe supra*, where the Supreme Court of Canada held that s 7 of the Canadian Charter imposed extensive duties on the prosecution to disclose information to the defence on the basis of an accused's right to make full answer and defence. Section 7 was interpreted to require the prosecutor to disclose relevant evidence in his or her possession to the accused at an early stage in the proceedings. The accused has a right to all relevant documents and exhibits in the adversary's position unless protected by some specific rule of privilege. According to Mahoney, this decision demonstrates judicial acceptance of a prosecution duty to preserve evidence. See Mahoney *op cit* 43. According to Christopher Manfredi and Scott Lemieux, the disclosure rule articulated in

Denial of access to state witnesses' statements in the police docket would violate an accused's right to a fair trial, because an accused who is not fully informed of the case to meet, may not be able to prepare a plea or a defence adequately. It is also possible that reliability of the prosecution's evidence will not be adequately challenged if the accused is not granted prior access to such statements.[96] However, the prosecution can refuse access, by convincing the trial court that access is not justified for the purposes of a fair trial. This would depend on the simplicity of the case and the degree of information already in the accused's possession.[97]

According to Steytler, the *Shabalala* decision demonstrates that internal documents need not be disclosed to the accused routinely.[98] Thus, the right of access does not include the right to inspect all the contents of the police docket. The right to a fair trial may also entail that information in the possession of third parties could be necessary for the adequate preparation of a defence.[99] However, an accused's right to fair trial may conflict with a third party's right to privacy.[100] The Constitutional Court recognised a number of exceptions to the access rule in *Shabalala*.[101] However, at

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Stinchcombe can be understood as another means of equalising the balance of power between the crown and the defence. See Manfredi and Lemieux "Judicial discretion and fundamental justice: sexual assault in the Supreme Court of Canada" 47 (1999) *The American Journal of Comparative Law* 489 at 495. The *Stinchcombe* decision modified the rules of discovery to require that the crown disclose all information in its possession or control to the defence, unless the information was irrelevant or protected by privilege. The Canadian courts have also been willing to stay charges where the ability to make full answer and defence has been compromised. See *R v O'Connor supra*, where the court recognised that in some cases a failure to disclose may be serious enough to result in a stay of proceedings.

96 See *Nortje v Attorney-General, Cape supra* at 255 B-C.

97 See Steytler *Constitutional criminal procedure* 241-242.

98 *Ibid* at 242. These documents are internal to the investigation and the prosecution. However, Steytler maintains that the accused may be able to convince the trial court, depending on the particular circumstances of the case, that such information is essential to the adequate preparation of his case.

99 The principle of "equality of arms" also applies during the preparation of one's trial. This will encapsulate the compulsory process of obtaining evidence in the possession of third parties.

100 See *Shabalala v Attorney-General of Transvaal supra*. Also see *R v O'Connor supra* and *R v Beharreil supra*. The *O'Connor* case is instructive regarding how the Canadian courts have balanced the accused's right to a fair trial with the third party's right to privacy. At issue was the accused's right to secure production of therapeutic records held by third parties, as well as the process that might govern the production of such records. The court was unanimous in holding that defendants have a right to request production of records held by third parties. Thus, in other jurisdictions, it has been held that information in the hands of third parties may in certain circumstances be necessary for the adequate preparation of a defence. Also see Calarco "What happens when evidence has not been recorded? Staying charges to ensure a fair trial" (2001) *Criminal Law Quarterly* 514 at 532, where the writer argues that a trial where relevant and accessible information has been denied to the defence through the deliberate actions of a third party, is an unfair trial.

101 These exceptions relate to state secrets, methods of police investigation, the identity of informers, communications between a legal adviser and his or her client, and intimidation of state witnesses. See *Shabalala v Attorney-General of Transvaal supra*.

the end of the day, the trial court has a discretion to balance the accused's need for a fair trial against the legitimate interests of the state in enhancing and protecting the ends of justice.[102]

Similarly, in the **United States**, defendants (accused) have certain rights to obtain "discovery" of prosecution evidence which will be introduced. Most of the rules regarding discovery of prosecution evidence are based on statutes and procedural rules, but some disclosures to the defence are constitutionally required.[103] Due process principles require the prosecution to turn over exculpatory or other pro-defence evidence in its possession whenever such evidence is "material" to either the determination of guilt or sentencing.[104] According to Weissbrodt, due process principles and the right to effective assistance of counsel, require that the accused has adequate time and facilities to prepare his defence before trial.[105] Thus, there is no express reference in the United States Constitution to the right to adequate facilities to prepare a defence, but the due process guarantee is a sufficient source for any arguments which may be raised.[106] However, there are very few specific

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102 *Id*. However, see s 39 of the Promotion of Access to Information Act 2 of 2000, where an information officer of a governmental public body may refuse access to a police docket if such disclosure may prejudice the police investigation or prosecution of the crime committed by the alleged offender, and must refuse disclosure if the access to the police docket concerns bail proceedings in terms of s 60(14) of the Criminal Procedure Act.

103 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 43.

104 See *Brady v Maryland supra*. The question arises regarding the disappearance of evidence in the prosecution's control. The United States Supreme Court has already recognised that police bad faith provides a compelling link with the issue of the exculpatory potential of lost evidence. See *Arizona v Youngblood supra*. If the police without justification, purposely destroyed evidence possessing a high likelihood of assisting the defence, a breach of the accused's right to make full answer and defence would be found. Therefore, without police bad faith, the accused who seeks a new trial because of a failure to disclose must show an actual impairment of his or her ability to make full answer and defence. According to Mahoney, where the police act in bad faith in destroying evidence, then the burden should shift to the prosecution to prove that the destroyed evidence actually did not possess any exculpatory potential, and that the accused's right to adequate facilities to present a defence has therefore not been infringed. See *Mahoney op cit* 38, 43-44.

105 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 43. The Supreme Court remarked in *Griffin v Illinois supra* at 17, that "equal protection and due process emphasise the central aim of our entire judicial system that all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court". The court was quoting *Chambers v Florida* 309 US 227, 241 (1940). Also see *Gideon v Wainwright supra* at 344, which held: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

106 It is noteworthy that the right to "adequate facilities to prepare a defence" is enshrined in s 24(d) of the New Zealand Bill of Rights Act 1990. The accused's right to adequate facilities to prepare a defence was considered in *R v B* [1995] 2 NZLR 172, where the court recognised the right of an accused facing sexual violation charges to have the proceedings stayed if, in an appropriate case, the complainant refused to submit to an intimate medical examination by a physician instructed by the defence. The court chose to favour the interests of the accused if this was compelled by the need to present a meaningful defence. Also see *R v Donaldson* [1995] 3 NZLR 641, where the Court of Appeal determined that the Bill of Rights Act guarantee of adequate facilities to prepare a defence required the police officer to have obtained a blood sample from

guarantees or *per se* rules in this area.[107]

In the **United Kingdom**, there are now requirements for the disclosure of information by the prosecution. However, the inequality between the prosecution and the defence in the matter of access to resources for investigation has been highlighted in recent miscarriage of justice cases, particularly where there has been non-disclosure of evidence that would be helpful to the defence.[108] The requirements in Scotland are said to be less onerous than England and Wales, in that the crown must give lists of productions (that is, exhibits) and lists of witnesses to the defence with the indictment, and there is a right of inspection. Lists of witnesses are exchanged purely as a matter of courtesy in summary cases. However, police witness statements are provided on request to the defence.[109]

The right to adequate facilities is also advanced in **European** jurisprudence. According to the European Commission, the right to adequate facilities guarantees for the accused,

> "The opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings".[110]

This right applies to access to lawyers by detainees, and access to information held by the state. The right to adequate facilities to prepare a defence has been used to guarantee access to a lawyer.[111] The right of access to adequate facilities also imposes a positive duty on the state to provide an accused with such facilities. These include granting an accused access to the results of the police investigation. The European Court of Human Rights has based the prosecution's duty of disclosure on the general right to a fair trial in a number of decisions.[112]

7.4.3 THE RIGHT TO EXPERT AND OTHER SERVICES

In South Africa, the courts have come to the assistance of the indigent accused. The courts have appointed psychiatric and medical expert witnesses to assist *pro deo*

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the accused. The failure to do so deprived the accused to make full answer and defence. This led to the accused's acquittal. Thus, the New Zealand courts have responded to the interests of the accused in a manner dictated by fairness.

107 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 43.

108 See Harris and Joseph *op cit* 224.

109 *Id*.

110 See *Can v Austria* 12 July 1984 Series A no 96 and 53.

111 See *Campbell and Fell v United Kingdom supra*.

112 See, *inter alia*, *Edwards v United Kingdom supra*, where the court held that it is a requirement of a fair trial that "the prosecution authorities disclose all material evidence for and against the accused".

counsel in the preparation of the defence of insanity.[113] The general principle has developed that a court should assist the accused as far as possible in *pro deo* cases.[114] The question arises regarding what resources are adequate for the preparation of a defence. Steytler maintains that the right to adequate facilities in terms of section 35(3)(b), transforms the court's discretionary power into an obligation to make available at state expense such facilities as may be necessary for the preparation of a defence.[115]

The right to adequate facilities to prepare a defence is also well advanced in **American** jurisprudence. In the United States, the state is obliged to provide indigent accused with various kinds of assistance for the adequate preparation of a defence.[116] Indeed, where a defendant's lack of financial assets could jeopardise the

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113 See, *inter alia*, *R v Linda* 1959 (1) SA 103 (N) and *R v Mfuduka and Another* 1960 (4) SA 770 (C). Please refer to subsection 10.2.5.3 for a detailed discussion about expert documentary evidence.

114 See *S v Huma* (1) 1995 (2) SACR 407 (W) 409e. It should be noted that in *Huma*, the court authorised the appointment of a ballistics expert for an indigent accused, even though the accused did not establish positively that such an expert would indeed give evidence favourable to the defence. The state had opposed the application on the basis that the accused's defence did not require the appointment of such an expert witness. The court's order was couched in terms of providing assistance to *pro deo* counsel "in the preparation of the accused's defence". However, the court remarked that care had to be taken in granting applications of this nature as there were financial implications: the appointment of experts entailed additional costs which may not have been budgeted for. Also see Meintjies-Van der Walt "*S v Huma* 1995 (2) SACR 407 (W), Shooting at science: expert evidence and equality of arms" 9 (1996) *South African Journal of Criminal Justice* 361.

115 See Steytler *Constitutional criminal procedure* 246, where he also states that the courts should determine which types of assistance fall under the term "facilities" and when these are due to the accused. An appellant should also be provided with adequate facilities to prepare for an appeal or review, which may include the furnishing of a copy of the trial record. See *Griffin v Illinois supra*. Also see Mbodla *op cit* 83, where the writer states that the right to adduce and challenge the state's evidence will only be meaningful if the defence will be able to consult with its own expert witness in order to make an informed assessment of the state's case. Otherwise, without such resources, it would make a mockery of the right to a fair trial.

116 See *Ake v Oklahoma* 470 US 68 (1985), where the court held that an indigent accused was entitled to a state-appointed psychiatrist where the defence of insanity was seriously in issue. Also see *Bounds v Smith* 430 US 817 (1977), where the Supreme Court held that the state must assist indigent prisoners with the constitutional challenge of their convictions. State courts have since expanded *Ake* to confirm the right of an indigent accused to "basic tools of an adequate defence". See McCormick "The constitutional right to psychiatric assistance: cause for re-examination of *Ake*" 30 (1993) *American Criminal Law Review* 1329 at 1330-1372. McCormick maintains that the *Ake* decision has not led to greater access to expert assistance for many indigent defendants. The Supreme's Court's failure to articulate clearly the circumstances in which due process requires the court to appoint a psychiatric expert has led to the courts denying such assistance in a large number of cases. The writer states that due process requires courts to provide indigent defendants with expert psychiatric assistance more readily and frequently than is currently the case. Due process should guarantee that a defendant receive partisan psychiatric assistance when the defendant has made an *ex parte* showing that mental illness will be an element of the defence. Although the state need not provide the indigent accused with resources equal to its own, the state must provide the indigent defendant with minimal necessities of marshalling a defence.

probability of a just outcome, the Supreme Court has repeatedly held that the prosecuting state must provide the indigent defendant with the "basic tools of an adequate defence".[117] Therefore, some state legislatures provide for "investigative, expert or other services" that are "necessary for an adequate defence".[118] According to McGrath, the court couched the *Ake* decision in the language of the equality principle by stating that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly.[119] However, entitlement to a psychiatric expert does not create an entitlement to a specific expert or to a favourable result. The defendant was entitled at a minimum to access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defence but no constitutional right to choose a psychiatrist of personal liking or to receive funds to hire his own.[120]

Therefore, in the United States, due process principles provide some minimum standards at least when the accused can demonstrate that particular resources (such as hiring an expert witness), are essential to a fair determination of key issues in the case.[121] Some state and federal statutes grant broader rights to obtain services other than legal representation. However, according to Weissbrodt, the level of funding for defence services, and sometimes even counsel's legal competency and adversary zeal, are usually inadequate, particularly in jurisdictions with increased criminal caseloads.[122]

Thus, the right to adequate facilities guarantees to an accused, access to information in the possession of the state (represented by the prosecution). It is a fundamental

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117 See *Britt v North Carolina* 404 US 226, 227 (1971) and *Gideon v Wainwright supra* at 344.

118 Consequently, an interesting body of law has developed regarding the issue of which arm of the state should pay for these defence tools provided to the indigent accused. See Mahoney *op cit* 58.

119 See McGrath "*Sommers v Commonwealth*: an indigent criminal defendant's right to publicly funded expert assistance other than the assistance of counsel" 84 (1995-1996) *Kentucky Law Journal* 387, whose article discusses an indigent criminal defendant's right of access to publicly funded expert assistance that would allow a defendant to prepare and conduct an effective defence. The article explores the continued debate about an indigent criminal defendant's unqualified right to expert assistance and to equal treatment in the methods of securing such assistance. Also see pages 393-394 for a discussion of the "basic tools" approach employed by the courts.

120 See *Ake v Oklahoma supra*. Also see *People v Stone* NW 2d 1992 WL 197727 (Mich App), where it was held that a trial court's refusal to approve funds to enable a defendant to hire an independent psychologist to testify at the dispositional hearing did not violate the defendant's equal protection rights. The defendant's private interest was less compelling since his guilt had already been determined and his liberty was no longer at stake.

121 *Id*. Also see *Dunn v Roberts* 963 F 2d 308, 331-334 (10th Cir 1992), where a state trial court denied a defendant due process, when it refused her request for funds to employ a psychiatric expert to assist in her defence. It was held that an expert could have explained the nature of the battered woman's syndrome and given an opinion on whether the defendant suffered from the syndrome.

122 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 46.

principle of a fair trial to disclose relevant information in the state's possession to the accused. This means not only that the accused must be informed of the charge/s against him, so that he can prepare an effective defence, but also that he is entitled to have access to relevant information in the police file to facilitate the preparation of his defence. A positive duty also rests on the state to provide the indigent accused with facilities which may assist him in the preparation of his defence, such as psychiatric, medical, ballistic and other expert evidence. However, the appointment of an expert will have financial implications because this may entail additional costs. Therefore, the courts should exercise care in granting such applications.

7.5 CONCLUSION

It is a fundamental principle "that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[123] It is a fatal irregularity to deny an accused person his right to necessary information or to be prepared for trial if he requests it, as it cannot be said that such an accused has had a fair trial. These rights are as much denied if they are not communicated to the accused. A court is entitled to set aside a conviction where the accused has not had a sufficient opportunity to weigh the case against him, to understand it and its implications, and to arrive at a mature and unhurried decision on how to plead or to conduct his case.[124] Therefore, the right to be prepared for trial, is a fundamental principle of a right to a fair trial.

The principle of "equality of arms" underlies the right against an unduly hasty trial and the right to adequate facilities, for the preparation of a defence.[125] The principle of "equality of arms" means that both the prosecution and the defence must come to court on an equal footing. There can "be no equal justice where the kind of trial a man gets depends on the money he has".[126] This entails that the accused is entitled to a postponement of the trial, if more time is required to prepare his defence.[127] Similarly, the accused is entitled to a reasonable opportunity to secure legal representation.[128] A refusal to grant a postponement to enable the accused to secure legal representation may amount to an irregularity.[129] A violation of the right to be prepared also occurs when summary proceedings are brought against the accused,

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123 See *R v Surrey Justice – Ex parte McCarthy* [1924] 1 KB 256 at 259.

124 See *S v Yantolo supra*.

125 Also see s 35(3)(b) of the Constitution which embodies the right to adequate time and facilities to prepare a defence.

126 See *Griffin v Illinois supra* at 19.

127 See, *inter alia*, *S v Nel supra*.

128 See *S v McKenna supra*. It has also been held that the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. See *Powell v Alabama* 287 US 45 (1932) at 68-69.

129 See *S v Van Wyk supra*.

because the accused is not given adequate time to prepare a defence.[130]

The right to adequate time and facilities is also observed in other jurisdictions.[131] Indeed, the HRC has held that the right to adequate time and facilities for the preparation of a defence, is an important aspect of the principle of "equality of arms".[132] The determination of "adequate time" is said to depend on the individual circumstances of each case. Whilst a delay of two and a half months has been found not to affect the accused's right to adequately prepare his defence,[133] a mere four hours for counsel to communicate with his client, has been found to be insufficient time to adequately prepare a defence in a capital case.[134] The United Nations case law also demonstrates that the duty rests on the attorney to seek a postponement. Therefore, a failure to do so, will not lead to a violation of article 14(3)(b) rights.[135] Similarly, the right to prepare an adequate defence also entails the right to private communication with counsel.[136] The Committee has found violations of article 14(3)(b) where persons have been detained incommunicado,[137] where the first communication with the defendant's lawyer has been on the first day of the trial,[138] or where an *ex officio* lawyer has been appointed against the defendant's will.[139] However, the Committee has also rejected complaints in many cases where it was not shown that the time was clearly inadequate and that the court (by refusing an adjournment) was responsible, or that officially rather than privately-appointed lawyers were responsible.[140]

The right to adequate facilities entails that the accused should be provided with all relevant evidence to prepare for his trial. It has been held that the right to a fair trial required disclosure of relevant information in the prosecution's possession.[141] Denial

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130 See *S v Nel supra*.

131 See art 14(3)(b) of the ICCPR in this regard.

132 See *Perkins v Jamaica supra*.

133 See *Tomlin v Jamaica supra*.

134 See *Smith v Jamaica supra*.

135 See *Wright v Jamaica supra*.

136 See, *inter alia*, *Gomez de Voituret v Uruguay supra*.

137 See *Carballal v Uruguay* (33/1978).

138 See, *inter alia*, *Reid v Jamaica* (250/1987); *Little v Jamaica* (283/1988), where the accused was given only half an hour to consult with a legal aid lawyer; *Smith v Jamaica* (282/1988).

139 See *Izquierdo v Uruguay* (73/1980).

140 See for example, *Henry v Jamaica* (230/1987) and *Wright v Jamaica* (349/1989).

141 See, *inter alia*, *Shabalala v Attorney-General of the Transvaal* and *S v Makiti supra*. This means not only that an accused is entitled to access to relevant information in the police file, but also that the accused be informed of the charge/s against him so that he can prepare an effective defence. Thus, pre-trial disclosure is essential to the right to be prepared for one's trial. Then only, can one challenge expert evidence.

of access to such information would violate an accused's right to a fair trial, as the accused will not be able to prepare an adequate defence if he is not fully informed of the case that he has to meet. However, the prosecution can refuse access by convincing the trial court that access is not justified for purposes of a fair trial.[142] A similar approach has been followed in other jurisdictions. The HRC has held that the accused should be granted access to documents and records which are necessary for his defence.[143] However, this decision falls short of entitling the accused to copies of **all** relevant documents.[144] The Canadian courts have also imposed extensive duties on the prosecution to disclose information to the defence, on the basis of an accused's right to make full answer and defence.[145] Indeed, a failure to disclose may in some cases result in a stay of proceedings.[146] Similarly, in the United States, due process principles dictate the right of access to "material" evidence in the prosecution's possession.[147] The New Zealand courts have also favoured the interests of the accused for purposes of securing a meaningful defence.[148]

The right to "facilities" has also been interpreted to entitle an indigent accused to expert evidence.[149] Nevertheless, the court has warned that care should be exercised in granting such applications, because of financial implications.[150] A similar approach has been followed in the United States, where the state is obliged to furnish an indigent accused with investigative and expert services for the adequate preparation of his defence.[151] However, Steytler maintains that the courts should determine what

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142 See *Shabalala v Attorney-General of the Transvaal supra*.

143 See *Edwards v UK supra*.

144 See General Comment 13/21 of 12/4/84.

145 See *R v Stinchcombe supra*, where the issue was the nature of the crown's disclosure obligation in criminal proceedings. The court determined that one of the "principles of fundamental justice" protected by s 7 of the Charter is the right to make "full answer and defence" and this right cannot be properly exercised without obliging the crown to disclose all "relevant information" in its possession to the defence.

146 See *R v O'Connor supra*. This case is also instructive regarding how the Canadian courts have balanced the accused's right to a fair trial with a third party's right to privacy.

147 See *Brady v Maryland supra*.

148 See, *inter alia*, *R v B supra* and *R v Donaldson supra*. Also see s 24(d) of the New Zealand Bill of Rights Act 1990, which embodies the right to "adequate facilities to prepare a defence".

149 See *S v Huma supra*, where the court authorised the appointment of a ballistics expert for an indigent accused. This was necessary for the "preparation of the accused's defence".

150 *Id*.

151 See, *inter alia*, *Ake v Oklahoma supra*, where it was held that when a defendant demonstrates that his sanity at the time of the offence is likely to be a significant factor at trial, the Constitution mandates that the state provide access to a psychiatrist whether the defendant can afford one or not.

types of assistance are adequate, and when they are due to the accused.[152]

The above discussion demonstrates that an accused can only exercise his right to a fair trial, if he is adequately prepared. If the accused is adequately prepared, he can prepare an effective defence. Similarly, an accused should not be denied access to the courts because of poverty.[153] There exists a tension in every democratic society between the need to investigate and prosecute a criminal for criminal acts, and the need to protect every individual, including an accused person, against excessive zeal on the part of state organs in their task to bring an accused criminal to book.[154] Therefore, a duty rests on the presiding officer to strike a balance between the two. A fair trial exists if there is balance. However, if there is no balance, there is no fair trial. A free democratic society cannot tolerate an unfair criminal justice system. Therefore, it must be vigilant in ensuring that both society's integrity and the rights of the accused have been addressed. The judiciary must play its role in ensuring the integrity of the criminal justice system. Indeed, we must count on the wisdom of the judiciary to decide not what is convenient or publicly acceptable but rather what is truly just.[155] Then only can we say that justice has been done.

An accused is ready to conduct his defence once he has prepared for his trial. However, his presence is required at the trial in order for him to conduct his defence. Indeed, his physical and mental presence at the trial is necessary for him to participate in a meaningful and informed manner at the trial. His personal participation is necessary because he is no longer the object of the proceedings as in primitive times. He will only be able to adduce and challenge opposing evidence if he is present at the proceedings. The next chapter will discuss the accused's right to be present at the trial.

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152 See Steytler *Constitutional criminal procedure* 246.

153 See *Griffin v Illinois supra*, where it was held that if the concept of equality before the law is to be given any meaningful content, it must mean that a person should not be denied effective access to the courts because of poverty. This is the philosophy which underlies the jurisprudence of the US Supreme Court.

154 See *S v Nkabinde supra* at 1001.

155 See McGrath *op cit* 413.