CHAPTER TEN

THE RIGHT TO PRESENT ONE'S CASE

10.1 INTRODUCTION

It is a fundamental principle that the accused should be allowed to present his case in court in an effective manner. This will enable him to establish the truth about his guilt or innocence.[1] The right to present one's case applies to all aspects of court proceedings where the court makes a factual finding. This right is an expression of the *audi alteram partem* principle and part and parcel of the right to a fair trial.[2] The notion of a fair and adversarial hearing requires that the accused be given an adequate opportunity not only to challenge and question witnesses against him, but also to present his own witnesses in order to establish an effective defence. The right to present one's case is also subject to the principle of "equality of arms". The principle of "equality of arms" is the guarantee that both sides will be given the same procedural opportunities to prove their cases.[3] Therefore, the court cannot act in a way which gives the prosecution an advantage over the defence.[4]

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1 It is noteworthy that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. As per Watermeyer AJ (as he then was) in *Rex v Difford* 1937 AD 370 at 373.

2 The "*audi alteram partem*" principle literally means "hear the other side". This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. See *S v Suliman supra* at 385. The rules of natural justice come into play here. The "*audi alteram partem*" principle is followed in judicial proceedings in a number of countries throughout the world, along with the rights such as legal representation, the right to argument and cross-examination, and the leading of evidence.

3 See art 14(1) of the ICCPR, which provides that all persons shall be equal before the courts and tribunals. Also see s 9(1) of the 1996 Constitution which provides that: "Everyone is equal before the law and has the right to equal protection and benefit of the law". The right of all persons to be equal before the courts, requires that the prosecution and defence be treated equally in a criminal trial.

4 In *Robinson v Jamaica supra* at 223/1987 at 241, the HRC considered a case where the accused's request for adjournment in a murder trial in order to arrange for legal representation, was denied by the trial court. The Committee found that the refusal raised issues of fairness and violated art 14(1) because of the "inequality of arms" between the parties. Also see Weissbrodt (2001) *op cit* 130.

In order for an accused to present his case effectively, he must, *inter alia*, have access to statements of state witnesses so that he can adduce and challenge evidence effectively.[5] Thus, this right is also closely related to the right to be prepared for one's trial. The right to present one's case is also linked to the other rights mentioned in section 35 of the Constitution.[6] The right to present one's case contains a number of sub-rights, which are directly related to the main right. These sub-rights appear in the trial phase of the criminal process. They comprise the following rights such as, the right to cross-examine witnesses, the right to address the court on evidence to be adduced, the right to give and adduce evidence, the right to address the court at the conclusion of evidence and the right to address the court on sentence. The right to present one's case effectively is fundamental to an accused's right to a fair trial.

This chapter will first examine the right to cross-examination. The limitations of this sub-right, such as face-to-face cross-examination, hearsay evidence and documentary evidence will also be discussed. Thereafter, the other sub-rights will be discussed. 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, and present proposals and recommendations.

10.2 THE RIGHT TO CROSS-EXAMINATION

Cross-examination is a marked characteristic of the common law adversarial trial system.[7] According to Wigmore, it is "the greatest legal engine ever invented for the discovery of truth".[8] It has strong historical and symbolic roots.[9] Section 166 of the Act provides that the accused has the right to cross-examine state witnesses and

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5 See *Shabalala v Attorney-General, Transvaal supra* at 1593.

6 To illustrate this, the right is linked to the following rights such as, the right to present one's case *via* one's legal representative in terms of s 35(3)(f); the right to remain silent and thus to present one's case in a passive manner in terms of s 35(3)(h); and the right to present one's case in a language that you understand in terms of s 35(3)(k).

7 The adversary system's real genius, the heart of the concept, lies in the use and perfection of cross-examination. The central philosophy is that by testing the statements of one against the questions of an adversary, the fact finder may determine the truth. See Singer "Forensic misconduct by federal prosecutions – and how it grew" (1968) *Alabama Law Review* 227 at 268.

8 See Wigmore *Evidence in trials at common law* Boston (1979) s 1367.

9 See Van der Merwe "Regterlike inkorting van kruisondervraging: 'n gemeenregterlike, statutêre en grondwetlike perspektief" (1997) *Stellenbosch Law Review* 348. Also see Underwood "The limits of cross-examination" (1997) *American Journal of Trial Advocacy* 113 at 113-118, regarding the history and mythology of cross-examination.

any witness called by the court, before he presents his case for the defence.[10] This gives him the opportunity to elicit favourable evidence from witnesses (known as adducing evidence) and to undermine the value of incriminating evidence (known as challenging evidence). Therefore, the object of cross-examination is firstly, to obtain information that is favourable to the party on whose behalf the cross-examination is conducted and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party.[11] In South Africa, the accused's right to cross-examine also has constitutional basis, and is derived from section 35(3)(i) of the Constitution.[12]

10.2.1 THE RIGHT TO CROSS-EXAMINE STATE WITNESSES

The defence is entitled to cross-examine each and every state witness.[13] The right of cross-examination also exists in respect of a co-accused who has elected to testify.[14] However, the content of the cross-examination must be relevant to the accused's

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10 Section 166(1) of the Act provides that the accused may cross-examine any co-accused who testifies at criminal proceedings. This section also provides that after every witness has been cross-examined by the other party, the party who called the witness may re-examine the witness on any matter raised during the cross-examination of that witness. Also see *S v Ramalope* 1995 (1) SACR 616 (A), regarding the meaning of the right to re-examination in terms of s 166(1) of the Act.

11 See Cross and Tapper *Cross on Evidence* 7ed Butterworths (1990) 303. Also note that usually a party may not cross-examine his own witness. However, the advantage of having a witness declared hostile is that the party calling him may thereafter cross-examine the hostile witness. See *S v Dolo* 1975 (1) SA 641 (T).

12 Section 35(3)(i) of the 1996 Constitution provides that the accused has the right "to adduce and challenge evidence". The right to "challenge evidence" includes the right to cross-examine evidence. This is part of the accused's right to a fair trial.

13 See Joubert (2001) *et al op cit* 222. Also see *S v Langa* 1963 (4) SA 941 and *S v Lesias* 1974 (1) SA 135 (SWA).

14 It is accepted practice that co-accused persons exercise their right to cross-examine their co-accused or his witness in numerical order before the state is given the opportunity to cross-examine. Similarly, it has been held in *R v Hadwen* [1902] 1 KB 882; *R v Stannard* (1962) [1964] 1 All ER 34, that where one prisoner gives evidence on oath inculpating another charged on a joint indictment, he is liable to be cross-examined by or on behalf of that other. Also see *Murdoch v Taylor* [1965] AC 574 at 592, where it was stated that a trial judge has no discretion whether to allow an accused to be cross-examined regarding his past criminal offences once he has given evidence against his co-accused. This view was endorsed by the New Zealand Court of Appeal in *R v Clark* [1953] NZLR 823 at 830. See Lawn "Discovery of co-accused convictions" (1999) *New Zealand Law Journal* 81-84. Also see *R v Schuller* [1972] Q WN 41 (Q Ct of Cr App), where it was held that in accordance with the existing practice in Queensland, New South Wales and Victoria, an accused may cross-examine a co-accused who has given evidence at a joint trial whether or not such evidence is in any way adverse to him.

credibility as a witness.[15] Where the defence proposes to submit another version of any fact or event testified to by a state witness, there usually rests a duty upon the defence to put its version to the state witness whose evidence the defence will contradict in the course of its own case. It is only as a result of proper cross-examination along these lines, that the court will be placed in a position to estimate the relative acceptability of the two versions. If this rule is not followed, it may require the recalling of state witnesses and lead to an unnecessary waste of time.[16] Assertions made on behalf of the accused during his cross-examination of state witnesses and which are intended to reflect the defence case, may, in exceptional circumstances, have the effect of curing the deficiency in the state case where the evidence adduced by the state is insufficient to establish a *prima facie* case.[17] There is no absolute rule that failure to cross-examine a witness prevents the party in question from disputing the truth of that evidence.[18] However, the decision not to cross-examine may often be a risky one and it should be taken only after careful consideration.[19]

The position in other countries is similar to our law. The right to confrontation and cross-examination is seen as an essential and fundamental requirement of a fair trial.[20] The primary object of the Confrontation Clause is to prevent depositions of *ex*

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15 See *S v Pietersen* [2002] 2 All SA 286 (C), where it was held that the only fetter on the right of a co-accused to cross-examine another accused is relevance. The court possesses a discretion to control and restrict the ambit of cross-examination under s 197(b).

16 See *S v M* 1970 (3) SA 20 (RA). However, see *S v Motlhabane* 1995 (8) BCLR 951 (B), where it was held that the death of a state witness during cross-examination threatens the right of an accused to a fair trial to the extent that the evidence remains untested and the court should consider disregarding such evidence *in toto*. Also see *Foley v The Queen* (1998) 105 A Crim R 1 (Q Sup Ct CA), where it was held regarding cross-examination, that if the essential elements of the eventual case were not put to witnesses who might have the capacity to cast doubt on the case, a fair trial (that is, a trial fair to both sides) would be jeopardised and appropriate adverse comments would have been reasonably expected.

17 See *S v Offerman* 1976 (2) PH H215 (E).

18 See *S v Chigwana* 1976 (4) SA 26 (RA). However, failure to allow cross-examination to take place is a serious irregularity at common law since there will usually be prejudice to a party. See *R v Ndawo* 1961 (1) SA 16 (N).

19 See *S v Gobozi* 1975 (3) SA 88 (E). However, see *R v Chubb* (1863) 2 NSWSCR 282 (AUS), where it was held that a judge in a criminal case may in his discretion postpone the cross-examination of a witness.

20 See *Pointer v Texas supra* at 400, where the accused had objected against the use of a transcript of the witness's statement at the trial, which denied him any opportunity to have his counsel cross-examine the principal witness against him. The court had to decide whether the defendant was denied his right to confront witnesses against him based on the facts of the case. To deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of the due process of law. Thus, the court found that the Sixth Amendment guarantee of confrontation and cross-examination was denied to the accused.

parte affidavits being used against the prisoner in place of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only to test the recollection and sifting of the conscience of the witness, but also to compel him to stand face to face with the jury so that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he can be believed.[21] Thus, the primary interest secured by the Confrontation Clause is said to be the right of cross-examination.[22] The Sixth Amendment Confrontation Clause also guarantees defendants (accused) the right to meaningfully cross-examine witnesses who appear at the trial, but who cannot or will not respond to questions. The defendant's inability to cross-examine a witness on important matters because that witness has invoked a testimonial privilege or witness "shield" law violates the Sixth Amendment.[23] However, granting the accused an opportunity to cross-examine witnesses can be meaningless if the accused does not have skilled counsel to conduct the questioning.[24]

The HRC has extended the right to examine witnesses to include the right to confront directly and to cross-examine witnesses.[25] The Committee has found that a

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Also see *Chambers v Mississippi supra* at 294, where the court remarked that the rights "to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognised as essential to due process". The court had to decide whether the accused Chambers had been denied his due process by not having a fair opportunity to defend against the state's accusations, to confront and cross-examine witnesses, and to call witnesses on his own behalf. The majority of the court concluded that the exclusion of the statements of the three witnesses together with the state's refusal to allow Chambers to cross-examine McDonald (witness), denied him a trial according to the traditional and fundamental standards of due process. Thus, it found that the trial court had deprived Chambers of a fair trial.

21 *Mattox v United States supra* at 237. The court held that the trial court could admit into evidence the transcribed testimony of a witness who has testified at trial but had since died prior to the second trial, and the witness had been fully cross-examined. The testimony was found to be admissible because the defendant's lawyer had the opportunity to fully cross-examine the witness at the first trial, thereby preserving the defendant's constitutional guarantees.

22 See, *inter alia*, *Davis v Alaska* 415 US 308, 315 (1974), *Ohio v Roberts supra* at 63, *California v Green supra* at 149 and *Douglas v Alabama* 380 US 415 (1965). Also see *Delaware v Fensterer* 474 US 15, 21-22 (1985), where the court held that the Confrontation Clause is usually satisfied when the defence is given a full and fair opportunity to probe and expose infirmities of testimony such as forgetfulness, confusion and evasion through cross-examination.

23 See *Olden v Kentucky* 488 US 227 (1988).

24 See *Powell v Alabama supra* at 45, where it was 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".

25 The position at common law is that all witnesses are subject to cross-examination. See *R v Hilton* [1971] 3 All ER 541. According to the **English common law**, defendants are granted the right to confront witnesses according to the concept of trial as combat. The right to confront assumes the right to cross-examine, which is performed by the respective parties. This is also the position under the European Convention. Also see *Allen v Allen* [1894] P 248, where it was held that the evidence of one party cannot be received as evidence against another party in the same litigation

failure to make the statement available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial.[26] However, the court has accepted that some jurisdictions exempt certain witnesses from testifying.[27] Nevertheless, the European Court is not willing to accept written statements from absent witnesses as a substitute. In the case of *Kostovski v Netherlands*[28] the conviction for armed robbery was based on reports of statements by two anonymous witnesses, who were interviewed in the absence of the accused and his counsel by the police. The court found that the fact that the prosecution witnesses' identities had been withheld, meant that the accused was not only denied the right to cross-examine, but he was also unable to demonstrate prejudice, hostility or unreliability. Although the possibility existed of intimidation of witnesses in serious cases, there was a need to balance the use of anonymous statements with the interests of the accused, and the conviction was found to be irreconcilable with the guarantee in article 6.[29] The court has also made it clear that the right to examine prosecution witnesses has to be balanced against the interests of the witnesses.[30]

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unless the latter has had an opportunity of testing it by cross-examination.

26 It transpired that in the following cases *Garfield and Andrew Peart v Jamaica supra* at 464/1991 and 482/1991, a statement made to the police by the main prosecution witness regarding the murder for which the complainants were charged, was not made available to the defence. It appeared that the statement differed materially from the statement at the preliminary hearing and at the trial. Also see De Zayas "UN human rights treaties" in Weissbrodt and Wolfrum (1998) *op cit* 687.

27 To illustrate this, the non-compellability of members of the accused's family was found to be acceptable in *Unterpertinger v Austria supra*.

28 See *Kostovski v Netherlands supra* at 434. It was emphasised by the European Court, that its duty was not to express a view on whether the statements were correctly admitted and assessed by the trial court, but to ascertain whether the whole proceedings, including the way in which the evidence was taken and the defence rights were honoured, was fair. Similarly, **English law** prefers live testimony. However, a statement may be admitted if a credible witness testifies under oath that the deponent is dead, ill, or prevented from attending by the defendant or his agent. The deposition must take place in the defendant's presence, and the defendant or his lawyer must be given the opportunity to cross-examine the witness. See Sherman *op cit* 857.

29 Article 6(3)(d) provides that the accused has the right to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. According to Cheney, art 6 seems to echo the due process requirements of Anglo-American law. To illustrate this, when paragraph (3)(d) guarantees the right to cross-examine witnesses, this represents the right of confrontation which underlies the adversarial process. As long as the cumulative effect of the proceedings, notwithstanding the existence of some specified defect is not a denial of a fair hearing, the European Court will not find that the trial infringes art 6. See Cheney *et al op cit* 76.

30 See *Doorson v The Netherlands* (1996) 22 EHRR 330, where the conviction was based on the evidence of anonymous witnesses. No violation was found in the circumstances. Regarding witness anonymity in New Zealand, see Finn "Legislation comment: secret witnesses, a New Zealand initiative: the *Evidence (Witness Anonymity) Amendment Act 1997* (NZ)" (1998) *Criminal Law Journal* 277.

The HRC has noted that article 14(3)(e) protects the "equality of arms" between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its right to cross-examine a prosecution witness during the trial hearing.[31]
In *Compass v Jamaica*[32] the accused alleged that he had not been given the opportunity to cross-examine one of the main prosecution witnesses, who was unable to give evidence during the trial because he had left the country. However, the Committee found no violation because the witness had been examined by the defence under the same conditions as by the prosecution, at the preliminary hearing.

Similarly, in **Australia**, it has been held that a right to cross-examine is not a fundamental human right. Rather, it is part of the court's obligation to ensure that there is a fair trial; that is, one which fairly balances the interests of the accused with those of the public represented by the prosecution.[33] Similarly, in **New Zealand**, it has been held that the Bill of Rights Act 1990 did not elevate the opportunity to cross-examine into an absolute right to confront and question witnesses at trial.[34] Section 25(f) of the New Zealand Bill of Rights ensures that an accused has an adequate and proper opportunity to challenge and question witnesses against him at some stage in the proceedings.[35] Nevertheless, it is not necessary that this opportunity is always afforded at trial, or at a preliminary stage if the accused has the right to examine witnesses at the trial.[36] The court is said to exercise a wide

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31 Weissbrodt (2001) *op cit* 138.

32 No 375/1989 UN Doc CCPR/C/49/D/375/1989 (1993). There was no violation because on the one hand, the accused was present during the preliminary hearing when the witness gave his statement under oath and was cross-examined by the accused's lawyer, and on the other hand, no objection was voiced either at the trial or on appeal, regarding the submission of the witness statement, and his answers in cross-examination as evidence.

33 See *R v McLennan* [1999] 2 Qd R 297 (Q Sup Ct CA).

34 See *R v Cheprakov* [1997] 2 NZLR 169, where the court found that it was impossible for the accused to have a fair trial in all the circumstances because the right to cross-examine meaningfully under the Bill of Rights Act 1990 and the right to adequate time and facilities to prepare a defence had been breached. Similarly, in **Canada**, it has been held that it is the duty of the trial judge to ensure that cross-examination does not offend trial fairness. See *R v Fanjoy* (1985) 21 CCC (3d) 312.

35 Section 25(f) affords the accused the right to examine prosecution witnesses.

36 See *R v Haig* [1996] 1 NZLR 184.

discretion in this regard.[37] In **England**, the accused has the general right to cross-examine prosecution witnesses.[38] However, questions must be relevant and answers on collateral issues are usually accepted as final.[39] The judge has a discretion to prevent any questions which in his opinion, are unnecessary, improper or oppressive.[40] The judge's leave is also required if the accused in a rape case wishes to adduce evidence or cross-examine about any sexual experience of the complainant with a person other than himself. Leave may only be granted if the judge is satisfied that it would be unfair to the accused to refuse it.[41]

The above discussion illustrates that the right to cross-examination is a fundamental requirement of an accused's right to a fair trial. The court is said to exercise a wide discretion regarding the right to cross-examination. Thus, the right to cross-examine must be carefully considered.

10.2.2 THE RIGHTS OF AN UNDEFENDED ACCUSED

It is a common fact in South Africa, that undefended accused are unaware of the proper way to conduct their defence. An undefended accused does not always understand the nature and extent of cross-examination. It is also unfair to expect that he performs as competently as an experienced legal practitioner. Therefore, it is the duty of the presiding officer to inform an undefended accused about the right to cross-examine and how to exercise it.[42] The undefended accused should be

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37 See *R v Petaera* [1994] 3 NZLR 763, where the court excluded a video-taped statement of a witness who had since died because lack of opportunity to cross-examine would seriously impede a fair trial. However, in *R v L* [1994] 2 NZLR 54, the court found that there was no basis to give any substantial weight to the absence of the practical opportunity to cross-examine the complainant at the preliminary hearing.

38 The tradition of cross-examining a witness is said to be a recent development in **England**. The procedure involved the judge examining the witnesses who were allowed to relate their stories in their own words. It was only during the 18th century that the practice developed of having barristers prosecute and defend. See Müller and Tait (TSAR) *op cit* 521.

39 Harris and Joseph *op cit* 229.

40 *Id*.

41 In practice however, leave is refused if the evidence or cross-examination relates only to credit, and granted if it is relevant to an issue. Nevertheless, the distinction can be difficult to draw. *Id*.

42 See *S v Khambule* 1991 (2) SACR 277 (W). Also see *S v Tyebela* 1989 (2) SA 22 (A), where it was held that the accused's rights of cross-examination should be explained to them, and some indication given regarding how cross-examination should be conducted. Also see *Dladla v S* [2002] 4 All SA 666, where it was held, *inter alia*, that the presiding officer must assist the unrepresented accused in cross-examination during trial proceedings, and make him aware of

furnished with a full explanation of the right to cross-examine.[43] This right should be conveyed to accused persons before the testimony of the first state witness, so that the accused listens to the evidence with cross-examination in mind. The presiding officer is obliged to assist the illiterate and untutored accused in presenting his defence by way of cross-examination. This may be done, for example, by expressly asking him whether he agrees with each material allegation made against him by a state witness.[44] In this way, it should become clear which evidence is disputed, and the presiding officer should assist the accused by means of pertinent questions directed to state witnesses.[45] Therefore, when an unrepresented accused experiences difficulty during cross-examination, the court must help the accused to clarify issues, formulate the questions, and put his defence properly to the witnesses. The court must also assist an undefended accused to question a witness called by the accused who is able to shed light on an important point in dispute.[46]

Where an undefended accused as a result of incompetence or ignorance fails to

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his procedural rights. In **Australia**, the trial judge should take pains to ensure that the trial is fair. See *Love v R* (1983) 49 ALR 382. However, see *R v Anastasiou* (1991) 21 NSWLR 394, where it was held that the trial judge should tell the accused of his or her rights but not how to exercise them. Nevertheless, the trial judge is entitled to control the cross-examination of an unrepresented accused. See *R v Kranz* (1991) 53 A Crim R 331 CCA (QLD), where the trial judge intervened to stop irrelevant questions after the accused had been warned on several occasions.

43 See *S v Lekhetho* 2002 (2) SACR 13 (O), where the magistrate's explanation to the accused did not constitute a full explanation of the right to cross-examine. He was told he could cross-examine, but not what it meant. He was not told how to go about it nor that he may put his version to the state witnesses. This constituted an irregularity which tainted the trial. Thus, the court held that the accused had not been accorded a fair trial.

44 This was held in *S v Sebatana* 1983 (1) SA 809 (O). Here, the court accepted as trite evidence that illiterate and untutored accused have a tendency to put a few irrelevant questions to a state witness, or no questions at all, and then subsequently give evidence, which conflicts with that of the state witness in material respects. This may stem from ignorance about the true nature and purpose of cross-examination. Therefore, such accused should be assisted by the court with their cross-examination. Also see *S v Mngomezulu* 1983 (1) SA 1152 (N).

45 See *S v Khambule supra* and *S v Namib Wood Industries v Mutiltha* 1992 (1) SACR 381 (Nm). Also see *S v Maseko* 1993 (2) SACR 579 (A), where it has been held that the court has a duty to assist an unrepresented and unsophisticated accused who shows an insufficient understanding of his right to cross-examination and the consequences of a failure to exercise it.

46 *S v Moilwa* 1997 (1) SACR 188 (NC).

cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the risk of a failure of justice.[47] This would give the accused the impression that he is being fairly treated during the trial. Thus, reliance upon an accused's failure to cross-examine may, in such circumstances, be unfair and unjust.[48] A serious disregard of the bounds of fair cross-examination of an unrepresented accused conflicts with the ideas underlining the concepts of justice which are the basis of all civilised systems of criminal justice.[49] The presiding officer also has a duty to grant an accused, especially an undefended accused, sufficient opportunity to fully cross-examine a state witness in a manner acknowledged as reasonable cross-examination. No suspicion must exist that the defence was hampered in its cross-examination, such as, for example, that excessive interference with the defence's cross-examination occurred.[50]

Therefore, a presiding officer is obliged to assist an undefended accused in presenting his defence by cross-examination. This is part of the accused's right to a fair trial. Any failure by the presiding officer in not furnishing the undefended accused with a full explanation of his right to cross-examine, may lead to the accused not being accorded a fair trial.

10.2.3 THE RIGHT TO CROSS-EXAMINE WITNESSES FOR THE DEFENCE

The prosecution may cross-examine each defence witness and the accused if he elects to give evidence.[51] Cross-examination of the accused by the state should be

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47 See *S v Simxadi supra* at 169. Therefore, an unrepresented accused must be assisted by the court to exercise the right to challenge evidence.

48 *S v Dipholo* 1983 (4) SA 751 (T). Also see *S v Sebatana supra*, where the court held that it is unfair to draw an adverse inference from the accused's failure to cross-examine.

49 See *S v Hendricks* 1997 (1) SACR 174 (C).

50 See *S v T* 1990 (1) SACR 57 (T). Also see *S v Visser* [2001] 2 All SA 5 (C), where it was held that it is not sufficient for a judicial officer to inform an accused of his rights to cross-examine a witness where it is apparent that the accused is not competent to exercise the right.

51 Section166(1) also provides that the prosecutor may cross-examine any witness including an accused called on behalf of the defence at criminal proceedings. Regarding the question of whether cross-examination is an appropriate tool for testing expert evidence, see Meintjies-Van

conducted with courtesy and without prejudice to the accused. It should not be conducted in an intimidating, offensive or mocking fashion. The accused should obtain a full opportunity to answer questions. Improper cross-examination by the prosecutor may lead to the accused's conviction being set aside on appeal and review.[52] There may be occasions when a prosecutor may decide not to cross-examine an accused person or a defence witness. Such a decision is a risky one because courts will be reluctant to reject a defence version which went untested and unchallenged by cross-examination.[53]

The questioning of witnesses is left to legal representatives. The court should only ask questions necessary to clarify issues as contemplated in terms of section 167 of the Act. A judicial officer may question witnesses for the defence in order to clarify unclear aspects of the case, but he may not cross-examine them.[54] In cross-examination, a witness should not be confronted with the transcript of his statement at the hearing in the regional court, and be asked to explain it, as that would amount to cross-examination by two counsel which is unfair. The witness could be asked to explain apparent contradictions. Therefore, the record of the regional court proceedings should not be used as a springboard for cross-examination.[55]

10.2.4 THE RIGHT TO RECALL WITNESSES FOR CROSS-EXAMINATION

Presiding officers have the power to refuse a request to recall a witness for cross-examination or even for further cross-examination. However, this power should be

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der Walt (*SAJHR*) *op cit* 301.

52 See *S v Nkibane* 1989 (2) SA 421 (NC). Also see *S v Gidi* 1984 (4) SA 537 (C), regarding guidelines for proper cross-examination. For a discussion about improper cross-examination of the accused by prosecutors, see Taylor and Byrne "Reflections on crown attorneys and cross-examination" (2001) *Criminal Law Quarterly* 303-330. The writers suggest that crown attorneys should begin canvassing with trial judges whether the probative value of a proposed line of questioning will be outweighed by its prejudicial effect before they embark on improper cross-examination. Nevertheless, just as the judiciary must become more active in stopping inappropriate cross-examination and, correcting improprieties after they occur, similarly, the defence must become more vigilant in objecting to improper cross-examination.

53 See *S v Gobozi supra*.

54 See *S v Van Niekerk* 1981 (3) SA 787 (T).

55 See *S v Msiwa* 2001 (1) SACR 413 (Tk).

exercised sparingly by them, and then only when it is clear that the request is made frivolously or as part of delaying tactics.[56] The position is that where an accused has already cross-examined the state witnesses and put his defence to them, he suffers no prejudice if the court refuses the request to recall a witness for further cross-examination made by his legal representative who was appointed subsequently.[57] Where a witness is to be recalled, the nature of the proceedings should be explained to such witness.[58] It should be explained that the proceedings are not a new trial but that further questions will be put in order to clarify certain issues.

10.2.5 LIMITATIONS ON THE RIGHT TO CROSS-EXAMINATION

However, the right to cross-examination is not absolute. The possibility exists that the right to cross-examination can be abused in a system which requires the judicial officer to play a passive role. The legislature has tried to remedy this situation with the introduction of section 166(3) to the Criminal Procedure Act.[59] Section 166(3)(a) of the Act provides that the court may if it appears that cross-examination is being "protracted unreasonably and thereby causes the proceedings to be delayed unreasonably", request the cross-examiner to disclose the relevancy of any particular line of examination.[60] The court may also impose reasonable limits regarding the length and line of the cross-

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56 See *S v Kondile* 1974 (3) SA 774 (Tk) and *S v G* 1992 (1) SACR 568 (B).

57 See *S v M* 1976 (4) SA 8 (T).

58 See *S v Msiwa supra* at 413.

59 It has been inserted by s 8 of the Criminal Procedure Amendment Act 86 of 1996. The position at common law and statutory law, is that an accused does not have an absolutely free hand to cross-examine at will. These restrictions are inherent to the right itself, or require justification in terms of the limitation clause under the Bill of Rights.

60 De Waal *et al* suggest that s 158 may also impose a limitation on the right to challenge evidence. Section 158 provides that a court may order that evidence be given by means of closed-circuit television or similar form of electronic media, provided that the prosecutor and the accused retain the right to question the witness and to observe the reaction of that witness. See De Waal *et al op cit* 555. See chapter 8 on "The Right to be Present" for a more detailed discussion about s 158 of the Act.

examination in terms of section 166(3).[61] The court may also order that any submission regarding the relevance of cross-examination be heard in the absence of the witness.[62] It should be noted that section 166(3)(a) does not limit the right to challenge evidence. However, it gives the court the power to control unreasonable questioning. The court may legitimately curb the line of an accused's cross-examination where it is irrelevant, or does not advance the discovery of the truth on the main issues before the court.[63] The practice of not disclosing to a witness the purpose of a line of questioning (which is an essential part of cross-examination), is also not infringed by the duty to disclose. The reasonableness of any limitation regarding the length of the cross-examination, would depend on the circumstances of each case. However, thorough and relevant although lengthy cross-examination should not readily be curbed.[64]

A judicial officer has both a discretion and a duty to control undue or improper cross-

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61 According to De Waal *et al*, this provision is not unconstitutional. Rather, it confers a discretion and it is therefore possible to apply it in a manner which does not violate the accused's right to a fair trial. *Id*.

62 In terms of s 166(3)(b). Both ss 166(3)(a) and 166(3)(b) raise constitutional issues which concern the right of the accused to a fair trial, and more specifically, the right to challenge evidence and the right to be present during the trial. Van der Merwe argues that whilst both sections are constitutional, they ought to be applied with caution in order to secure a fair trial as guaranteed by s 35(3) of the Constitution. See Van der Merwe (1997) (*Stellenbosch Law Review*) *op cit* 359.

63 Also see *R v Kranz supra*, where it was held that where an unrepresented accused abused the right of cross-examination which was given to him, the trial judge was entitled in the exercise of his inherent power to control the conduct of the case to terminate his right to continue with his cross-examination of witnesses. The trial judge was said to have intervened only because the accused continued to defy rulings and asked irrelevant questions. Also see Brauti "Improper cross-examination" (1997) *Criminal Law Quarterly* 69, where the writer examines the restrictions on cross-examination, and delineates a number of areas which often lure lawyers into improper cross-examination in Canada. The major areas of concern are questions which offend the rules of evidence and questions which are asked in an insulting, degrading, threatening and inflammatory manner. These improprieties can lead to a mistrial or an order for a new trial by the appellate courts. He recommends that lawyers operate within the legal limits to avoid turning cross-examination into a liability rather than an asset.

64 See *Walkeley v The Queen* (1990) 64 ALJR 321, where it was held that a trial judge must abstain from too ready an intervention to cut off lines of cross-examination. Some leeway should be allowed to counsel to perform his duty, where warranted, of testing the evidence given by an opposing witness.

examination.[65] The court also has a discretion to restrain and control the ambit of cross-examination in terms of section 197(b) of the Act.[66] This discretion must be exercised in the light of the principles governing relevance.[67] The court remarked that the right to cross-examination is not absolute in *Klink v Regional Court Magistrate NO*[68] in that the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or improper. The court also remarked that it may also prevent a lawyer from conducting a bullying or intimidating form of cross-examination, or if it appears that his line of questioning is calculated to confuse the witness.[69] To this end, cross-examination should always be conducted with restraint

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65 *S v Cele* 1965 (1) AD 82. The court noted that latitude in the cross-examination of witnesses, where credibility is the issue, should be allowed until the court is satisfied, either that the right to cross-examine is being misused or abused, or that the particular line of cross-examination could never produce anything which could assist the court in its eventual decision on credibility. Also see *Foley v The Queen supra*, where it was held that questions in cross-examination that invite a witness to answer by reference to comment on the truthfulness of other witnesses are inadmissible and improper questions. It is a matter for the judge or jury to decide if someone is a liar, and not the witness.

66 In terms of s 197(b), the accused giving evidence is protected from questions showing that he has been charged with any offence other than that which he is charged, or that he is of bad character, unless he testifies against another accused charged with the same offence.

67 See *S v Pietersen* 2002 (1) SACR 330 (C), where it was held that the cross-examination has to be relevant to the issue of credibility and it cannot prejudice the accused being cross-examined in the conduct of his defence to the extent that his right to a fair trial is undermined.

68 See *Klink v Regional Court Magistrate supra* at 402. Also see *S v Mayiya* 1997 (3) BCLR 386 (C), where the court held that although an accused should be allowed to cross-examine unhampered, the court may disallow questions that are irrelevant, misleading, vexatious, abusive, oppressive and discourteous. The court on appeal considered the duty of disclosure, and held that it also places the accused in a better position to test the reliability and credibility of state witnesses by means of cross-examination in the interests of a fair trial. The prosecutor's failure to disclose the medical report to the accused, rendered the trial unfair. Similarly, it has been held in **Australia**, that a judge or presiding officer has a wide discretionary power in any proceedings to contain cross-examination within proper limits and to disallow repetitious, prolix or unnecessary questions. See *R v Kelley*; *Ex parte Hoang van Duong* (1981) 28 SASR 271; 4 A Crim R 1 (SA Sup Ct FC).

69 See *Klink v Regional Court Magistrate supra* at 410 D-E.

and dignity.[70] Similarly, it has been held in *Davis v Alaska*[71] that an accused's right to cross-examine is subject only "to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation". To disallow such questions is not regarded as a limitation on an accused's right to challenge evidence, because they do not achieve the legitimate purpose of cross-examination. Similarly, in the **United States**, the court may limit cross-examination if the questions are prejudicial, irrelevant, cumulative or collateral.[72] The court may also restrict cross-examination if it contains no sufficient factual basis or will jeopardise an ongoing government investigation.[73]

Therefore, an accused cannot state that his right to a fair trial has been infringed if the court intervenes to prevent his lawyer from conducting a bullying or intimidating form of cross-examination, nor if it appears that his line of questioning is directed at confusing the witness. Thus, the circumstances of each case will dictate whether or not the curtailment or limitation of cross-examination has resulted in the violation of a right to a fair trial. However, where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of his constitutional right to challenge evidence sufficiently.[74]

Accused persons may be found to have forfeited their constitutional and evidence-

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70 See *S v Gidi supra* at 537.

71 See *Davis v Alaska supra* at 316. Also see *R v Rewniar* [1949] 1 WWR 177; 93 CCC 142; 7 CR 127 (CAN), where it was held that judge may check cross-examination if it becomes irrelevant, prolix or insulting, but so long as it may be fairly applied to the issue or touches the credibility of the witness it should not be excluded. Also see *R v Ignat* (1965) 53 WWR 248 (CAN), where it was stated that counsel for an accused in a criminal case, must be allowed the widest latitude in the examination and cross-examination of witnesses subject to the limitations imposed by the rules of evidence and of fair advocacy. Serious curtailment of this right by the court, and any suggestion of partiality on the court's part, may result in the conviction being squashed.

72 See, *inter alia*, *US v Diaz* 26 F 3d 1533, 1539-40 (11th Cir 1994), *US v Gonzalez-Vazquez* 219 F 3d 37, 45 (1st Cir 2000).

73 See, *inter alia US v Alvarez* 987 F 2d 77, 82 (1st Cir 1993), *US v Balliviero* 708 F 2d 934, 943 (5th Cir 1983).

74 See *S v Motlhabane supra*.

law rights to confront and cross-examine a prosecution witness. This occurs if that witness is unavailable for trial due to threats or other misconduct of the accused, or due to misconduct of others to which the accused has agreed to.[75] It may also happen that accused who are physically disruptive in the courtroom may forfeit their right to be present. Similarly, section 159(1) of the Act provides that if an accused conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. This will impact on his right to cross-examine state witnesses. However, he is later given the opportunity to question or to confront witnesses who testified in his absence.[76]

10.2.5.1 Face-to-face cross-examination

A *prima facie* limitation of the right to cross-examination occurs where the cross-examiner's questions are substituted by another person, and the examination does not occur within the physical presence of the examiner. The ordinary procedures of criminal justice were found to be inadequate to address the needs and requirements of a child witness.[77] Section 170A was introduced to address this problem and to provide protection for young witnesses.[78] Section 170A of the Act provides for the

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75 See *People v Geraci supra* at 817. The accused is also said to have waived the right to cross-examination if he prevents a witness from testifying or fails to make a timely objection to a violation. See *inter alia*, *US v Houlihan* 92 F 3d 1271, 1278 (1st Cir 1996), *US v Burton* 937 F 2d 324, 329 (7th Cir 1991).

76 See s 160 of the Act.

77 Also see Zieff "The child victim as witness in sexual abuse cases – a comparative analysis of the law of evidence and procedure" (1991) *South African Journal of Criminal Justice* 21, where the writer evaluates the experience and treatment of children in the courtroom with a view towards reforming the courtroom process by introducing judicial procedures which are more sensitive to the needs of the child victim, but at the same time preserve the rights of the accused.

78 A study by the South African Law Commission concluded that the ordinary adversarial procedure with its strong emphasis on cross-examination, was insensitive and unfair to the child witness. The Commission recommended that an intermediary be appointed, and that face-to-face confrontation be eliminated by using electronic or other devices. These recommendations led to the introduction of s 170A. See Gqiba *op cit* 75. Also see *South African Law Commission Working Paper 28 project 71* "Protection of the child witness" *supra* at 29. It should be noted that there will be some overlapping between the discussion on the accused's right to cross-examination in this chapter and the accused's right to confrontation in the previous chapter. This

screening
of a child witness from the courtroom and the questioning of that witness through an intermediary.[79] The giving of evidence, including cross-examination, takes place through the intermediary, except for examination by the court in terms of section 170A(2)(a). Where an intermediary is appointed, the court may direct that a child witness testify in a place which is situated in such a way that the witness is kept away from the presence of a person who may upset the witness in terms of section 170A(3)(b).[80]

The Constitution protects the best interests of children, including child witnesses.[81] The right to challenge evidence could be limited if it is in the best interests of the child witness. However, a balance should be struck between the competing rights of the right to challenge evidence and the best interests of the child witness. Therefore, section 170A should be interpreted to reflect the above. Steytler suggests that the right to challenge a witness through cross-examination is infringed by substituting an accused's questioning with that of an intermediary.[82] The use of a third person (an intermediary) to put questions, blunts the effectiveness of the traditional method of

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is inevitable because confrontation facilitates cross-examination. However, the emphasis in this chapter will focus on the accused's right to cross-examine *per se*. Please refer to 9.3.1.2 for a detailed discussion about the rights of child witnesses vs the accused's right to confrontation.

79 Section 170A(1) provides that the court may appoint an intermediary when it appears that it would "expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at criminal proceedings". Section 170A was inserted by the Criminal Law Amendment Act 135 of 1991, into the Act.

80 The intermediary is appointed from a list of persons or categories of persons, compiled by the Minister of Justice in terms of s 170A(4). The procedure is that the intermediary conveys the general meaning of any question to the witness, unless the court directs otherwise in terms of s 170A(2)(b).

81 This is in terms of s 28(2) of the Constitution, which states that "a child's best interests are of paramount importance in every matter concerning the child." Also see art 3(1) of the United Nations Convention on the Rights of the Child, which provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

82 Steytler *Constitutional criminal procedure* 349.

cross-examination. Steytler states that whilst the objective of an intermediary is to protect the interests of
child victims, the court's discretion to appoint an intermediary appears to be overboard.[83]

In *Klink v Regional Magistrate NO*[84] the issue arose regarding the constitutionality of section 170A(2) of the Act. Thus, the question arose whether cross-examination through
an intermediary is inconsistent with the fundamental right to challenge or cross-examine a witness. The court found that the right to cross-examination was not an absolute right. A trial court retained a discretion to disallow questioning which was irrelevant, unduly repetitive, oppressive or improper. Therefore, an accused person could not contend that any curtailment of cross-examination violated his right to a fair trial. The court held that the use of an intermediary did not constitute a limitation of the right to cross-examine. The witness could still be examined on all aspects of his evidence and the right to challenge the evidence was not impaired.

The question also arises whether the intermediary has unduly limited an accused's

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83 The question arises whether an intermediary is necessary to overcome the stress and suffering which a child witness experiences by testifying in court. Steytler suggests that the holding of the hearing *in camera* in terms of s 153(5), would address this concern. The witness should be removed from the presence of an accused, if the latter's presence causes stress to the witness. The intermediary should only be used for the purposes of questioning. Cross-examination by a defence lawyer could also traumatise a child witness. Steytler suggests that s 170A could be interpreted to mean that the court may appoint an intermediary only if it is necessary to protect a child witness from undue mental stress or suffering, which may result from being questioned by the accused personally or the defence lawyer. *Id*.

84 See *Klink v Regional Magistrate supra* at 402. The court remarked that the intermediary acted as an interpreter, and interpreters were widely used throughout the courts in the country. Although the possibility existed that the effect of cross-examination may be blunted when an intermediary was interposed between the questioner and the witness, this did not mean that the accused was denied the right to a fair trial. The interests of a child witness had to be balanced against the accused's right to a fair trial. The court also made pertinent remarks regarding subsection (2)(b). It found that there were sound reasons why conveying the general purport of the question might enable a child witness to participate properly in the process. A child witness may not fully comprehend or appreciate the content of a question formulated by a lawyer. The intermediary was not allowed to alter the question when he conveyed the general purport of the question. What had to be conveyed was the content and meaning of what was asked in a language and form understandable to the witness. The interests of justice required that questions which were posed to children be done in a way that was appropriate to their stage of development. This furthered the truth-seeking function of the trial court without depriving the accused of his or her right to cross-examine.

rights to challenge the child witness's evidence, by conveying "the general purport of any question". This will depend on the court's power to control the questioning in a particular case. It was also held in *Klink* that the trial court must ensure that the intermediary carries out his or her function properly and without prejudice to the accused.[85] The court also has the power to direct the intermediary to convey the actual question and not merely its general meaning. Therefore, the court was satisfied that the accused's right to cross-examine was not violated by the provisions of section 170A.[86]

Similarly, in the **United States**, the right to face-to-face cross-examination or confrontation is not absolute. However, excluding a witness from the courtroom in certain circumstances, must be justified. Sufficient reason should be advanced to exclude the normal practice of face-to-face confrontation, such as protecting child victims of sexual abuse or protecting the safety of witnesses. The court should also decide whether the particular child witness requires protection. Inquiries about a witness' name, address, and place of employment are deemed legitimate areas of cross-examination. However, federal courts have recognised that concern for the safety of a witness may lead to the curtailment of the right to cross-examine the witness about that information in open court provided that certain other conditions are met.[87]

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85 See *Klink v Regional Court Magistrate NO supra* at 413.

86 According to Müller and Tait, the procedure provided for in s 170A does not interfere with the fundamental right of an accused to a fair trial. However, the application of this procedure may in a specific case result in an unconstitutional interference with the right to a fair trial, and the court's duty is to guard against this. See Müller and Tait (*TSAR*) *op cit* 530. Also see Schwikkard (*Acta Juridica*) *op cit* 155-160, for a detailed discussion about s 170A of the Act. Also see *S v Mathebula supra* at 231, which is instructive regarding the appointment of an intermediary in terms of s 170A(1) of the Act. Also see *S v Stefaans supra* at 182, where the Cape High Court laid down certain guidelines for the application of s 170A in the light of the Constitution.

87 There must be genuine danger to the safety of the witness. See Iraola "The Sixth Amendment right to confront a witness in a federal criminal trial about his true name, address, and place of employment" (2002) *Criminal Law Bulletin* 396. The article explores the circumstances under which federal courts have determined that a witness who testifies on behalf of the government may not have to divulge at trial, his or her name, address, or place of employment. Also see *People v Levine* 461 Mich 172, 600 NW 2d 622 (1999), where the accused challenged the use of an undercover officer's affidavit instead of testimony at his suppression hearing, as being violative of his sixth amendment right to confront witnesses. The state argued that the officer needed to remain anonymous because the investigation was ongoing. The court observed that this was not a sufficient justification to deny the right of confrontation and cross-examination of the witness. Thus, the court found that cross-examination should not have been entirely

In the United States of America, the courts have also introduced protective measures to protect child sexual assault victims as a result of the increased number of repeated child abuse cases. According to Brannon, protective measures such as videotaping testimony, allowing testimony by way of one-or two-way closed-circuit television, and testifying outside the presence of the accused are available for child sexual assault victims in a number of states.[88] These protective measures are usually resisted by the accused because they prevent face-to-face confrontation between the accused and the witness against him, and thus violates the accused's right to confrontation.[89]

The following case discussion illustrates how the American courts have balanced the competing interests of the child witness against the rights of the accused. In *Coy v Iowa*[90] the court held that the right to confrontation is violated by a procedure, authorised by statute, placing a one-way screen between the child witnesses and the accused, thereby sparing the witnesses from seeing the accused. This conclusion was reached even though the witnesses could be viewed by the accused's lawyer and by the judge and jury, even though the right of cross-examination was not limited in any way, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma. The court rejected the Wigmore view that the only essential interest preserved by the right was cross-examination, and stressed the importance of face-to-face confrontation in eliciting truthful testimony. However, the court's objection was based on the fact that the legislation created a presumption

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precluded.

88 Brannon *op cit* 440. Also see Rowe *op cit* 233, where he suggests that the danger of false child testimony is addressed by other constitutional safeguards stemming from the confrontation clause such as, the right of cross-examination. Also see Anderson *op cit* 767, where the writer discusses the conflict between a defendant's constitutional rights and society's interest in protecting child abuse victims from further trauma.

89 The Sixth Amendment to the US Constitution provides, *inter alia*, that an accused shall enjoy the right "to be confronted with the witnesses against him". Please refer to the previous chapter on "The Right to Confrontation" for a more detailed discussion about protective measures for child sexual assault victims.

90 See *Coy v Iowa supra* at 1012.

that all juvenile victims of sexual abuse suffered from emotional trauma when testifying in the accused's presence. This prevented the trial court from making an individualised assessment of the case. According to Watkins, this decision does not support child abuse victims who are called upon to testify in open court.[91]
However, in *Maryland v Craig*[92] the court came to an opposite conclusion. The court upheld *Maryland's* use of one-way, closed-circuit television to protect a child witness in a sex crime from viewing the accused. Thus, the court concluded that the interests of the child justified the dispensing of face-to-face confrontation. The difference between the two cases is that *Maryland* required a case-specific finding that the child witness would be traumatised by the presence of the accused, whilst the Iowa procedures struck down in *Coy*, depended on a statutory presumption of trauma. The court in *Craig* described the clause as indicating a preference for face-to-face confrontation, which can be overcome where a denial of such confrontation is necessary to further an important public policy and where the reliability of the testimony is assured. The court found a sufficient state interest to outweigh the defendant's right to face-to-face confrontation. This was reached by considering the state interest in protecting the welfare of children, the number of state laws designed to protect child witnesses and the increased academic literature on the psychological trauma suffered by child abuse victims. The court was also careful to point out that the need for protective measures for child witnesses should be determined by a case-by-case analysis.

However, the Supreme Court in *Maryland v Craig* did not establish, as a matter of law, any categorical evidentiary requirements to determine when a trial judge should

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91 Watkins also states that it is difficult to achieve justice for child sexual abuse victims in a judicial system which is designed for adults. There is a compelling need to protect the sexually abused child not only from further sexual abuse but from additional emotional harm by the judicial system. According to the Constitution, the rights of accused must be protected. Society and the legal system should find some way to accommodate this constitutional right, but not at the child's expense. Therefore, the sexually abused child is regarded as a double victim in our contemporary judicial system. See Watkins *op cit* 41.

92 See *Maryland v Craig supra* at 836. The Maryland statute allowed for a one-way closed-circuit televising of the evidence of a child witness who was a victim of child abuse. The trial court was required in each case to determine that should the witness testify in the presence of the accused, he or she would suffer serious emotional distress, such that the child could not reasonably communicate.

decide that the use of one-way closed-circuit television will be allowed to take the place of a face-to-face confrontation between the witness and the accused. It merely stated that if the trial judge finds that protective measures are necessary as defined by applicable state statute, then a child witness may testify through one-way closed circuit television without violating the Confrontation Clause.[93] However, recent cases have defined the level of protection available to the child victim witnesses.[94] Congress enacted the Child Victims' and Child Witnesses' Rights (CVCWR) Statute after the ruling in *Maryland v Craig*. The statute provides for two alternatives to live, in-court testimony for child victim witnesses: testimony by way of two-way closed-circuit television, and videotaped depositions.[95] The statute also provides for the protection of the child's privacy, the confidentiality of information, and for the closing of the courtroom at the court's discretion.[96] The constitutionality of the CVCWR Statute was challenged in *United States v Farley*.[97] The Tenth Circuit upheld the

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93 *Ibid* at 860. However, Robert Bloe believes that until the courts restrict the *Craig* exception, it will remain problematic. Although he agrees with the court's finding in *Craig*, he finds the court's constitutional standard for determining the admissibility of closed-circuit testimony to be questionable. See Bloe *op cit* 290.

94 See *Spigarolo v Meachum supra*, where the Second Circuit Court held that the accused's right to confrontation was not violated by the use of the child victims' videotaped testimony. The fact that the testimony was not "live" did not violate the accused's right to confrontation. In *Thomas v Gunter* 962 F 2d 77 (10th Cir 1992), the Tenth Circuit reiterated the principle that the child's trauma must originate from the accused's presence, and not merely from the courtroom procedures in general. The court also stated that the testimony given in the accused's absence must be reliable. Also see *Cumbie v Singletary* 991 F 2d 715 (11th Cir 1993).

95 18 USC s 359 (1988).

96 Brannon *op cit* 456.

97 See *US v Farley supra* at 1122. Also see the case of *United States v Carrier* 9 F 3d 867 (10th Cir 1993), which involved the sexual abuse of three young Native American girls. The Tenth Circuit found that the district court properly allowed the children to testify via closed-circuit television since the case satisfied the requirements of both the CVCWR statute and the Supreme Court decision in *Maryland v Craig*. The Tenth Circuit distinguished the *Maryland* case from the CVCWR statute. The court in *Maryland* required that the child's inability to testify should stem from the fear of the accused's presence. However, the CVCWR statute requires a more generalised fear of testifying in open court in the accused's presence. It should be noted that in *United States v Garcia* 7 F 3d 885 (9th Cir 1993), the court concluded that the CVCWR is consistent with the standard approved in *Maryland*. Here, the child victim of aggravated sexual assault was allowed to testify via two-way closed-circuit television under the CVCWR statute. The court found that the fear of facing the accused must be so acute as to prevent the child victim from testifying, rather than general anxiety brought about by the courtroom environment. The child should also suffer such emotional distress that she could not "reasonably communicate".

district court's finding that under the CVCWR Statute, the child was unable to testify in the accused's presence. It further held that the child would be unable to testify due to fear and the likelihood of trauma arising from the accused's presence. Thus, the constitutionality of the CVCWR Statute was upheld.

In *Fields v Murray*[98] the United States Court of Appeal considered the issue where an alleged abuser puts himself in the position of personally cross-examining his own victim by invoking his self-representation right. The court held that a defendant's self-representation right can be properly restricted by preventing him from personally cross-examining witnesses against him, so long as the purposes of the self-representation right are "otherwise assured".[99] The state's interest was also found to be sufficiently important to outweigh the accused's right to personally cross-examine the child victim. Thus, the above case law demonstrates that US courts have found that there is compelling state interest in protecting child victims of sexual assault. The case law has established that the public interest in protecting child victim witnesses overrides the accused's right to personally confront the witnesses against him. Allowing defendants to question the child victims is not necessary to further the Sixth Amendment's truth-determining goal, and would only serve to intensify the fear and humiliation of children.[100]

The **Canadian** courts have also found a compelling state interest in protecting the interests of women and victims of sexual assault. The discussion on Canadian case

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98 49 F 3d 1024, 1026 (4th Cir 1995). The case explores the question whether the defendant's right to proceed *pro se* or right to self-representation guarantees that he personally may cross-examine the child victim.

99 The court found that the accused Fields was able to confront the child witnesses face-to-face, and he could also control the cross-examination by specifying the questions asked. The only restriction was that he could personally not question the witnesses. Thus, the court found that because he could have conducted every other aspect of the trial, his dignity and autonomy would have been "otherwise assured". *Ibid* at 1035-1037.

100 See Anderson *op cit* 794. However, Professor Mosteller maintains that only trauma that threatens severe harm to the child sexual abuse victim, or eliminates or inhibits the child's ability to testify, could justify dispensing with the right to cross-examination. See Mosteller *op cit* 783. The article contains a detailed discussion about developments in the prosecution of child sexual abuse.

law illustrates this. Section 7 of the Canadian Charter has been interpreted to protect the accused's right to present full answer and defence as contemplated in article 14(3)(e) of the ICCPR. In the case of *Seaboyer*[101] the Supreme Court held that this right was violated by a statutory provision which prohibited the accused from cross-examining a sexual assault complainant about her prior sexual contact with people other than the accused, apart from the incident in question. However, a minority of the court held that any such evidence would have limited relevance to the accused's guilt and could distort the trial process by sexist stereotypes. Parliament's response was to enact a new provision requiring judicial approval for the introduction of any evidence of the complainant's prior sexual activity with another person or the accused.[102] It has been suggested that the reason for this legislative restriction on cross-examination was partly motivated by a vision of equality which emphasises improving the conditions of the disadvantaged, in this case women who are

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101 (1992) 66 CCC (3d) 321 (SCC). Also see *R v Al-Amoud* (1992) 10 OR (3d) 676 (Gen Div) (Theron J), where the judge at an accused's preliminary inquiry on a charge of sexual assault refused to permit cross-examination of the complainant's credibility in relation to identification evidence. The court held that the judge's ruling resulted in jurisdictional error because it substantially deprived the accused of the right to test the complainant's evidence on the important issues of identification and credibility. Jurisdictional error occurred when the right to cross-examine at a preliminary enquiry was infringed so that the accused's right to full answer and defence was compromised.

102 The Canadian Parliament also changed the offence of sexual assault by defining certain circumstances that did not constitute consent, and requiring an accused who claimed a mistaken belief in consent to have taken "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". See s 273.2 of the Criminal Code. Section 276 of the Code states that judges are required to consider, *inter alia*, the following factors in deciding whether to admit such evidence, such as "the interests of justice, including the right of the accused to make a full answer and defence" and "society's interest in encouraging the reporting of sexual assault offences". Also see Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 15. In the **United States**, the so-called rape shield rule also prohibits the questioning of rape victims about their past sexual history in terms of Federal Rules Evidence 412(a). For a discussion about legislation on sexual history evidence in **England**, see Durston "Cross-examination of rape complainants: ongoing tensions between conflicting priorities in the criminal justice system" 62 (1998) *Journal of Criminal Law* 91. Also see Birch "Rethinking sexual history evidence: proposals for fairer trials" (2002) *The Criminal Law Review* 531, where the writer criticises s 41 of the Youth and Criminal Evidence Act 1999, because it restricts the use that defendants can make of evidence of complainants' sexual history. Also see Ellison "Cross-examination in rape trials" (1998) *The Criminal Law Review* 605, where the writer argues that the inadequate regulation of cross-examination in criminal trials in general needs to be recognised before the ordeal of rape complainants in court can be addressed.

disproportionately the complainants in sexual assault trials.[103]

The accused's right to full answer and defence can also be violated if he is not allowed to cross-examine a complainant in a sexual assault trial on mental health records relevant to issues in the trial.[104] Courts have also upheld legislation that allows screens between the accused and the witness and videotaped evidence-in-chief in order to address the trauma that young complainants in sexual assault trials may face when testifying. In *R v Levogiannis*[105] the question arose whether section 486(2.1) of the Canadian Criminal Code violated any section of the Canadian Charter of Rights and Freedoms. The court held that where an order is made pursuant to the section of a code, the requisite elements of confrontation, that is, the accused's rights to face his accusers in court, were limited. Therefore, there was no infringement of the principles of fundamental justice. The court also found that the screen between the accused and the complainant did not undermine the presumption of innocence or operate unfairly against him and hamper cross-examination. Therefore, the Canadian courts have come out in favour of protecting the rights of youthful witnesses.[106]

A similar position has been adopted in **Europe**. The position in England is that an

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103 See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 15. Weissbrodt suggests that even if this new law still violates the accused's rights, the courts may find it to be justified under s 1 of the Charter as being necessary to protect the interests of women and victims of sexual assault. If this new law was found by the courts to be an unjustified violation of the accused's right to a fair trial, there would be significant support in Canada for Parliament to use its s 33 override to re-enact the legislation notwithstanding the fair trial rights of the Charter.

104 See *R v Osolin* (1993) 86 CCC (3d) 481 (SCC). The case was criticised because insufficient weight was given to the interests of victims.

105 See *R v Levogiannis supra* at 327. The relevant section allowed a judge, in certain cases, to order that a complainant under the age of 18 should testify outside the courtroom or behind a screen or other device that would allow the complainant not to see the accused, if the judge was of the opinion that the exclusion was necessary to obtain a full and candid account about the allegations from the complainant. Also see *R v L* (DO) *supra* and *R v F* (CC) *supra*, where the constitutional validity of child protection measures was upheld.

106 For a more detailed discussion of the Canadian experience with testimonial aids, see Bala *et al op cit* 461.

accused may not cross-examine, in person, a child who is the victim of or a witness to a sexual or violent offence.[107] It is unlikely that this will be a breach of the Convention as the competent authorities have to determine the manner in which the accused's rights are to be protected.[108] The court has also accepted the need to weigh the interests of the defence against those of vulnerable victims and witnesses.[109] In *Baegen v The Netherlands*[110] the European Commission rejected an application alleging that the accused had not been allowed to question a rape victim directly. This decision has implications for the protection in English law given to child witnesses and to victims of sexual assault.[111] A measure of anonymity may be achieved in the courtroom by the use of a screen where the witness, although known to the accused, is unwilling to face him directly. A television link may be used where the witness is outside the court's jurisdiction or is a child.[112] The Youth Justice and Criminal Evidence Act of 1999 (hereinafter referred to as the "YJCEA") has radically changed the orthodox adversarial trial model for the reception of evidence from child witnesses and other vulnerable witnesses. The Act enables courts to give "special measures directions" to protect child witnesses and other vulnerable witnesses.[113]

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107 This is in terms of s 34A of the Criminal Justice Act 1988. The Government is considering extending this rule to rape trials. The issue of compellability of a child victim of abuse is a thorny issue, because forcing a child to testify can cause harm to the child. The fault is said to lie with the current approach to cross-examination. See Gillespie "Compellability of a child victim" 64 (2000) *Journal of Criminal Law* 98, where the writer assesses whether a child victim of abuse should be compelled to testify.

108 See *X v Austria* No 1242/61 (1964).

109 Also see Momeni "Balancing the procedural rights of the accused against a mandate to protect victims and witnesses: An examination of the anonymity rules of the International Criminal Tribunal for the former Yugoslavia" (1997) *Howard Law Journal* 155-179.

110 A 327-B (1995).

111 Cheney *et al op cit* 100.

112 See s 32(1) of the Criminal Justice Act 1988. Also see *R v Lynch supra* at 868, and *R v Foster supra* at 333. The issue of screens was also raised in *X v UK supra*, where the Commission rejected the complaint, finding that the decision to screen witnesses did not interfere with the accused's rights under art 6.

113 The "primary rule" provides that children who are the alleged victims of, or are eyewitnesses to sexual offences are entitled to give their direct testimony by way of a video recorded interview, usually conducted by the police or social workers, and to be cross-examined and re-examined

Section 29 of the YJCEA provides for the use of intermediaries in criminal trials to assist vulnerable witnesses with communication difficulties to give their best evidence in court.[114] These measures are said to be compatible with article 6 of the European Convention on Human Rights.[115]

However, the question has arisen regarding whether the trial is fair if the principal prosecution witness is not open to cross-examination by the defence in a number of Strasbourg judgments. In these decisions, the European Court has emphasised that situations may arise where it may be acceptable to allow a witness to remain anonymous.[116] The Strasbourg judgments illustrate that if the evidence of the anonymous witness is significant but not decisive, the trial may be fair if there are sufficient safeguards for the defence. However, where the evidence is decisive, no amount of safeguards can cure the inherent unfairness. Where anonymity is granted, the consequent handicaps of the defence, should be counterbalanced by the procedures which are followed, and restrictions on the rights of the defence should be the minimum consistent with the interests of the witnesses.[117]

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by a video-taped pre-trial hearing. The court may also order that the child witness benefit from *inter alia*, communication aids, an intermediary, a screen or a direction that the evidence be heard *in camera*. See Hoyano *op cit* 948, where the writer reviews the compatibility of these measures with the fair trial guarantees contained in art 6 of the European Convention of Human Rights.

114 See Ellison "Cross-examination and the intermediary: bridging the language divide?" (2002) *The Criminal Law Review* 114, for a discussion of the extent to which the introduction of intermediaries will promote more emphatic communication during the process of cross-examination.

115 According to Hoyano, the great majority of these measures directions are likely to be ECHR compatible. Hoyano *op cit* 948.

116 See *Doorson v The Netherlands supra* at 330, where respect for the rights of the witness under arts 5 (physical safety) and 8 (private life) was emphasised. However, the court also emphasised that the rights of the defence must be safeguarded. However, in *Visser v The Netherlands* (2002) ECHR, Third Section: Feb 14, 2002, where the conviction was based largely on evidence of an anonymous witness who was not questioned within sight of the defence counsel, a breach of the right to a fair trial in terms of art 6(3)(d) was found.

117 Thus in *Van Mechelen and Others v Netherlands* (1997) 25 EHRR 647, the court found a violation of art 6 where anonymous police officers were interviewed by the investigating judge in a separate room from that of the accused and their counsel, the only communication being a sound link. The defence was not only unaware of the witness identity, but was also prevented from observing their demeanour under direct questioning, and thus testing their reliability.

In **Australia**, restrictions on cross-examination depend upon expressed statutory limitations or generally on the nature of the decision that the magistrate is required to make.[118] In some jurisdictions, there are special procedures which may be adopted for the taking of evidence from young children and other vulnerable witnesses, including the use of closed-circuit television or screens.[119] Palmer maintains that the trauma of a child testifying could be reduced if cross-examination was conducted through a "communicator" or "intermediary" as is the case in Western Australia and South Africa.[120] This would make cross-examination a more appropriate test of the child's credibility and so promote accurate fact-finding. It has also been suggested that evidentiary and procedural innovations should be introduced to improve the availability and quality of children's evidence and in reducing the trauma of court appearances together with inter-agency co-operation between law enforcement, welfare and child protection authorities.[121] Similarly, **New Zealand** legislation also

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118 See *Maddison v Goldrick* [1975] 1 NSWLR 557 at 568-9. Also see s 5(1) Sexual Offences (Evidence and Procedure) Act 1983 (NT), where the defendant cannot cross-examine the complainant directly. Similarly, s 69 Justices Act 1902 (WA), provides that the affected child cannot be called as a witness unless there are special circumstances. This was considered in *Angus v Di Lallo* (1994) 11 WAR 93.

119 See *inter alia*, (NSW) Crimes Act 1900 ss 405D-405F. Also see (VIC) Magistrates' Court Act 1989 Sch 5 cl 15. Also see *R v West* [1992] 1 Qd R 227; (1990) 51 A Crim R 317 (Q Ct of Cr App), where during a trial for rape, the complainant was declared a "special witness" under the Evidence Act 1977 (Q) s 21A, and during cross-examination the accused was placed at the back of the court to interpose a screen between the accused and the witness. It was held that where a *prima facie* intimidation appears to affect the ability of a witness to give evidence, it is proper to make some arrangement which will minimise or eliminate the problem, subject to the protection of the accused from unfair prejudice. The scheme of s 21A is to entrust to the court a balancing exercise between disadvantage to a witness and prejudice to an accused.

120 See Evidence Act 1996 (WA), s 106F, and s 170A of the Criminal Procedure Act respectively. Also see Palmer *op cit* 198. Palmer discusses a number of prospective reforms in Australian jurisdictions which not only shield the child witness, but also promote accurate fact-finding, such as cross-examining the child witness at an early stage of the proceedings to allow the child to begin the process of recovery as soon as possible, the video-recording of investigative interviews and the adoption of a special exception to the hearsay rule applicable only in sexual abuse cases.

121 The prosecution should be given the option of tendering as evidence a video-recording of an interview with the child obtained in accordance with stringent procedures. Questions in cross-examination should be directed to the child through a "child examiner" at the interview stage or alternatively, if the child is required for cross-examination at the trial, the court should use a number of options including closed-circuit television and the use of a court-appointed examiner to communicate questions to the child. See Warner *op cit* 302.

currently provides for the limited use of an interpreter or intermediary in cases of sexual violence where the complainant is a child or mentally handicapped person.[122] However, the relevant provision does not allow the intermediary to rephrase questions or interpret the witnesses's answer.[123]

Therefore, our law conforms with international law in that the interests of child victims of sexual assault and other vulnerable witnesses are given preference over the rights of the accused, where it appears that they will be traumatised by testifying in the presence of the accused. When alternative procedures such as conducting proceedings outside the courtroom or out of the accused's presence would impinge less on the accused's rights, the opportunity for cross-examination should not be eliminated if those alternative procedures would allow for cross-examination while reducing trauma to tolerable levels.[124] Steps should be taken to ensure that cross-examinations are consistent with the legal code of ethics and will produce trials that are fair to all while minimising potential damage to child witnesses and other vulnerable witnesses.[125] Developing legal measures to achieve a sensitive balance between these competing interests is said to be important. Section 170A allows for the separation of the accused and the child witness and the appointment of an intermediary, through whom cross-examination is conducted. This process allows the child witness to effectively participate
in the judicial process with the ultimate aim of establishing the truth.[126] The

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122 See s 23E(4) of the Evidence Act 1908 (NZ), which provides that where a witness is to give evidence from out of court by closed-circuit television or from behind a screen by audio link, the judge may direct that questions be put to the witness through a person approved by the judge.

123 See Ellison (*The Criminal Law Review*) *op cit* 117.

124 See Mosteller *op cit* 791.

125 See Davies *et al* "In the interests of justice? The cross-examination of child complainants of sexual abuse in criminal proceedings" (1997) *Psychiatry, Psychology and the Law* 217.

126 Müller and Tait (*TSAR*) *op cit* 530. Also see Müller and Hollely "Empowering child witnesses against the legal system" (2001) *De Jure* 330 at 341, where the writers argue that the secret to effective testimony in the case of child witnesses is empowerment in the form of education and skills development. The goal of empowerment is not only to improve performance in the witness

procedure provided for in section 170A does not interfere with the fundamental right of an accused to a fair trial.

10.2.5.2 Hearsay evidence

10.2.5.2.1 The common-law position

Hearsay evidence is regarded as being untrustworthy because it cannot be tested by cross-examination.[127] It is not only the maker of the statement who might have been deliberately lying. He may simply have been mistaken owing to deficiencies in his powers of observation or memory, or he may have narrated the facts in a garbled or misleading manner. The purpose of cross-examination is to expose these deficiencies. If the maker of the statement is not present before the court, then this safeguard is lost.[128]

According to Zeffertt *et al*, the common-law rule was rigid.[129] All hearsay evidence which does not come within some established exception was excluded, no matter how reliable it may have been. This could lead to a grave injustice. The common-law rule prevented the court from discovering the truth in cases where no policy could have justified its application. This lead to a new approach in South Africa, namely, the statutory position.

10.2.5.2.2 The statutory position

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box but also to ensure better post-trial adjustment.

127 Hearsay is defined as any oral or written statement, or conduct, reported on the witness stand by someone other than the person who stated, wrote or engaged in the questionable conduct. Such evidence is usually excluded unless it falls within one of the common law or statutory exceptions. See Zeffertt *et al op cit* 381, regarding the status of the common law and statutory exceptions. Refer to subsection 9.3.3 where the admission of hearsay evidence as an exception to the right to confrontation is discussed.

128 See *Teper v R* [1952] AC 480 at 486; [1952] 2 ALL ER 447 at 449.

129 Zeffertt *et al op cit* 366.

The statutory position is regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988. Section 3(1)(a) states, *inter alia*, that hearsay shall not be admitted as evidence at criminal or civil proceedings unless each party against whom the evidence is to be adduced agrees to the admission of such evidence at such proceedings.[130] The person upon whose credibility the probative value of such evidence depends, must himself testify at such proceedings in terms of section 3(1)(b). Section 3(4) defines hearsay evidence as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. It is evident from the above that section 3(4) no longer requires a statement, that it is to be hearsay, to be tendered for the purpose of asserting the truth of its content.[131]

It has been held that the implied assertion of verbal conduct will be hearsay in terms of subsection (4) if its probative force depends on the credibility of anyone other than the witness.[132] Hearsay may be provisionally admitted in terms of section 3(3) if the

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130 However, where the agreement is express, courts should act with caution where accused persons are unrepresented, and rather consider the contents of s 3(1)(c).

131 The case of *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 (3) SA 343 (W), illustrates this. The plaintiff brought an action for defamation and injurious falsehood, alleging that the defendants had spread rumours that cigarettes manufactured by the plaintiff company had caused tuberculosis. A commercial traveller's testimony that statements to this effect had been repeated to him by customers was found not to constitute hearsay since the evidence was tendered not to prove that the statements were true, but to show that rumours were circulating. The question arises whether the probative value of the evidence depends on the credibility of any person other than the witness? Thus the statements which were held not to be hearsay at common law, in the *International Tobacco* case, would be hearsay under the statute because of their probative force. An inference could be drawn from them that a rumour which was circulating would be governed by or controlled by the credibility of both the witness and the non-witness. See Zeffertt *et al op cit* 368.

132 See the case of *S v Van Niekerk* 1964 (1) SA 729 (C), where it was held that implied assertion fell within the ambit of the rule against hearsay. The facts were that a magistrate was charged with the theft of a gun, which he had confiscated from a drunk who died shortly afterwards. The magistrate admitted having sold the gun and having kept the proceeds, but said that the deceased had asked him to sell the gun and had later told him to keep the money. The prosecution tried to rebut this defence by producing letters written by the deceased to his brother before and after the sale, asking him to collect the gun from the magistrate. The letters were tendered as conduct by the deceased tending to show that he did not think that he had authorised the magistrate to dispose of his gun and in order to show that his view was correct. The court held that the letters should have been excluded as hearsay evidence. Also see Zeffertt *et al op cit* 364.

court is informed that the declarant will testify subsequently. If he does not, it will be excluded unless it can be admitted by agreement or if the court is of the opinion in terms of section 3(1)(c), that it would be in the interests of justice to do so. Thus, section 3(1)(c) of the Evidence Amendment Act 45 of 1988 gives courts the discretion to admit hearsay evidence if they are of the opinion that such evidence "should be admitted in the interests of justice".[133] The phrase "interests of justice" must be interpreted in the context of the Bill of Rights and an accused's right to a fair trial.

Hearsay evidence is said to deny an accused the right to cross-examine the witness. This is because the declarant of a statement is not in court, and thus cannot be challenged. Therefore, a judge should hesitate when admitting or relying on hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, where such evidence plays a decisive or even important role in convicting an accused unless there are compelling reasons for doing so.[134] The case law illustrates that the courts have been reluctant, even before the Constitution, to use the exception lightly in criminal cases against the accused. However, hearsay evidence has been admitted more readily where it is tendered by the accused. It has been held in the

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133 The court may consider the following factors:

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whom the credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the court's opinion be taken into account.

134 See *S v Ramavhale* 1996 (1) SACR 639 (A) at 649. When the court convicted the appellant of murder, it had relied on a piece of hearsay evidence by a state witness as to what the deceased had said. The prosecutor did not lead the evidence in question, but slipped it inadvertently. The court did not rule on the admissibility of the evidence despite objection to the evidence by defence counsel before the state's case was closed. The evidence was admitted only at the time of judgment. The court held that it was the duty of a trial judge to keep inadmissible evidence out. It found clear prejudice to the appellant in admitting the hearsay at the stage at which it was admitted, namely at the stage of judgment. It held further that the irregularities were so gross that the trial could be vitiated.

case of *S v Cekiso*[135] that section 3(1)(c) should not be exercised in favour of allowing hearsay evidence on controversial issues on which conflicting evidence has been given. To allow such evidence would result in severe prejudice to the person against whom the evidence is given. The discretion in terms of section 3(1)(c) will seldom be exercised in favour of the admission of hearsay in criminal cases, due to the presumption of innocence and the court's reluctance to allow untested evidence to be used against an accused in a criminal case.[136] However, this does not affect the position in civil matters where the section will be constructively applied to search for the truth.

However, in *S v Dyimbane*[137] the court admitted certain evidence which had not been challenged and which was highly relevant material in the prosecution case. Thus the court found that it was not "hearsay" evidence. It was held in *S v Mpofu*[138] that if the

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135 1990 (4) SA 20 (E) at 21 E. The state had applied for the admission of certain hearsay evidence. In a criminal trial, the court had refused to allow the evidence of what the deceased had told a witness about the accused having entered the deceased's house. The accused had denied that they had entered the deceased's house at all. The court considered s 3(1)(c) which allowed evidence to be adduced in certain circumstances. It would not be in the interests of justice to allow such evidence, which cannot be tested in the normal way. Therefore, the application to lead such evidence was refused.

136 See *Metadad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) at 499 H. The purpose of the Act was to permit hearsay evidence in certain circumstances where the application of rigid and archaic principles could frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. The fact that the statement is untested in cross-examination is a factor to be considered in assessing its probative value. The court found that there is no principle to be extracted from the Act that it is applied only sparingly. The court is bound to apply it when so required by the interests of justice.

137 1990 (2) SACR 502 (SE) at 504. The court also remarked that when hearsay evidence is prejudicial to the accused, the court must consider this factor. However, it need not be decisive. Hearsay evidence is very prejudicial where it concerns proof of guilt. In this case, it should only be admitted if there are compelling reasons. Steytler suggests that this view is correct in the light of the constitutional right to challenge and adduce evidence. See Steytler *Constitutional criminal procedure* 351. The court held further that should the evidence in fact be "hearsay" as defined in the Act, it was admissible under s 3(1)(c) of Act 45 of 1988. The court remarked that in deciding whether or not to admit hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, it must consider all the factors set out in s 3(1)(c) of the Act and take an overall view at the end of the case.

138 1993 (2) SACR 109 (N).

probative value of what has been adduced is so diminished as a result of unreliability, then the resultant prejudice caused by its reception may persuade the court to exercise its discretion against admitting it. The case of the undefended accused was considered in *S v Ngwani*[139] where it was held that the court should explain the provision to such accused, and give them the opportunity to address the court on the question of whether the admission of the hearsay evidence would be prejudicial to them.

Hearsay evidence is more readily admitted in a bail hearing because it is not regarded as "criminal proceedings". This includes the introduction of affidavits by the accused.[140] The court is more likely to admit hearsay evidence where evidence is tendered regarding the imposition of a proper sentence. This is so because the nature of the sentencing enquiry which requires a complete picture of a convicted person and the interest of society, requires evidence which often will include hearsay evidence. The court had to consider an opposed bail application in *S v Maki en Andere* (1)[141] where one of the accused did not give oral evidence but relied on an affidavit he had made, which was handed in on his behalf. The state contended that the affidavit was not admissible. The court held that bail applications are not "criminal proceedings" as they are not "proceedings directed by the state against the accused in order to secure his conviction and punishment".

10.2.5.2.3 The constitutional position

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139 1990 (1) SACR 449 (N). The magistrate had invoked s 3(1)(c) of Act 45 of 1988, but he had not explained the effect of the subsection to the accused. He had also not informed the accused on the question whether the subsection should be invoked or not. The court set aside the conviction.

140 *S v Pienaar* 1992 (1) SACR 181 (W). The court held that there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications inadmissible. However, an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination. On the other hand, an affidavit will also carry more weight than a mere statement from the bar.

141 1994 (2) SACR 630 (OK). The court noted that a bail application is couched in the form of an application with some characteristics of civil proceedings. Therefore, it is regarded as "civil proceedings" for the purposes of s 3 of the Law of Evidence Amendment Act, and hearsay evidence is admissible. Accordingly, the court applied the above principles and held that the affidavit was admissible.

The question arises whether the admission of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, is constitutional. It has been held in *S v Ramavhale*[142] that hearsay evidence may be accepted "subject to the broad, almost limitless criteria set out in section 3(1)". However, the courts have approached the two statutory exceptions in section 3 with caution. An accused is entitled to legitimately waive the right to challenge evidence by consenting to the admission of such evidence in terms of section 3(1)(a). It is also preferable to insist on his express consent, and not to construe a failure to object to its reception as implied or tacit consent.[143] It has been suggested that in view of the constitutional right to challenge evidence, this practice should be given constitutional force, and that any consent should meet the requirements of a valid waiver and be explicitly noted on the record.[144] Common law hearsay exceptions should also be subjected to the requirements of section 36(1) of the Constitution. However, they are most likely to survive as they are based on trustworthiness and necessity.[145]

The constitutionality of section 3 was challenged before the Supreme Court of Appeal in *S v Ndhlovu and Others*,[146] where it was held that the use of hearsay evidence by the state does not violate the accused's right to challenge evidence by cross-examination at all, since "where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant". Therefore, the Supreme Court of

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142 See *S v Ramavhale supra* at 650b.

143 Steytler *Constitutional criminal procedure* 351.

144 *Id*.

145 *Ibid* at 353.

146 2002 (2) SACR 325 (SCA) at para 24. The court also found that since the Constitution did not guarantee an entitlement to subject all evidence to cross-examination; it contained the right (subject to limitation) to "challenge evidence". According to Zeffertt *et al*, a more realistic approach would be to regard the provisions of s 3 which constituted a limitation of the accused's right to challenge evidence, as a reasonable and justifiable limitation in terms of s 36 of the Constitution. See Zeffertt *et al op cit* 381.

Appeal confirmed that the Law of Evidence Amendment Act 45 of 1988 provides a constitutionally sound framework for the admission of hearsay evidence.[147]

The position in certain other countries is similar to our law.[148] In the **United States**, the general position is that all hearsay statements are inadmissible, but there are many exclusions and exceptions to this rule.[149] However, the following types of hearsay are sometimes admissible, provided that the declarant is not available to testify at the trial due to a testimonial privilege or refusal to testify, lack of memory, death or infirmity in a re-trial, testimony from a prior trial, and in a homicide trial, statements of the circumstances of what the declarant believed was his or her impending death. The prohibition against hearsay is based on the rationale that statements made out of court are not subject to cross-examination, and therefore do not give a defendant a chance to challenge their veracity and truthfulness.[150]

The US Supreme Court seemed to equate the Confrontation Clause with the

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147 See *S v Ndhlovu supra* at 341c.

148 In **Islamic law,** testimony is also limited to directly observed events. Hearsay is inadmissible and one may not testify regarding events that another allegedly observed. The common law also excludes hearsay evidence. However, it also recognises exceptions by means of which hearsay may be admitted into evidence. See Mahmood "Criminal procedure" in Mahmood *et al op cit* 304. In **Germany**, it is admissible to examine witnesses on statements of individuals who are not subject to questioning in the main hearing. Therefore, judges, prosecutors, police officers or other witnesses may be questioned about statements of individuals examined by them or other statements. However, one cannot read aloud or utilise documents containing statements of individuals who are not examined in the main hearing. However, there are some exceptions for reading aloud judicial interrogation protocols such as, a witness, expert or co-accused has died, has become mentally incompetent or his present abode cannot be investigated, the person is unavailable, or the prosecution, defence and the defendant agree to the documents being read aloud. See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 524-525.

149 The following types of statements are generally excluded from the definition of hearsay, and are therefore admissible at trial (see Minn Rule Evd 801(d)): they include prior consistent or inconsistent statements of a trial witness, prior statements identifying a suspect, or describing an event or condition while it is observed, or immediately afterwards, and prior admissions of an opposing party (including criminal defendant) or that party's agent or co-conspirator. See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 55.

150 See *Pointer v Texas supra* at 400, where a conviction was reversed. This was because the trial court had admitted transcript testimony from the previous hearing in which the defendant's counsel was not present, and the witness was not cross-examined.

hearsay rule in a number of decisions since 1965. It held that a major purpose of the clause was "to give the defendant an opportunity to cross-examine the witnesses against him."[151] The right to confront prosecution witnesses entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement has sufficient "indicia of reliability", and the declarant is not available to testify at the trial.[152] A witness is said to be unavailable if the government is unable, despite good-faith efforts to procure that witness' attendance at trial.[153] However, a trend has developed in some of the modern state evidence codes and Federal Rules of Evidence towards a more open admissibility of all types of evidence, including hearsay.[154] Recently, the US Supreme Court has dispensed with the unavailability requirement for statements admitted under certain admitted

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151 *Ibid* at 406-407, where the use of preliminary hearing testimony was found to violate the defendant's right of confrontation. Also see *Douglas v Alabama supra* at 418 and *Bruton v US* 391 US 123 (1968).

152 See *Ohio v Roberts supra* at 56, which raised the issue concerning the testimony of an unavailable witness. The court allowed the admission of the out of court statement where actual cross-examination during the preliminary hearing did not occur, and where the declarant was unavailable for cross-examination at trial. A general test was set by the US Supreme Court in order to harmonise the confrontation clause with societal interest in accurate fact-finding. The court interpreted the confrontation clause in the Sixth Amendment in two ways to restrict the range of admissible hearsay: firstly it considered the rule of necessity, where the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. Secondly, the court stated that once a witness is shown to be unavailable, then the clause allows only hearsay characterised by such trustworthiness that there is "no material departure from the reason of the general rule". This means that the hearsay declarant is not present for cross-examination at trial, then the statement is only admissible if it bears adequate "indicia of reliability". One can infer reliability where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded where there is no trustworthiness. The rule in *Roberts* was narrowed in *United States v Inadi* 475 US 387 (1986), where the court held that the rule of "necessity" is confined to the use of testimony from a prior judicial proceeding, and does not apply to co-conspirators' out-of-court statements. See Smith *op cit* 1287-1309, where Smith argues that a standard should be developed that will allow uncross-examined and inculpatory hearsay statements to be admitted against the defendant only when these statements are truly reliable. The Confrontation Clause will satisfied once such a standard is implemented. Also see Lathi *op cit* 507, where the writer also proposes a hearsay exception to the Federal Rules of Evidence for the out-of-court statements of children who allege sexual abuse. Also see Imwinkelried *op cit* 521.

153 See *Mancusi v Stubbs* 408 US 204, 212 (1972).

154 Watkins *op cit* 37. Also see Douglass "Beyond admissibility: real confrontation, virtual cross-examination, and the right to confront hearsay" (1999) *The George Washington Law Review* 191, where the writer discusses a new approach to the confrontation-hearsay dilemma. He believes that the answer lies in the tool of confrontation.

exceptions to the hearsay rule, for example, statements made to obtain medical diagnosis or treatment.[155]

Choo advocates the abolition of hearsay and its exceptions. He maintains that evidence of all out-of-court statements should be regarded as *prima facie* inadmissible on behalf of the prosecution.[156] In order to secure admissibility, the prosecution must satisfy the court that the maker of the statement is either being called as a witness or is unavailable.[157] He states that the requirement of unavailability should not be applied strictly where hearsay evidence is tendered by the defence, since the crown has "no right of confrontation". Rather, the focus should be on reliability.[158]

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155 See *White v Illinois* 502 US 346 (1992). The US Supreme Court has also held that out-of-court statements of co-conspirators, spontaneous statements and those made in the course of procuring medical services are examples of firmly rooted hearsay exceptions which make proof of unavailability and reliability unnecessary. See *Bourjaily v United States* 483 US 171, 183 (1987). Also see Layton "U (FJ): Hearsay, reliability and prior inconsistent statements made by co-accused, Part 11" (1999) *Criminal Law Quarterly* 501-516. Also see Gray "The medical treatment hearsay exception in Maryland: a low point in clarity for practitioners and protection for litigants" (2000) *University of Baltimore Law Review* 237.

156 He refers to the traditional approach, in which hearsay was inadmissible unless it fell under one of the recognised common law exceptions or was admissible by statute, has been supplemented by a "principled approach", in which otherwise inadmissible hearsay may be admitted if it is necessary and reliable. The exceptions usually assist the courts to deal honestly with reliable hearsay. However, the exceptions sometimes allow the introduction of evidence that is not reliable. To illustrate this, "a declaration made when the declarant was under a settled and hopeless expectation of death is admissible in evidence, in a homicide prosecution to prove the cause of the declarant's death." The original rationale for this exception was that when a person faces death, he or she has no reason to lie and every reason to tell the truth. According to Choo, this rationale is unlikely to be valid in modern society, where many types of religious belief compete less with each other than with non-belief. However, the exception is still recognised. Choo also questions why the exception has not been extended to cases where the accused has been charged with something else. See Stewart "Hearsay and confrontation in criminal trials by ACT Choo: book review" (1997) *The Canadian Bar Review* 282 at 284, where the author makes a strong case.

157 *Ibid* at 285.

158 *Id*. In **Canada**, hearsay evidence is also not automatically excluded, but it may be admitted when it is necessary in the case and there are reasons to believe that it is reliable. See *R v Khan supra* and *R v Smith* [1992] 2 SCR 915. Also see Sugunasiri and Murphy, *R v F* (W.J): Hearsay evidence and the necessity of "necessity" (2000) *Criminal Law Quarterly* 181, for a discussion about the Supreme Court of Canada's approach towards hearsay evidence.

A similar position has been followed in the **United Kingdom**. In England, accused persons have the right to call witnesses on their own behalf and to cross-examine witnesses called by the prosecution. However, witnesses cannot testify about statements made by persons who are not subject to questioning in court.[159] Article 6 prohibits the use of statements by absent witnesses.[160] The common law position is that such statements cannot be adduced as evidence in terms of the hearsay rule. Thus, such statements are inadmissible as evidence of any fact asserted. The reason for the exclusion of hearsay is that it is unreliable and because the witness is not subject to cross-examination. The use of hearsay also means that the trial can be stigmatised as being unfair and an abuse of due process.

However, written witness statements may be admissible under sections 23 or 24 of the Criminal Justice Act 1988. The presence of the witness is not required. The witness must be dead, physically or mentally unfit, out of the jurisdiction, unable to be traced, or have been intimidated. However, the trial judge has an exclusionary discretion under section 25 not to admit the evidence if, in the interests of justice, it ought not to be admitted.[161] However, the burden of persuading the court that the document should be excluded rests on the party objecting to admission. If the statement is one prepared for the purposes of criminal investigation, a positive duty rests on the trial judge in terms of section 26, to ensure that the party tendering the statement bears the burden of persuading the court that the admission of the statement is in the interests of justice.[162] The weight to be attached to the inability to

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159 This rule against hearsay evidence has been reviewed by the Law Commission. See Dickson "England and Wales" in Weissbrodt and Wolfrum (1998) *op cit* 508. Also see Tapper "Hearsay in criminal cases: an overview of Law Commission report no 245" (1997) *The Criminal Law Review* 771, for a discussion about the Law Commission's report.

160 The relevant article provides for a witness to be called, to give oral evidence and to be cross-examined.

161 Section 25(2) directs the court to look at the following elements: the nature and source of the document; the extent to which other evidence on the issue is available; the relevance of the evidence; or the risk of unfairness. See Cheney *et al op cit* 101. Section 25 is similar to s 3(1)(c) of the Law of Evidence Amendment Act.

162 The case of *R v Cole* [1990] 2 All ER 108, illustrates the different functions of ss 25 and 26. It involved a case of assault in which the prosecution tried to introduce the statement of an eyewitness who had subsequently died. Leave was required in terms of s 26 and the appellant

cross-examine and the magnitude of any risk that the admission of the statement will result in unfairness to the accused, will depend partly on the court's assessment of the quality of the evidence shown by the contents of the statement.[163] Any potential unfairness which arises from the inability to cross-examine on the particular statement, may be effectively counterbalanced by a warning and an explanation in the summing up to the jury. The court also has to consider whether the interests of justice will be properly served by excluding the statement if one considers other evidence available to the prosecution.[164]

The effect of the Criminal Justice Act 1988 and the statutory duty to consider any unfairness to the defendant before admitting documentary hearsay, ensures that there is a "fair hearing" and that these provisions do not infringe article 6.[165] It has been suggested that article (6)(3)(d) prohibits the prosecution from adducing hearsay evidence, but the court has not adopted such a strict interpretation. In the case of *Unterpertinger v Austria*[166] the court concluded that the conviction had been substantially based on written statements of absent witnesses, and therefore there

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argued that this should have been refused because the only way of denying the statement under s 26(ii) would have been for the defendant to testify or to call witnesses. This would have led to improper pressure on the defendant. The court of appeal rejected this submission. However, it accepted that a balance had to be struck between the widening of power to admit documentary hearsay and ensuring that the accused received a fair trial.

163 Cheney *et al op cit* 102.

164 See *R v Cole supra*.

165 Article 6(3)(d) embodies the accused's right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 6(3)(d) is phrased in such a way as to ensure the presence of witnesses, and thereby prohibit hearsay introduced on behalf of the prosecution. Similar material may be introduced on behalf of the defence, although there is no obligation as a result of art 6 for a domestic court to admit such evidence. See Cheney *et al op cit* 105.

166 See *Unterpertinger v Austria supra* at 175. The accused was charged with assault on his stepdaughter and wife. The police took witness statements from the two victims. The witnesses were not compellable under Austrian law. At the trial, both victims refused to testify and the interviews with the investigating judge were read out. Unterpertinger applied to the Commission on the grounds that the acceptance of written evidence of interviews with the judge and the police infringed art 1 and art (6)(3)(d), because he was unable to cross-examine the victims.

was a breach of article 6. A similar view was taken in *Kostovski v Netherlands*.[167] These cases demonstrate that where hearsay evidence is the main or decisive evidence against the defendant, reliance on it in court will lead to a breach of the Convention.[168] Other decisions stress that the hearsay evidence must not be the only item of evidence.[169] However, the cases are not wholly consistent on this point.[170] According to Andrew Ashworth, the *Trivedi* ruling demonstrates that in certain cases it will be possible to hold that the trial was fair, largely because of the strength of other evidence.[171]

The impact of article 6 may require amendment to the rigid application of the rule

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167 See *Kostovski v The Netherlands supra* at 434. Here, the conviction was based on accounts by two witnesses, who were allowed to remain anonymous and not to testify because of the fear of reprisals.

168 See *Van Mechelen v The Netherlands supra* at 657, where the court held that the trial was unfair when eleven police officers gave evidence for the prosecution, remained anonymous, and were questioned by the judge whilst prosecuting and defence counsel were kept in another room, with only a sound link to the judge's chambers.

169 See *Doorson v The Netherlands supra* at 330, where the court held that the trial was not unfair when two prosecution witnesses remained anonymous and were questioned by the judge in the presence of counsel but not the accused. In *Asch v Austria*, 12 HRLJ 203 (1991), the court held that where a victim of an assault declined to testify at the trial, then the statements relied on were not the only evidence.

170 The European Commission has also considered the relationship between the provisions of the Act and art 6 in *Trivedi v UK* [1997] EHRLR 520. Here, a doctor was charged with false accounting by claiming for more night visits to a patient than had actually occurred. The prosecution had relied on written statements by the patient who was elderly and infirm. The Commission declared that the application was inadmissible as the statements were not the only evidence. The judge had conducted an enquiry into the patient's condition, and evidence on the patient's reliability had been admitted. The jury had been warned against attaching undue weight to the patient's evidence. Thus, in this case, the admission in evidence of pre-trial statements made by an elderly witness unfit to give oral evidence at the trial did not render the proceedings unfair as a whole. However, the Commission came to a different conclusion in *Quinn v UK* 23 EHRR CD 41 (1996). Here, the statements were regarded as important evidence where the applicant had not been allowed to cross-examine the witnesses in person.

171 However, this does not alter the fact that the provisions of the Criminal Justice Act 1988 do not, on their face, comply with art 6(3)(d), and that judicial discretion cannot be relied upon to ensure compliance unless judges take account of such matters as the need to keep departures from art 6.3(d) to an essential minimum, the need to devise other "counter-balancing" procedures to compensate for any incursion on defence rights, and the importance of not basing a conviction solely or mainly on evidence admitted by these means. See Ashworth "art 6 and the fairness of trials" (1999) *The Criminal Law Review* 261at 270.

regarding defendants. The case of *R v Blastland*[172] involved a murder case in which a third party made a statement which strongly suggested that person's involvement in the killing. The House of Lords found the statement to be inadmissible. In *Blastland*, the result of the exclusion of the items of evidence involved (the third party's confession and his knowledge of the crime), was to deprive the jury of information which might have left it with a reasonable doubt about the defendant's guilt. The argument has been advanced that the concept of a fair hearing requires an inclusionary discretion to admit hearsay statements on behalf of the accused.[173] However, it is a principle of common law that any evidence admissible for the defence must also be admissible for the prosecution. Thus, the right to a fair trial is fundamental in Britain and Europe, as it is in the USA.

In **Australia**, the High Court has adopted a flexible "common-sense" approach in determining whether a hearsay statement should be admitted as evidence based on whether the statement is "sufficiently reliable and free from the risk of concoction to render it appropriate for consideration".[174] This position has been endorsed by the Evidence Act 1995 (Cth/NSW), which allows a hearsay statement into evidence if it was made in circumstances which make it highly probable that the statement is reliable.[175]

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172 [1985] 2 All ER 1095.

173 Cheney *et al op cit* 104.

174 See *Walton v The Queen* (1989) 166 CLR 283. For a discussion about the Australian approach to the relaxation of the hearsay rule, see Marshall "Admissibility of implied assertions: towards a reliability-based exception to the hearsay rule" (1997) *Monash University Law Review* 200-219. The writer concludes (at 219) that the Australian High Court is said to be establishing a principled basis for the admission of implied assertions under the hearsay rule, namely, that courts should have the power to admit such evidence when its reception is warranted by reference to the criterion of reliability. Also see Palmer "The reliability-based approach to hearsay" (1995) *Sydney Law Review* 522, and Hunter "Unreliable memoirs and the accused: bending and stretching hearsay – Part Two" (1994) *Criminal Law Journal* 76. The latter article examines the importance of reliability and authenticity in relation to *inter alia*, the rule against hearsay.

175 See s 65(2)(c) of Evidence Act 1995 (Cth/NSW) regarding criminal proceedings. Also see Molomby and Clark "Let's not hear it for hearsay" (2001) *The Australian Law Journal* 133, where the writer criticises s 65. She states that there are major problems in the drafting of tests for the admissibility of hearsay in criminal cases, with the consequence that the tests prescribed are not only inappropriate, but in many cases unworkable. Also see Smith and Holdenson "Comparative evidence – the Uniform Evidence Acts and the common law" (1998) *The Australian Law Journal*

The human rights rationale of the rule against hearsay was considered in *Astill*[176] in order to determine whether an out of court statement should be admitted into evidence. The court held that reliability was neither the final nor the decisive factor in admitting hearsay evidence.

The above discussion illustrates that hearsay evidence is generally excluded because of its unreliability, unless it falls under one of the recognised exceptions. A denial of the right to cross-examination may lead to the trial being rendered unfair. Therefore, a balance has to be struck between the admission of hearsay evidence and the accused's right to a fair trial. The article 6 decisions of the European Court demonstrate that the overall fairness of the trial was not undermined by the reception of evidence from anonymous witnesses[177] nor by the admission of a statement of an absent witness.[178] This is so because in all cases there was sufficient other evidence available, and the conviction was not based mainly on the evidence admitted in breach of article 6. On the other hand, where the court has come to the conclusion that such evidence was the sole or main basis for a conviction, it has found little hesitation in finding the trial unfair and in violation of article 6.[179] The Convention

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363, for a detailed discussion about the Evidence Act.

176 (1992) 63 A Crim R 148. The court held that the contents of a series of telephone calls between two prosecution witnesses should be admitted into evidence despite their contents being hearsay. The contents of the telephone calls was found not to encroach upon the protection envisaged in art 14(3)(e) of the ICCPR. It should be noted that art 14(3)(e) prohibits the prosecution from leading hearsay evidence since an accused is entitled to examine all prosecution witnesses. However, art 14(3)(e) does not apply to hearsay evidence led by an accused and, thus diverges from the common law which traditionally applies indiscriminately, excluding hearsay evidence which may be relevant either to the accused's guilt or innocence. See *inter alia*, *Sparks v R* [1964] AC 964.

177 See *Doorson v The Netherlands supra*.

178 See *Trivedi v UK supra*.

179 See, *inter alia*, *Unterpertinger v Austria supra*, where the conviction was mainly based on evidence untested by cross-examination; *Kostovski v Netherlands supra*, where the conviction was based "to a decisive extent" on evidence from anonymous witnesses whom the defence was unable to see; and *Saidi v France* (1993) 17 EHRR 251, where written witness statements were the "sole basis for applicant's conviction".

appears to require that the trial as a whole must be fair.[180]

10.2.5.3 Expert documentary evidence

A prerequisite for cross-examination is that all evidence be produced in court and that witnesses testify *viva voce*. An exception to this rule occurs when evidence is furnished by way of affidavit or certificate. Section 212(4) of the Act provides that whenever a fact is established by any examination or process requiring any skill in, *inter alia*, chemistry, which is relevant to the issue before the court, the affidavit by a state employee who alleges that he has established such fact by means of such a process, is *prima facie* proof of such fact. However, the court may use its discretion to subpoena such a person to give oral evidence regarding the submitted affidavit in terms of section 212(12) of the Act, and to then allow cross-examination. Therefore, the mere fact that evidence has been tendered in the form of an affidavit or certificate does not *per se* render the proceedings unfair.[181]

The exclusion of cross-examination as a result of section 212(4), does not limit the right to a fair trial.[182] However, the fairness of a trial would be effected if the court refused a fair request to call the deponent of an affidavit. The court further held in *Van der Sandt*, that a fair trial means that the state should present its evidence so that the accused or his representative will understand it, to enable him to contradict it

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180 Ashworth (*The Criminal Law Review*) *op cit* 272.

181 See *S v Van der Sandt* 1997 (2) SACR 116 (W) 133, where the accused had been convicted of drunken driving. A forensic analyst testified by way of certificate, in terms of s 212 of the Act, regarding the blood alcohol content of the accused's blood. On appeal, the accused argued that s 212 was unconstitutional as it curtailed the right of cross-examination. The court held that evidence tendered by s 212(4) concerns a formal non-contentious nature and is peripheral to the real issues before the court. The court held that admission of such evidence does not render the trial unfair in terms of the Bill of Rights. Rather, it depends on the nature of the evidence. Refer to subsection 7.4.3 for a detailed discussion of the accused's right to expert services.

182 However, if it were, it would be a proper limitation in terms of s 36(1) of the Constitution, because it would cause undue wastage of scarce state resources to provide oral evidence on mostly undisputed evidence. Also see *S v Van der Sandt supra*, where the court rejected an argument that s 212(4) and the whole of s 212 was unconstitutional because it curtailed the right of cross-examination. It held that evidence could be tendered in any form. If it was relevant, it was normally admissible.

if he so wishes. It also noted that the mere fact that an expert used an unnamed or unexplained process to establish a fact, does not lead to a fair trial. Therefore, it follows that for an accused to be able to challenge or rebut the contents of the affidavit, it must contain sufficient detail to establish the deponent's expertise, and the grounds on which the opinion was based.

Thus, the use of expert documentary evidence does not *per se* render the trial unfair. The provision for adducing the evidence by affidavit is not only meaningful, but also essential to the proper administration of justice.

10.3 THE RIGHT TO ADDRESS THE COURT ON EVIDENCE TO BE ADDUCED

Section 151 of the Criminal Procedure Act provides that an accused may address the court for the purpose of indicating what evidence he intends adducing.[183] However, the position in practice is that the defence very rarely avails itself of the right to open, by addressing the court. The reason is that in most cases, the full defence version will have been put to the state witnesses in cross-examination, and will be known to the court.

10.4 THE RIGHT TO GIVE AND ADDUCE EVIDENCE

Section 196 embodies the accused's right to testify in his own defence and to call witnesses for the defence, whilst section 179 embodies the right to compel the attendance of witnesses. An accused's right to present evidence for the defence, is entrenched in section 151 of the Act. The right "to give and adduce evidence" has a constitutional basis, and is derived from section 35(3)(i) of the Constitution.[184] An

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183 Section 151(1)(a) provides that if the accused should wish to lead evidence, he or his representative, may address the court on the evidence to be led, but may not comment on the evidence.

184 Section 35(3)(i) of the Constitution provides that every accused has the right "to adduce and challenge evidence". The right "to adduce evidence" includes *inter alia*, the right to call witnesses for the defence, and the right to compel the attendance of witnesses.

accused's right to "give and adduce evidence" is part and parcel of an accused's right to present an effective defence. This right is fundamental to the accused's right to a fair trial.

10.4.1 The accused's right to call witnesses

The right to call witnesses has been described as an important principle of a fair trial. Indeed it was held in *Taylor v Illinois*[185] that the right of an accused to present witnesses in his own defence is an essential attribute of the adversary system. This right is codified in the Act. Section 196(1)(a) of the Act provides that an accused may testify in his own defence at any stage during the trial, and or call any witness for the defence.[186] The accused is also a witness at his calling, and therefore, the accused should also be informed of this right. The court must give the accused the opportunity to exercise this right.[187] The magistrate's refusal to call a witness in *Younas*, was found to have denied to the respondent his fundamental right to a fair hearing. The respondent was denied the opportunity to call a witness, and this was prejudicial to his case. This constituted a gross irregularity in the proceedings, and resulted in a failure of justice. Similarly, a magistrate's refusal to grant a postponement to the defence, to enable an accused to secure the attendance of witnesses, has been found to be prejudicial to the accused's case.[188] An accused

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185 484 US 400, 408 (1988).

186 Also see s 151(1) of the Act.

187 See *S v Younas* 1996 (2) SACR 272 (C) 274. The reviewing court had to consider the refusal by a magistrate to allow a respondent to call a witness. The reviewing court found that the respondent's request was not a delaying tactic as suggested by the magistrate. It was a genuine desire to advance the evidence of others to support his denials of the applicant's evidence.

188 See *S v Levin* 1928 TPD 357, where a magistrate refused to grant a postponement at the request of the accused for the purpose of allowing them or their legal adviser to consult with and secure the attendance of witnesses for the defence. However, the court upheld the appeal against conviction on the ground that the magistrate had used his discretion wrongly with possible prejudice to the accused. The conviction was set aside, and the case remitted for retrial. In *Rex v Hatch* 1914 CPD 68, the lawyer for an accused applied for a postponement at the close of the case for the prosecution, in order to enable witnesses to be called for the defence. He mentioned the name of at least one witness whom he wished to call. The magistrate found it unnecessary to call the witnesses. The court found that the magistrate had acted wrongly in not granting the application.

has an absolute right to call a witness, and this is an unqualified right.[189]

The accused or his legal representative may call and examine witnesses for the defence.[190] However, the accused and his representative may not both control the defence case. The question regarding who is in control of the accused's case (either the accused himself or counsel) does not affect the right to present one's case. However, it has caused problems regarding, for example, the right of an accused to give evidence and the decision to give evidence. In the case of *R v Baartman and Others*[191] the court laid down the principle that a defended accused cannot participate side by side with his lawyer in the examination of witnesses. The legal representative has complete control of a matter once a client has instructed him. If counsel persuades the accused not to give evidence, the accused may not later on appeal challenge the correctness of the verdict on this ground.[192] Therefore, an accused in a criminal case cannot question his counsel's conduct of the trial, and claim relief because counsel "prevented" him from giving evidence. If the accused, in spite of his advocate's advice to the contrary, insists on going into the witness box, and thus makes it impossible for his advocate to exercise his legal ability honourably and faithfully, as required of him by his office, then the advocate must withdraw from the case rather than act contrary to the express wish of his client. However, it will constitute an irregularity if the accused has not been consulted as to whether he

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189 See *S v Gwala* 1989 (4) SA 937 (N). The court stated further that the judicial officer has no function, where an accused wishes to call a witness, but to hear what a witness might say. The judicial officer lacks the power to deny the accused the right to call the witness and a denial of that right amounts to a gross irregularity. This sort of irregularity is so prejudicial to the defence, that it destroys the whole trial. However, Steytler raises the question whether this dictum accurately reflects the common law. He states that the question must still be asked whether there are any inherent qualifications of the constitutional right to call a witness. See Steytler *Constitutional criminal procedure* 354.

190 However, it is undesirable that a witness be present in court before he gives evidence. This was held in *S v Manaka* 1978 (1) SA 287 (T).

191 1960 (3) SA 535 (A).

192 See *S v Matonsi* 1958 (2) SA 450 (A).

wants to give evidence or not.[193]

Although the accused is competent to testify, he cannot be compelled to do so either by the state, the court or his co-accused. The previous position was that the accused could make an unconfirmed statement from the dock, rather than to testify under oath from the witness box. However, section 196(3) makes this no longer possible. An accused who wants to testify must do so under oath or confirmation. The court also has a duty to inform the undefended accused submitting a plea in terms of section 115 of the Act, that such statement must be made under oath for it to constitute evidence.[194] Similarly, it has been held in **Australia** that is necessary that an unrepresented accused person should be informed of his right "to adduce evidence" that is, to give evidence himself, and to call witnesses, and that although it did not clearly appear that he did not desire to call evidence at his trial, it also did not appear that he did not desire to do so.[195]

A somewhat conservative approach regarding the accused's right to call witnesses, is followed by the United Nations Human Rights Committee and the European Commission. The HRC has held that article 14(3) does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel.[196]

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193 See *S v Majola* 1982 (1) SA 125 (A).

194 See *S v Mungoni* 1997 (2) SACR 366 (V). The accused had been unrepresented at his trial, but his rights were properly explained to him. The accused decided not to give evidence because he was afraid to get into the witness stand. The court held that a court was obliged to explain to the accused once more at the commencement of his case that his plea explanation in terms of s 115 of the Act, did not constitute evidence. An irregularity had been committed by the court in proceeding with the trial. The magistrate had also misdirected himself in not dealing with the accused's remarks and by not ascertaining the reason for the accused's fear. Therefore, the court found the trial to be unfair in terms of s 35 of the Constitution.

195 See *R v Doolan* [1962] Qd R 449 (Q Ct of Cr App), where the appellant now applied to the court to have further witnesses examined, giving as the reason for their not being examined at the trial, his ignorance of the law and of the fact that he could have subpoenaed them. As some of the proposed evidence appeared to be material, the court found that there had been a mistrial and the conviction of the appellant should be squashed.

196 See *Gordon v Jamaica supra* at 237/1987 (1992). Article 14(3) of the ICCPR refers to the right to obtain and examine defence witnesses.

An accused's right to obtain the attendance and examination of witnesses on his behalf in terms of article 14(3)(e), may also be waived by counsel.[197] In the *Kostovski v The Netherlands*[198] the European Court remarked that evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. It stated further that the accused should also be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making a statement or at some later stage in the proceedings. However, in *Kamasinski v Austria*[199] the European Court remarked that the right to call defence witnesses is not regarded as absolute. This right is subject to the principle of "equality of arms".[200]

Similarly, in *Engel et al v The Netherlands*[201] the court stated that an accused does

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197 *Pratt and Morgan v Jamaica*, Communication No 210/1986 and 225/1987, UN Doc A/44/40 at 222 (1989). In the above case, two men convicted for murder and sentenced to be executed, argued that the judge improperly closed the case before an important defence witness was allowed to provide an alibi for one of the accused. The accused argued that his attorney should have insisted upon calling the witness, and that the lawyer's failure to do so constituted a violation of art 14(3)(e). The Committee found that the defence attorney did not call the witness because of tactical considerations. Therefore, the Committee held that the lawyer's decision not to call the witness was within his professional judgment, and it did not amount to a denial of the accused's right to call and examine witnesses.

198 See *Kostovski v The Netherlands supra* at no 166 and 41. In the case of *Vidal v Belgium* A 235-B (1992), the accused was convicted on the basis of evidence in the case file without hearing oral testimony, including the testimony of those witnesses specifically requested by the defence. Such a course of action was found to be a breach of the right to a fair hearing.

199 See *Kamasinski v Austria supra* at no 168 and 102. Nevertheless, the court regarded it as an inherent part of a "fair hearing" that "the defendant should be given an opportunity to comment on evidence obtained regarding the disputed facts even if the facts relate to a point of procedure rather than the alleged offence as such".

200 The principle of "equality of arms", which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-a vis* its opponent. See *Krcmár and Others v Czech Republic* (2001) 31 EHRR 41, where the court found that respect for the right to a fair hearing, guaranteed by art 6(1), required that the applicants be given the opportunity to comment on the documentary evidence produced at the request of the Constitutional Court by the national authorities. A breach of art 6(1) of the Convention was found in said case.

201 8 June 1976 Series A no 22 and 91. Also see *Honsik v Austria* D 25062/94 18/10/95, 83/77, where it was held that Art 6(3)(d) does not guarantee an unlimited right for an accused to have witnesses called. As a general rule, the national courts are required to assess whether it is appropriate to call witnesses in the autonomous sense given to that term in the Convention.

not have an unlimited right in terms of article 6(3)(d), to call any witness he pleases. The aim of article 6(3)(d) was a full "equality of arms".[202] It has also been held that a defendant's right under section 2 of the Criminal Procedure Act 1865, to call witnesses and address the jury was to be construed in the context of the judge's obligation to ensure the proper conduct of the trial.[203]

The notion of a fair and adversarial hearing carries with it certain other rights, for example the right to confrontation with witnesses, the opportunity to hear them, and to examine them. The European Court stated in *Delta v France*[204] that these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at a later stage in the proceedings.[205] The court noted that in the

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However, a different view was held in *S v Gwala supra*, where the court held that the accused has an unqualified right to call witnesses. The South African position appears to be more progressive.

202 However, in the **United States**, the prosecution has additional powers both before and during trial, which are not available to the defence. Prosecutors have many means to obtain witness testimony which are not available to the defence. To illustrate this inequity, before trial, the prosecution can summon potential witnesses by using its arrest and pretrial detention powers, and by exploiting the general tendency of citizens to co-operate with the police. The prosecution also has the power to summon witnesses before the grand jury, whereas the defence has no legal power to compel witnesses to appear and answer questions except at trial and certain trial-related hearings, for example, to determine probable cause. Unfortunately, American courts have held that the government has no obligation to request a grant of testimonial immunity for the defence witnesses who fear self-incrimination. This clearly contravenes the principle of "equality of arms". See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 54.

203 See *R v Morley* [1988] 2 All ER 396, (1987) Times, 19 December, CA, where it was held that the defendant's right to call witnesses and address the jury was conditional on him using the right for the proper purpose of advancing the course of justice and for the proper conduct of the trial and he could not use it to frustrate the trial by behaving improperly or calling unnecessary witnesses.

204 See *Delta v France supra* at 574. The case concerned the examination of witnesses. The applicant's conviction was based solely on the written statements of the victim and her friend taken soon after the offence, but in the absence of the applicant. At the trial, the applicant did not call the victim or her friend as witnesses. Although the prosecution summoned them, the court did not take steps to order their appearance when they failed to appear. The applicant's requests to call several witnesses including the victim and her friend during his appeal, were refused as being unnecessary.

205 The accused complained, *inter alia*, that he had not had a fair trial and particularly, that he had been deprived of the right to examine witnesses and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him within the meaning

particular case, the applicant was not present when the victim and her friend gave the police their statements, on the basis of which he was convicted. Thus, the court held that in the circumstances, despite the fact that at the trial, the accused did not call the victim or her friend as witnesses, he was not given any proper opportunity to question the witnesses. This meant that his rights were subject to such restrictions that he did not receive a fair trial. The accused was therefore prevented from challenging, publicly and in the presence of other parties, the evidence brought against him, particularly in order to enable the court to judge the credibility of that evidence. The same conclusion was reached on similar facts in *Saidi v France*.[206] In *Antonaccio v Uruguay*[207] the complainant alleged among other violations of the ICCPR, that he was not allowed to present witnesses at his trial, held *in absentia* before a military tribunal. The HRC found that his article 14(3)(e) right to examine witnesses was violated, not only because he was not allowed to present witnesses, but also because he was unable to examine the witnesses against him, since neither he nor his counsel were present at the trial.[208] However, no violation was found in *Párkányi v Hungary*.[209]

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of arts 6(1) and (3)(d) of the Convention. The court concluded that there had been a violation of art 6(3)(d) of the Convention taken together with art 6(1). See Leigh "ECHR" in Weissbrodt and Wolfrum (1998) *op cit* 657.

206 See *Saidi v France supra* at 251. Also see *R v Vonarx* [1999] 3 VR 618 (Vic Sup Ct CA), where the court considered the issue of cross-examination of the accused on judicially excluded extra-curial statements. The court found that the trial judge's error influenced the accused not to give evidence, thus depriving him of a full and free choice as to the manner of presentation of his defence.

207 UN Doc A/37/40 at 114.

208 The HRC also held in *Mbenge v Zaire supra*, that a trial *in absentia* violated among other rights, the right to examine witnesses.

209 Communications No 410/1990 UN Document CCPR/C/45/D/410/1990 (1992). The accused alleged a violation of art 14(3), when the court rejected his application to have witnesses testify on his behalf. Hungary pointed out that both the court of first instance and the court of appeal had considered it unnecessary to hear the particular witness requested by the accused. The Committee held that it could find no violation of 14(3)(e), without evidence which would justify concluding that the court's refusal, upheld by the court of appeal, would infringe the "equality of arms" between the prosecution and the defence. The court also found that the circumstances under which the defence witnesses were heard were different from those under which the prosecution witnesses were heard. See Weissbrodt (2001) *op cit* 137.

The accused's right to call witnesses must be on the same basis as that of the prosecution.[210] The accused's right to examine or have examined witnesses for the prosecution is not so expressly limited. Nevertheless, the Committee appears to link the two.[211] In order for there to be a violation, the absence of a witness must be attributable to a decision of the court rather than the professional judgement of the accused's lawyer.[212] Refusal by the judge to call a witness may not be a violation where evidence would clearly not have helped the accused.[213]

However, where the failure of a witness to appear in court is as a result of the state's authorities, then the proceeding will be a violation of articles 14(1) and (3)(e). In *Grant v Jamaica*[214] the accused alleged that he had been unable to secure the presence of a witness on his behalf at his murder trial. The Committee noted that in the circumstances of the case, and the fact that it was a case involving the death penalty, the judge should have adjourned the trial and issued a subpoena to secure the attendance of the witness in court. The police should also have provided transportation for her.[215] However, the state is not held responsible where the defence fails to call a witness or where that person fails to turn up for reasons

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210 This is the application of "equality of arms" principle.

211 Article 14(3)(e) guarantees to the accused the same legal powers of compelling the attendance of witnesses and of cross-examining any witnesses as are available to the prosecution. See *Compass v Jamaica supra* at 375/1989, where no violation of art 14(3)(e) was found, where the accused was unable to cross-examine a prosecution witness at trial, but had the same opportunity as the prosecution to examine him at a preliminary hearing.

212 See *Henry v Jamaica supra* and *Prince v Jamaica* (269/1987). However, it is not clear whether the negligence of a court-appointed lawyer may amount to a violation. See *Reynolds v Jamaica* (229/1987).

213 See *Wright v Jamaica supra*.

214 No 353/1988 UN Doc CCPR/C/50/D/353/1988 (1994). The witness was willing to attend but had no means to travel to the courthouse on the day she was summoned by the police. The police allegedly told her that there was no car available to transport her.

215 Weissbrodt (2001) *op cit* 138.

beyond the court's control.[216]

In **England and Wales**, the attendance of a witness for criminal proceedings in the magistrate's court may be secured by a summons issued in terms of section 97 of the
Magistrates' Courts Act 1980. The magistrate or justices' clerk must be satisfied that the witness will be able to give or produce material evidence.[217] Similar provisions are said to apply regarding trials on indictment.[218] Where an accused is unrepresented, the trial judge ought to inform him, *inter alia*, of his right to give evidence and of his right to call witnesses in his own defence.[219]

According to Robinette, a criminal defendant's constitutional right to present a defence is implicit in the concept of fairness provided in the Fourteenth Amendment and the rights provided in the Sixth Amendment.[220] The **United States** has been slow to recognise the right to a present a defence, and it was not until 1967, that the Supreme Court clearly recognised a right to present a defence in a criminal trial. In *Washington v Texas*[221] the court made the following pertinent remarks:

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216 See *F v UK* Application No 18123/91, 15 EHRR CD 32 (1992).

217 See *R v Peterborough Magistrates' Court ex parte Willis* (1987) 151 JP 785, where the summons obtained by the defence was quashed where the nature of the anticipated testimony was not established.

218 See s 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965.

219 Failure to inform an unrepresented accused of his right to call witnesses may result in the conviction being squashed. See *R v Carter* (1960) 44 Cr App Rep 225, CCA.

220 See Robinette "*Montana v Egelhoff*: abandoning a defendant's fundamental right to present a defence" (1997) *Catholic University Law Review* 1349 at 1354. Similarly, Robert Clinton maintains that the Sixth Amendment assumes the presentation of some sort of defence on the part of the accused. His article suggests that there is a federally protected constitutional right of an accused to present a defence. See Clinton *op cit* 713.

221 388 US 14, 19 (1967). However, according to Clinton, *Washington* left unexplained major questions of how and when the accused's right to present a defence would be constitutionally protected. These issues were to be addressed until the 1970's. *Ibid* at 769.

"The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defence ... Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defence. This right is a fundamental element of the due process of law."

In *Chambers v Mississippi*[222] the United States Supreme Court considered whether the
exclusion of critical defence evidence denied a defendant due process of law. The Supreme Court concluded that the defendant had been denied a fundamental constitutional right to present a defence that included a right to present exculpatory evidence. Therefore, *Chambers* established that a defendant has a fundamental right to present a defence that includes the right to present evidence.[223] The right to present a defence is said to guarantee the accused's opportunity to fully participate in the search for truth at the criminal trial.[224]

Similarly, in **Australia**, the accused may give evidence and call witnesses in reply to the prosecution case. At the close of the prosecution case, the accused is asked whether he or she intends to adduce evidence.[225] Generally, the accused should give

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222 See *Chambers v Mississippi supra* at 284. The trial court had suppressed testimony by several defence witnesses. The evidence tended to show that a person other than the defendant had committed the crime for which he had been charged.

223 However, in *Taylor v Illinois supra* at 400, the court ruled that the preclusion of a criminal defendant's witness as a discovery sanction, does not *per se* violate the defendant's right to present a defence. The decision has been criticised by Stocker who argues that the "willful violation" standard that the court used instead will fail to adequately protect a defendant's Sixth Amendment right to present a defence, because it allows for the arbitrary exclusion of defence witnesses without requiring a balancing of the relevant interests involved. Also see Stocker "Sixth Amendment – preclusion of defence witnesses and the Sixth Amendment's compulsory process clause right to present a defence" (1988) *The Journal of Criminal Law and Criminology* 835 at 865.

224 This approach is consistent with the adversary system. See Clinton *op cit* 857.

225 See, *inter alia*, (NT) Criminal Code ss 360, 362, (QLD) Evidence Act 1977 s 131; (QLD) Criminal Code s 618, (TAS) Criminal Code s 371 (b), 371 (c).

evidence before calling witnesses, but it is not obligatory that he or she do so unless required by statute.[226] Similarly, in **Canada**, once the prosecution witnesses have testified, the defence has the opportunity to call witnesses.[227]

10.4.2 The accused's rights in terms of section 151 of the Act

The accused may give evidence for the defence, question witnesses for the defence and lead such other evidence on behalf of the defence as is admissible in terms of sections 151(1) and (2) of the Act. An accused's right in terms of section 151 of the Act, must be explained to him. However, the failure to record that fact does not necessarily lead to the setting aside of the conviction. However, the court remarked that it is imperative that an accused's rights in terms of section 151 of the Act, in respect of the adducing of evidence on behalf of the defence, be explained by the magistrate.[228] The magistrate should also ensure that this fact is properly recorded. The question also arises whether the accused must put their cases to the court in numerical order. The court considered the position of several accused in *S v*

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226 See *R v Lister* [1981] 1 NSWLR 110. Also see (NT) Criminal Code s 36, Sch 4 items II, IV, (TAS) Criminal Code s 371(d)(i).

227 See s 541(1), (5) of the Criminal Code. Also see *R v Ward* (1976) 31 CCC (2d) 466 (Ont H C), where it was held that justice must give the defence the opportunity to call witnesses, regardless of whether the crown has established a prima facie case; non-compliance amounts to jurisdictional error, resulting in the conviction being squashed. Also see *R v Thurlow* (1994) 34 CR (4th) 53 (Ont Gen Div), where it was found that the defence was deprived of calling witnesses as mandated by s 541(4) of the Canadian Criminal Code, and the accused's right to make full answer and defence was impaired. According to Paciocco, the Canadian courts have also advanced through their non-constitutional doctrine of full answer and defence, the principle that an accused should be entitled to adduce potentially exculpatory information. Thus, Charter authority has embraced the notion that an accused has a constitutional right to present a defence. For a discussion about the Canadian position, see Paciocco "The constitutional right to present defence evidence in criminal cases" (1985) *The Canadian Bar Review* 519-544 at 531, 538.

228 This was held in *S v Motaung* 1980 (4) SA 131. The magistrate had erred in not regarding the recording of this fact as necessary. However, the court found that the omission to record this fact does not, constitute an irregularity of such a nature as would entitle the accused to have the proceedings set aside, provided that his rights were explained to him. The court held that in the particular case there is no doubt that this had happened, and therefore, there was no failure of justice.

Ngobeni[229] where the question arose as to when the accused must put their cases to the court in numerical order. The court considered section 151 of the Act, and found that it does not prescribe the order in which several accused should respectively put their cases to the court. However, it has become established practice that several accused should put their cases to the court in numerical order.

If the accused answers in the affirmative, that is, he intends to testify in his own defence, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence. This was held in *S v Nene*[230] which involved an application on behalf of the accused for his wife to be called first. The court found that under ordinary circumstances, it would refuse the application. However, the convenience of witnesses was pertinent. Thus, the court acceded to the request and allowed the accused's wife to give evidence before him. If the accused decides, after other evidence on behalf of the defence has been led, to testify himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances in terms of section 151(1)(b) of the Act. The court also has a duty to inform the accused that he does not have to give evidence from

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229 1981 (1) SA 506 (B). It is a wrong procedure to ask an accused to exercise his choice of giving evidence and/or calling witnesses before the accused preceding him in numerical order has closed his case. This practice can only be departed from in the event of it being so ordered by the court after one of the parties has applied for such a departure, and the court is of the opinion that none of the parties would be prejudiced by it. It should only be in the interests of fairness and justice that such a departure is ordered. However, see *S v Mpetha and Others* 1983 (1) 429 (C), where the court held that if counsel for all the accused agree that they should present the cases for the accused in a different order to that in which the accused appear in the indictment, then it is their right and duty to do so. Counsel should not be called upon to explain to the court why they want to depart from the usual practice. Thus, the case confirmed that defence counsel are entitled by agreement between themselves, to present the cases for the various accused in any order which they in their discretion consider to be in their clients' best interests.

230 (1) 1979 (2) SA 520 (D). This was a matter which is covered by the wide umbrella of "good cause" referred to in s 151(b) of the Act, which for example, allows an accused's wife to give evidence before he does where she has young children in another province (as in this case) to return to, and would probably otherwise be detained over the weekend. Similarly, in *R v Smith* [1968] 2 All ER 115, it was held that the accused should be called as the first witness for the defence. Also see s 79 of the Police and Criminal Evidence Act 1984, which provides that if at the trial, the defence intends to call two or more witnesses, the accused must be called before the other witness or witnesses, unless the court in its discretion directs otherwise.

the witness-box, but that he may do so from the dock.[231]

The **Australian** courts have also considered the question whether an accused should be called first as a witness. No rule of law is said to prevent an accused from giving evidence even after he has called other witnesses for the defence.[232] It has also been held that although the desirable practice is that a defendant in a criminal trial be called to give evidence before other defence witnesses, evidence from a defendant at a later stage could not, as a matter of law, be excluded.[233] Although it is desirable that he should be the first witness where witnesses are ordered out of court, this rule does not apply to an accused who makes a statement.[234]

10.4.3 The accused's right to compulsory process

The right to compel the attendance of witnesses is entrenched in section 179(1) of the Act. The accused is also entitled to have witnesses subpoenaed by the court in terms of section 179(3) of the Act. This may occur even where he is not in a position to pay the required costs. Where the presiding officer is aware that an accused encounters difficulties in getting a witness to court, the accused should be informed of his right to compulsory process, and the court should also assist in securing the

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231 See, *inter* alia, S *v Mhalati* 1976 (2) SA 426 (Tk), *S v Mpofu supra* at 162 (RA). In **England**, it has been held that an accused must be asked whether he wishes to give evidence on oath or call witnesses. See *R v Moore* (1924) 18 Cr App Rep 29, CCA. An unrepresented accused should always be informed of his right to give evidence on oath or to make an unsworn statement to the court. A mere omission on the judge's part to inform him of this right is not a ground for squashing a conviction. See *R v Yeldham* (1922) 128 LT 28. However, in *R v Pine* (1932) 24 Cr App Rep 10, CCA, the conviction was squashed because the accused was not afforded an opportunity of giving evidence or of making any answer to the charge.

232 See *R v Richards* [1918] SALR 315 (SA Sup Ct Buchanan, J).

233 See *R v Lister supra* at 110. See *Connell v The Queen* [No 6] (1994) 12 WAR 133 (WA Sup Ct FC), where it was held that there is a rule of practice in Western Australia that when witnesses are out of court, the defendant should give his evidence before the other witnesses for the defence. The rule is based on ensuring the fairness of the trial. Counsel ought not to depart from the practice without the leave of the judge. If for any reason the practice is departed from the defendant cannot be denied the opportunity of giving evidence, but the departure should be a matter of comment.

234 See *R v Richards supra*.

attendance of the witness.[235] A presiding officer is not only obliged to advise the unrepresented accused of his right to call witnesses to give evidence, but he is also required to assist the accused in this regard.[236] Section 179(1)(b) of the Act now has constitutional status. In the case of *Pennington v Minister of Justice*[237] the court considered the accused's right to adduce evidence in terms of section 25(3)(d) of the Interim Constitution. However, the court suggested that it would be appropriate for the state to use its own resources to ensure the presence of any defence witnesses that the trial court may regard as material for a just disposition of the case. The state was also requested to make every effort to secure their attendance.

Steytler suggests that section 179 may constitute unfair discrimination against an indigent accused in terms of section 9(3) of the Constitution.[238] Section 179(3) provides that where an accused is unable to pay the necessary costs and fees of a

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235 See *S v Hlongwane* 1982 (4) SA 321 (N). The court stated that where an accused is unrepresented and has informed the court that he has a witness he wishes to call, the judicial officer must help such accused to bring the witness to court either by himself subpoenaing the witness under s 186 of the Act, or by informing the accused of his right to do so under s 179. The magistrate should also advise the accused of how to go about exercising such right. The court found that the accused did not in the circumstances of the case, have a real opportunity to call his witness and thus to present his full case. Thus, the magistrate's failure to provide the accused with that opportunity, amounted to an irregularity. This omission was found to be highly prejudicial to him, resulting in a failure of justice.

236 See *S v Hlakwane* 1993 (2) SACR 362 (O) 367. The court stated that the presiding officer is also required to subpoena the witnesses if it is necessary. Also see *S v Mzolo* 1994 (2) SACR 646 (N), where the court held that it was insufficient for the magistrate merely to have granted a postponement of seven days in order that the accused may call witnesses. It was clear that the accused's witnesses were highly material ones and the magistrate should have enquired from the accused what sort of difficulties he had encountered in contacting his witnesses. The court found that arrangements should have been made for the issue of subpoenas. The accused's election to have the case finalised in circumstances when he had been informed that he was only entitled to one postponement of seven days, was not a free and informed election to dispense with his witnesses. Therefore, the court set aside the conviction and sentence.

237 See *Pennington v Minister of Justice supra* at 279. The Minister had directed in terms of s 111 of the Act that the trial be held in Johannesburg. However, the accused and most of his defence witnesses resided in Cape Town. The accused lacked funds to ensure the attendance of witnesses at trial in Johannesburg. In review proceedings, the court held that the Minister's decision could not be reversed on any of the recognised grounds of review. The court also remarked that consideration should be given regarding the taking of evidence on commission in Cape Town.

238 Steytler *Constitutional criminal procedure* 355.

subpoena, the court may subpoena a witness whom it deems "necessary and material".[239] However, no such condition applies to state witnesses in terms of section 179(1) of the Act.[240] Steytler suggests that undefended accused should be informed of this right as a matter of course due to the constitutional nature of this right.[241]

The accused's right to compel witnesses for the defence is regarded as an important part of the right to adduce evidence in international law. This right is entrenched in the ICCPR and ECHR.[242] The ICCPR's provision concerning the right to examine witnesses is general in nature and does not address the issue of whether that right incorporates the right to direct confrontation. According to Sherman, two conclusions emerge from the text of article 14(3)(e), namely that an accused has the right to question the witnesses against him, and that both parties must be treated equally and follow the same procedures regarding the examination of witnesses.[243] According to the HRC, this provision was designed to guarantee the accused the same legal

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239 The South African Law Commission argues that the deletion of the word "material" from s 179(3)(a)(iii), may solve Steytler's problem as the threshold requirements for the state and defence will then be on par. See *South Africa Law Commission: Discussion Paper 90* "The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing" (March 2000) at 54.

240 See *S v Ntuli* 1996 (1) BCLR 141 (CC). The payment of witness fees is also discriminatory. Although s 191(1) entitles a state witness to witness fees over and above the travelling and transport costs unless the court directs otherwise, a witness for the defence will receive travelling and transport expenses only if the court makes such an order (s 191(2) of the Act together with GN R 2596 GG 13604 of 1 Nov 1991 reg).

241 Steytler *Constitutional criminal procedure* 356.

242 See art 14(3)(e) of the ICCPR; art 6(3)(d) of the ECHR respectively. Article 14(3)(e) of the ICCPR provides that every accused has the right to "examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Article 6(3)(d) of the ECHR, has the same wording. Article 7(1)(c) of the African Charter on Human and Peoples' Rights (AfCHPR) refers to the "right to defence, including the right to be defended by counsel of his choice". Art 8(2)(f) of the American Convention on Human Rights (AmCHR) provides that an accused has" the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts". Both articles 14(3)(e) of the ICCPR and 6(3)(d) of the ECHR also state that an accused's right to compulsory process should be under the same conditions that apply to state witnesses. These articles differ from s 179(1) of the Act *supra*, which clearly prefers state witnesses over defence witnesses.

243 Sherman *op cit* 853.

powers to compel the attendance of witnesses and to examine or cross-examine any witnesses available to the prosecution.[244] A violation of this provision was found by the HRC in *Lloyd v Jamaica*.[245] The witness requested on behalf of the defence, could not attend the hearing because she lacked the means to travel to court. The Committee held that the judge should have adjourned the trial and issued a subpoena to secure the attendance of witnesses, and the police should have made transportation available to her.

The **American** courts have also upheld the right to compulsory process in terms of the Sixth Amendment, which provides that criminal defendants have the right to compel witnesses to testify on their behalf.[246] This provision is referred to as the Compulsory Process Clause, and applies both to federal and state criminal proceedings.[247] The Compulsory Process Clause provides that a defendant has the right to subpoena witnesses. This right is not limited to subpoena favourable witnesses. It also encompasses the ability to elicit testimony from those witnesses

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244 Weissbrodt (2001) *op cit* 136. Article 14(3)(e) is more progressive than s 179.

245 No 351/1988. This was a case involving the death penalty. The commission considered this fact in coming to its conclusion.

246 See the Sixth Amendment of the US Constitution which guarantees an accused the right "to have compulsory process for obtaining witnesses in his favour". Also see *Pennsylvania v Ritchie* 480 US 39 (1987), and *White v Illinois supra* at 346, where it was held that an accused needs compulsory process for "witnesses" who would not testify without being compelled. Also see *Taylor v Illinois supra*, where a majority of the United States Supreme Court held that the compulsory process clause of the Sixth Amendment was not violated by the preclusion of a witness's testimony as a sanction for the violation of discovery rules. The decision in *Taylor* has been criticised by Stocker, who maintains that the court failed to apply the appropriate balancing test for determining Sixth Amendment rights in reaching its holding on the constitutionality of the preclusion sanction. See Stocker *op cit* 864.

247 The Compulsory Process Clause can be viewed as a mirror image of the Confrontation Clause. Whilst the Confrontation Clause ensures that the defendant in a criminal trial is allowed to cross-examine adverse witnesses, the Compulsory Process Clause allows him to produce witnesses in his favour. See Robinette *op cit* 1353. Also see Jonakait (*The Journal of Criminal Law and Criminology) op cit* 713-746, where the author states that the Compulsory Process Clause enables the accused to call on the coercive power of the state to enable him to produce witnesses in his favour. For example, compulsory process places a duty on the government to assist the accused in producing witnesses. See *Barker v Wingo* 407 US 514, 527 (1972), where the court held that a defendant has no duty to bring himself to trial; the state has that duty as well as the duty of ensuring that the trial is consistent with due process.

present at trial. In the case of *Washington v Texas*[248] the majority emphasised that the right of an accused to have compulsory process for obtaining witnesses in his favour is on an equal footing with other Sixth Amendment rights. The court stated that just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defence. The court held that the accused was denied his right to have compulsory process for obtaining witnesses in his favour, because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defence.

The state should also assist the accused in securing the attendance of witnesses. In *Barber v Page*[249] the court noted that a witness is not "unavailable" for purposes of the exception to the confrontation requirement, unless the prosecutorial authorities have made a good-faith effort to obtain his presence at the trial. The state had made no such effort to secure the presence of the witness. A violation was found to exist as the right to confrontation may not be dispensed so lightly. Thus, the *Barber* case enunciated the general principle that the prosecution must make a good-faith effort to bring the declarant to the site of the trial.[250] However, Imwinkelreid states that as a constitutional minimum, the prosecution must either exhaust all available means of compulsory process or make a persuasive case specific showing that it would be

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248 See *Washington v Texas supra* at 14. The court was called upon to decide whether the Sixth Amendment guarantees an accused the right under any circumstances to put witnesses on the stand, together with the right to compel their attendance in court.

249 See *Barker v Page supra* at 719. The court had to decide whether the accused's right to confrontation, which was guaranteed by the Sixth and Fourteenth Amendments was violated by the use of the preliminary hearing script, even though the accused was represented by a lawyer, and had the opportunity to cross-examine the witnesses had he so chosen.

250 Similarly, in Michigan, the prosecution is required to exercise "due diligence to produce the absent witness". See *People v Bean* 457 Mich 677, 580 NW 2d 390 (1998), where the Michigan Supreme Court found that although the police had taken affirmative steps to find the witness, their efforts did not rise to the required showing of "due diligence". Thus, a new trial was ordered. However, see *Mancusi v Stubbs supra*, where the court allowed the state to assume the unavailability of a witness because he now lived in Sweden, and to use the transcript of the witness testimony at a former trial.

futile to resort to the process.[251]

Similarly, in **Australia**, a miscarriage of justice was found to exist where a trial judge refused an adjournment to enable an accused person to produce alibi witnesses.[252] When considering whether a trial ought to be adjourned due to the unavailability of a witness, the test is whether the risk that the accused will not be able to question or to call the witness will prevent the accused having a fair trial.[253]

10.4.4 Limitations on the right to give and adduce evidence

The question arises whether there are limitations on the constitutional right to call witnesses. The common-law position is that the court may refuse to allow an accused to call a witness where the witness "cannot possibly give relevant evidence".[254] However, the court has to be "exceptionally careful" in arriving at such a conclusion. Where an accused is not intellectually developed and is unrepresented, the court must be exceptionally careful in refusing a request to call a witness.[255] Before it

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251 See Imwinkelreid *op cit* 536. Also see Epstein *op cit* 179-180, where the writer argues that a deposition will not satisfy the Confrontation Clause if the state has conducted it for the primary purpose of making a witness unavailable at trial, has improperly ensured the witness's absence at trial or has failed to take all reasonable steps to bring a witness to trial whose testimony it will present. Therefore, the Government should undertake every effort ranging from formal extradition to a request for the witness's voluntary return, to secure the witness's presence at trial.

252 See *Thornberry v The Queen* (1995) 69 ALJR 777 (HC). Medical circumstances had made the earlier attendance of those witnesses impracticable and unreasonable.

253 It is not necessary to establish that the witness was essential to the defence. See *R v Yuill* (1993) 69 A Crim R 450 (NSW Ct of Cr App).

254 The court stated in *S v Nkambule* 1995 (2) SACR 444 (T) 448, that this principle also applies to the Bill of Rights. The purpose of this right is to establish the truth, and irrelevant evidence does not achieve that purpose. Also see *S v Phomadi* 1996 (1) SACR 162 (E), where the court held that the *audi alteram partem* principle still applied to a person who is accused of contempt of court. Such an accused should be given the right both in respect of his conviction and sentence to give evidence, to call witnesses in his defence and to address the court. In **England**, the decision to call and examine witnesses at the trial depends on the parties themselves. However, the judge does have an overriding discretion and could refuse to hear a witness if he or she felt that the testimony would have little or no relevance to the issues. It would be necessary to advance reasons for a refusal to hear a witness. See Cheney *et al op cit* 100.

255 See *S v Tembani* 1970 (4) SA 395 (E).

decides on a refusal, it should ensure that such a witness cannot possibly adduce relevant evidence. If the court is not careful in fulfilling this obligation, a miscarriage of justice may occur. A court should not refuse a undefended's accused's request to call witnesses even if it believes that the accused is using delaying tactics, or if there is uncertainty regarding the whereabouts of the witnesses.[256] Where there is no proof that certain witnesses are available, the court may not draw an adverse inference from the accused's failure to call them.[257]

According to Steytler, section 182 of the Act violates this principle.[258] Section 182 provides that where an accused subpoenas a prisoner as a defence witness, prior authority of the trial court is required. The accused's request is granted only if the court is satisfied that the evidence of such witness is "necessary and material for the defence" and that the "public safety or order will not be endangered by the calling of the witness".[259] Thus, the high standard of relevancy requires that the evidence must be necessary and material, and that it will not endanger the public safety or order.[260] Similarly, the right to present witness testimony is not absolute in international law. It has been held that an accused does not have a constitutional right to present testimony "that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence".[261] The witness testimony must also be material and favourable to

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256 See *S v M* 1990 (2) SACR 131 (B). Also see *S v Selemana* 1975 (4) SA 908 (T) where it was held that when an accused is unrepresented, the magistrate, before he refuses a request, should ensure that such a witness cannot possibly give relevant evidence. A miscarriage of justice may occur if the court is not careful in observing this obligation. The denial of such an opportunity leads to a gross irregularity in the proceedings.

257 See *S v Phiri* 1958 (3) SA 161 (A).

258 Steytler *Constitutional criminal procedure* 355.

259 *Id*.

260 *Id*.

261 See *Taylor v Illinois supra*. This case is authority for the preposition that a court may refuse to allow a defence witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pre-trial discovery request and thereby attempted to gain a tactical advantage.

the defence in order to be constitutionally protected.[262]

Section 342A of the Act which refers to the compulsory closure of the defence case by a court, may limit an accused's right to adduce evidence.[263] A *prima facie* violation of the right occurs when the accused is prevented from leading evidence in this way. The justification for such an action would depend on the circumstances of its application. However, in certain cases, the accused's actions may be regarded as a valid waiver of the right to adduce evidence where, for example, an accused has made no effort to get a desired witness to court.[264] On the other hand, the enforced closure may be regarded as a justifiable limitation where there are compelling reasons "to eliminate the delay and any prejudice arising from that or to prevent further delay or prejudice".[265]

Therefore, the right of an accused to give and adduce evidence, is regarded as a fundamental right to a fair trial. This right cannot be dispensed easily. However, the right is not absolute and can be departed from in exceptional circumstances. The justification for such action would depend on the circumstances of the case.

10.4.5 The rights of the co-accused

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262 See *United States v Valenzuela-Bernal* 458 US 858 (1982).

263 Section 342A(3)(d) provides that where the court finds that the defence has delayed the completion of proceedings unreasonably, the accused has pleaded to the charge and is unable to proceed with the case or refuses to do so, it may issue an order that "the proceedings be continued and disposed of as if the case for the defence has been closed".

264 See *Perera v Australia* No 536/1993; *Gordon v Jamaica supra* at 237/1987 and *Pratt and Morgan v Jamaica* Nos 210/1986 and 225/1987 respectively. These cases have emphasised that the state cannot be held accountable in instances where the defence lawyer fails to call a witness. Similarly, the defence lawyer may waive the accused's right to call witnesses. In *Perera v Australia supra*, the point was raised that a defence lawyer had not called a certain witness to court. The HRC held that the state cannot be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. Also see De Zayas "UN human rights treaties" in Weissbrodt and Wolfrum (1998) *op cit* 687.

265 Section 342A(3).

An accused's right to call a witness may conflict with a co-accused's constitutional right not to testify. Steytler suggests that a balancing of these rights should take place.[266] The court has a discretion in terms of section 157 of the Act to order a separation of trials. Section 157(2) of the Act provides that the court may order a separation of trials where one accused may be prejudiced by the joint trial. However, it was held in *S v Somciza*[267] that the prejudice to one accused should be weighed against the prejudice of a co-accused and the state. This is because the separated trial has to commence afresh. A long trial will also lead to a separated trial taking place at considerable cost to the state and witnesses.

The question arose in *S v Shuma*[268] whether an accused's constitutional right to adduce evidence overrides the prejudice a new trial may cause the state. The court sought to balance the interests at stake by determining whether the accused would suffer prejudice if he decided not to call his co-accused. The co-accused could only provide limited evidence. Therefore, the court refused the application because there was no real danger of prejudice to the accused. If there was any possibility of prejudice to the accused, it would be outweighed by the prejudice to the state. The court concluded that the refusal to order a separation of trials, did not infringe an accused's constitutional rights to a fair trial. Rather, it was a reasonable and justifiable limitation of the right to call a witness.

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266 Steytler *Constitutional criminal procedure* 356.

267 *S v Somciza* 1990 (1) SA 361 (A) 367. The court remarked that the fact that one accused pleads guilty and another not guilty, is not the only ground upon which a separation of trials is ordered. In exercising its discretion, the trial court has to weigh up the prejudice likely to be caused to the applicant by a refusal to separate, against the prejudice likely to be suffered by the other accused or the state if the trials are separated, and then to decide whether or not, in the interests of justice, a separation of trials should be ordered. In the present case, the court found that the magistrate appeared not to have applied this test, and he exercised his discretion incorrectly when he refused to order the trials to be separated.

268 1994 (4) SA 583 (E). The court was asked to entertain an application in terms of s 157(2) of the Act, because accused no 3 was unwilling to testify on behalf of accused no 2 in the same proceedings in which he was being tried. The court held that it had a discretion in terms of s 157(2) to order or refuse to order the separation of trials. However, this discretion had to be exercised judicially in the promotion of the interests of justice, and prejudice to the accused was the primary consideration. The court held that evidence that the co-accused might give was restricted to peripheral issues. A separation of trials would not serve the wider interests of justice. Rather, a separation of trials may effect the realisation of both rights.

The co-accused may decide to testify in his own defence. The other accused cannot compel him to testify but he is competent to testify. Because the co-accused is merely testifying on his own behalf, and not on the behalf of the other accused, the prosecutor as well as the other accused are entitled to cross-examine him.[269] The one spouse cannot call the other spouse as a witness but either can testify on his or her own behalf. If the spouse testifies on his or her own behalf, what he or she says in respect of the other spouse is admissible against the other, irrespective of whether it is prejudicial to or in favour of such other spouse.

An accused's right to adduce evidence may also conflict with a co-accused's pre-trial right to remain silent. However, the courts have come out in favour of the rights of the co-accused. The Supreme Court of Canada tried to balance one accused's right to remain silent against the other's right to make full answer and defence in *R v Crawford*.[270] It allowed a co-accused to cross-examine the other on the latter's pre-trial silence. However, it restricted the cross-examination to the question of credibility. The co-accused's silence could not be used as positive evidence of guilt. Therefore, a co-accused was granted greater latitude to cross-examine than the prosecution. In *S v Aimes*[271] the learned judge allowed at the request of the second accused, the introduction of the record of the bail proceedings, which contained evidence obtained in violation of the first accused's rights against self-incrimination. The court allowed the bail evidence, provided that it could not be used against the first accused as a statement of the truth of its contents. Thus, the rights of the co-accused were protected.

10.4.6 The right to recall and re-examine witnesses

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269 See *S v Langa supra* at 941. The state cannot call a co-accused to testify on behalf of the state, except in certain circumstances, such as where the charge against the co-accused is withdrawn before he pleads; the co-accused pleads guilty so that there is no dispute between him and the prosecution or a separation of trials is ordered where both accused pleads not guilty. It is noteworthy that although a person who has been convicted but has not yet been sentenced, is technically a competent witness, it is desirable that he only be called after the passing of sentence.

270 (1995) 96 CCC (3d) 481 (SCC).

271 1998 (1) SACR 343 (C) 350.

Section 167 of the Act provides that a duty rests on the court to subpoena and examine or recall and re-examine any person if his evidence appears to the court to be necessary to the just decision of the case. The duty arises when the court is of the opinion that the evidence is essential. The court has a discretion as to whether it will call such a witness. If a judge exercises his discretion improperly, this would constitute an irregularity which may lead to the conviction being set aside.[272] If a court does call a witness in terms of section 167, the party that is adversely affected by his evidence should be given an opportunity of rebuttal and any party that desires to cross-examine such a witness should normally be allowed to do so.[273] However, the court may only recall and re-examine an accused that has testified at the proceedings in terms of section 167 of the Act. Where neither the state nor the defence has adduced any evidence and the accused, in the absence of any evidence, should be acquitted and discharged, it is irregular for the presiding officer to call a witness in terms of either section 167 or section 186.[274]

The interpretation of section 167 by our courts illustrates that the accusatorial system is firmly embedded in South African criminal procedure. The accusatorial system, which was taken over from English law, implies that the presiding officer plays a

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272 See *S v D* 1951 (4) SA 450 (A). Also see *S v Shezi* 1994 (1) SACR 575 (A), where the court was called upon to decide whether the court *a quo* had acted improperly in exercising its discretion in terms of s 167 of the Act. The court had recalled a state witness who had testified at a trial within a trial. The appeal court found that the appellant could not have been prejudiced in that the relevant evidence was not necessary to sustain a conviction. Even if the evidence had been necessary, the court had not acted improperly in recalling the witness as s 167 confers a wide discretion on the court to recall a witness "at any stage in the criminal proceedings". The evidence in question was also inherently formal and uncontroversial.

273 See *S v Soni* 1973 (1) PH HS20 (N).

274 See *S v Kwinika* 1989 (1) SA 896 (W). However, see *R v Harris* [1927] 2 KB 587; [1927] All ER Rep 473, where it was held that a judge in a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice. However, in order that injustice should not be done to the accused, a judge should not call a witness in a criminal trial after the case for the defence is closed, except in a case where a matter arises *ex improviso*, which is unforeseeable on the part of the prisoner.

passive role during the trial.[275] In our system of criminal procedure, a presiding officer may put questions during the trial to clarify an issue.[276] It is generally undesirable that he should participate extensively in the questioning of a witness.[277] However, where an accused is unrepresented, a judicial officer may participate in the examination of witnesses.[278] Questioning of the accused by the court, leading to self-incrimination or aggravation of punishment, is irregular unless the accused chose to testify.[279] However, the presiding officer may endeavour to elicit favourable information from the accused for the purposes of sentencing.[280]

10.5 THE RIGHT TO ADDRESS THE COURT AT THE CONCLUSION OF

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275 On the other hand, the inquisitorial system which is widely practised in Europe, implies that the judge is far more active in questioning witnesses, including the accused.

276 In **Australia**, the position is that it is within the trial judge's discretion to recall crown witnesses at the close of the case for the defence, to clarify a matter which had been left obscure, and the judge may so act without a request from the jury. See *R v Cartledge* [1959] ALR 628 (AUS).

277 See *S v Roopsingh* 1956 (4) SA 509 (A) and *S v Adriantos* 1965 (3) SA 436 (A). Similarly, in **English law**, a judge is entitled to question witnesses during the trial, but he may not dominate the proceedings. The appellate court may overturn a conviction if a judge interferes too much. See *Ali v London Spinning Co Ltd*, the Court of Appeal, *Times* (London), Apr 30, 1971 at 9, where the appellate court reversed the trial court's decision on the grounds that the judge had participated actively in the examination of witnesses. Also see *CG v United Kingdom* (2002) 34 EHRR 31, where the court did not find that the judicial interventions, although excessive and undesirable, rendered the trial proceedings as a whole unfair. Regarding judicial intervention in criminal trials in England, see Ellison *op cit* 609-611. Similarly, it has been held in **Australia**, that a judge should refrain from taking an unduly active part in a trial at which he is presiding, and particularly should not constantly interrupt by cross-examining the accused or a witness during the presentation of his defence. See *R v Martin* (1959) 60 SR (NSW) 286; 77 WN 4 (NSW Ct of Cr App).

278 See *S v Sigwahla* 1967 (4) SA 566 (A) 568.

279 See *S v Jawuka* 1970 (1) SA 368 (C) and *S v Mngadi* 1973 (4) SA 540 (N).

280 See *S v Sithole* 1974 (2) SA 572 (N).

The accused is granted this right (before judgment) in terms of section 175 of the Act.[281] After all the evidence has been adduced, the prosecutor may address the court, after which the accused or his or her attorney/legal representative may address the court in terms of section 175 of the Act.[282] Section 175 does not make it obligatory for the court to enquire from the accused or his legal representative whether he wishes to address the court. However, such an enquiry should be made and the response recorded. The question arises regarding what consequences would flow from the court's failure to grant the accused his rights in terms of section 175. This can occur in a number of ways, for example, by the presiding officer deliberately preventing the accused from addressing the court, or where the accused or his legal representative refuses to address the court. The case of *S v Mabote en Andere*[283] is authority for the preposition that an accused person has the right to address the court on the merits of the offence charged against him, and that the opportunity to exercise that right is given to him regardless of his prospects of success. At the end of the evidence, counsel should address the court on conviction only and not on sentence.[284]

If the accused is aware of his rights in this respect, but as a result of his own fault, fails to exercise them, failure on the part of the judicial officer to invite him to address

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281 Section 175(1) of the Act grants the accused the opportunity to address the court after all the evidence has been adduced.

282 Section 175(2) of the Act provides that if the accused or his legal representative raises a matter of law, the prosecutor may reply, and he may also, with the court's leave, reply on any matter of fact raised by the accused in his address.

283 1983 (1) SA 745 (O). The court held that a failure to give the accused the opportunity to address the court, affects the essence of administration of criminal justice and cannot be regarded as anything other or less than a gross irregularity. Such an irregularity destroys the fairness and therefore, the legal validity of the proceedings in question.

284 A bifurcated process should be followed: as there is a conviction in place the defence should argue first and have a right of reply. See *S v Msiwa supra* at 413.

the court will not amount to an irregularity.[285] However, if the accused is deprived of the opportunity to address the court by the conduct of the judicial officer, it will be a fatal irregularity, unless it is clear that he has not been prejudiced. In the case of *R v Parmanand*[286] the court stated that accused persons must not be deprived by the judicial officer of the opportunity to address the court. Although the statute does not provide that such enquiry shall be made, judicial officers should not only make such enquiry but also record what the response to it is. A partial failure to allow a person to address the court, where for instance, argument is stopped on a material factor and counsel or the accused is not given an opportunity to address an argument on such a material point which is pertinent to the case, constitutes an irregularity in the proceedings.[287] The consequences will be the same if the accused or his legal representative is not allowed to address the court on a material issue.[288]

The general rule regarding a legal representative is that if he wishes to address the court, he must do so without delay if he is not invited to do so by the court.[289] The court considered the right of an accused or legal representative to address the court

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285 See *S v Cooper* 1926 AD 54, where the accused was well aware of his rights but made no attempt to assert them when the presiding officer inadvertently failed to invite the accused to address the court. Therefore, the court held that there had been no irregularity. Also see *S v Kamffer* 1965 (3) SA 96 (T).

286 1954 (3) SA 833 (A). The appellant stated that he had not been given an opportunity to address the court at the close of the evidence and before verdict. This was substantiated by affidavits, and the magistrate in his reasons had stated that the appellant had not asked to address the court before judgment and that he had not in fact done so, though he had addressed the court in mitigation and given evidence and called a witness. The court found that the appellant had indeed been deprived by the magistrate of the opportunity to address the court and allowed the appeal.

287 See *R v Cooke* 1959 (3) SA 449 (T). The court held that where there is a failure to grant an accused an opportunity to address the court, prejudice will be assumed, and if there is any doubt regarding whether there was prejudice, the court must set aside the proceedings. Thus, it is incumbent upon the state to show absence of prejudice. Also see *S v Kwinda* 1993 (2) SACR 408 (V), where it was held that a failure to grant the accused the opportunity to address the court before judgment is a gross irregularity which will result in the setting aside of the proceedings, unless it is clear that the accused was not prejudiced thereby.

288 See *R v Cooke supra*.

289 See *S v Bresler* 1967 (2) SA 451 (A).

in *S v Breakfast*.[290] The court found that section 183(1) of Act 56 of 1955 provides that an accused or his legal representative cannot be denied the right to address the court after all the evidence has been led. If a judicial officer is deprived of the advantage of hearing the defence attorney's argument because he did not invite him to address the court, with the result that the judicial officer paid insufficient attention to material matters in the case, it may lead to a reversal upon appeal.[291] The position of the undefended accused was raised in *S v Brand*[292] where the court held that an undefended accused should be asked if he has any argument to submit.

The court must ask every accused to address it on the merits and give them the opportunity to do so. The court's failure to comply with this duty is regarded as an infringement of an accused's right to a fair trial.[293] The court also noted in *S v Mbeje*[294] that a failure to grant the accused an opportunity to address the court constituted a violation of section 175 of the Act, and the accused's right to a fair trial. However, where an infringement takes place, then the remedy following such an infringement would be the setting aside of the proceedings unless it is "abundantly

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290 1970 (2) SA 611 (E).

291 See *S v Sitlu* 1971 (2) SA 238 (N). However, in *S v Mutambanengwe* 1976 (2) SA 434 (RA), the Rhodesian Appellate Court held that although it was clear that the accused had wanted to address the court, a failure to be allowed to do so did not *per se* constitute an irregularity with a resultant possibility of prejudice.

292 1975 (2) PHH 138 (T). It appeared that the accused had not been advised of his right to address the court at the conclusion of evidence. The magistrate had stated that the accused had not been prevented from doing so. The court on review held that this was not a sufficient recognition of the right of the accused.

293 See *S v Zingilo* 1995 (9) BCLR 1186 (O). It was held that a denial of the opportunity to address a court on the merits before judgment constituted a breach of the right to a fair trial. Any infringement of any of the fundamental rights in the Interim Constitution, was held to amount to what had previously been regarded as a fatal irregularity, vitiating the proceedings as a whole.

294 1996 (2) SACR 252 (N). The magistrate had omitted to grant the accused no 2 who was not legally represented, an opportunity to address the court. The court held that because the accused had been denied the opportunity of making his case, the conviction should be set aside. However, see *S v Vermaas* 1997 (2) SACR 454 (T), where the court had to enquire into the exact nature of s 175(1) in order to determine what consequences would flow from an accused's failure to address the court. The court found that although any denial of the right of the address will be regarded as a gross irregularity, an accused is not obliged to address the court. As long as the accused is given the opportunity to make the address, any subsequent refusal or failure on the part of such accused, will mean that the right has been either abandoned or lost.

clear that there has been no prejudice to the accused".[295] The right of an accused to address the court on the merits is not only an expression of the *audi alteram partem* principle and thus the right to a fair trial, but it is also an important part of the right to adduce and challenge evidence.[296] However, dispensing with this right in extreme cases would have to meet the requirements of the limitation clause.[297]

Thus, it is clear that a court's failure or refusal to allow the right of address is an irregularity which will generally lead to the setting aside of the proceedings, unless it is clear that the accused suffered no resultant prejudice.

10.6 THE RIGHT TO ADDRESS THE COURT ON SENTENCE

Section 274(2) of the Act provides that the court may grant the accused an opportunity to address the court on sentence.[298] The accused is given the opportunity to supply evidence in mitigation of sentence after the previous convictions have been dealt with. The accused or his legal representative may address the court from the bar, regarding mitigating circumstances in less serious cases. It has been held that the address on sentence should not include facts. Rather, the facts should be proven

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295 See *S v Mbeje supra* at 257.

296 See *Kamasinski v Austria supra*. However, Cowling maintains that the focus in light of the Constitution is whether or not the accused has had a fair trial as guaranteed by the Constitution. Section 175(1) guarantees the right of an accused to address the court and any form of denial of that right whether deliberate or purely as a result of an oversight on the part of the trial court, constitutes a violation of the right to a fair trial. Therefore, review courts no longer have to speculate whether an address would have affected the outcome or not. Thus, the advent of the Bill of Rights and the guarantee of a right to a fair trial, has simplified the criminal process. See Cowling "The right to address the court at the close of a criminal trial" (1997) *South African Journal of Criminal Justice* 203-207 at 207.

297 See *S v Nel supra* at 730.

298 The case of *S v Louw* 1978 (1) SA 459 (C), is authority for the preposition that a court is obliged in terms of s 274(2) of Act 51/77, to give the accused an opportunity of addressing the court on sentence. The position in the **United States** is that the defendant always has the right to address the court at sentencing. This is called the right of allocution. See Hall *op cit* 744-746.

by evidence under oath.[299] However, this approach is not consistently followed. After the defence has led all the evidence on behalf of the accused, the state will normally be given the opportunity to lead evidence and to address the court on sentence.

10.7 CONCLUSION

The above discussion and case law demonstrates that the right to present one's case is fundamental to a fair trial. It also a fundamental requirement of a fair trial, that there be "equality of arms". Therefore, the defence and the prosecution must be on an equal footing. This means that each party must be given a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-a-vis* his opponent.[300] South Africa follows the accusatorial system.[301] The interpretation of section 167 by our courts, illustrates that the accusatorial system is firmly entrenched in our law. In the accusatorial system, the right to direct confrontation is regarded as one of the essential ingredients in a fair trial.[302] Those states that do not guarantee the right to direct confrontation of witnesses, provide for "equality of arms" in judicial proceedings. The UN Tribunal has adopted the accusatorial model *vis-a-vis* the examination of witnesses.[303] Trials in the inquisitorial system are characterised as an investigation.[304] The judge defines the

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299 See *S v Gough* 1980 (3) SA 785 (NC).

300 Thus, the parties must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed. See, *inter alia*, *Dombo Deheer BV v The Netherlands* (1993) 18 EHRR 213.

301 The accusatorial system implies that the presiding officer plays a passive role during the trial. He relies on information placed before him by the parties. Please refer to chapter 1, subsection 1.2.2.1 for a detailed discussion about the accusatorial system.

302 Many countries such as Botswana, United States and Mexico provide for direct confrontation in their constitutions.

303 The accusatorial model is followed in Great Britain and the United States.

304 France follows the inquisitorial system. The French system does not prioritise the defendant's right to confront, because a judge is responsible for the examination of witnesses.

issues and decides which witnesses to call at the trial. Cross-examination by the parties is also virtually non-existent.

The accused's right to present an effective defence includes the right to cross-examine evidence in terms of section 166 of the Act.[305] This enables him not only to elicit favourable evidence, but also to test the truthfulness of the evidence presented by the opposing party. Cross-examination is regarded as the principal method of testing the veracity and reliability of evidence. A judicial officer is obliged to assist an unrepresented and illiterate accused in presenting his defence by way of cross-examination.[306] However, the right to cross-examination is not absolute. A judicial officer has a discretion to control improper cross-examination,[307] and may disallow questions that are irrelevant, vexatious, abusive, oppressive and discourteous.[308] An accused cannot contend that any curtailment of his cross-examination violates his right to a fair trial. A *prima facie* limitation of the right occurs when the cross-examiner is substituted by an intermediary, and the child witness is screened from the courtroom. The court had to consider the rights of an intermediary and the competing interests of the accused and the child witness in *Klink*. The court endorsed the position of the intermediary, and held that the accused's right to cross-examine was not violated by section 170A(1) of the Act, which allows for the appointment of an intermediary. The court found that the interests of justice required that an intermediary be appointed to protect the needs of the child witness.[309] Thus, the right to cross-examination must occasionally yield to considerations of public policy and

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305 Also see s 35(3)(i) of the Constitution which provides that the accused has the right to "adduce and challenge evidence". The right to "challenge evidence" includes the right to cross-examine evidence. The right to cross-examination is seen as a fundamental requirement of a fair trial.

306 See *S v Sebatana supra*.

307 See *S v Cele supra*. Also see *Klink v Regional Court Magistrate supra*, where the court held that the right to cross-examination is not absolute.

308 See *S v Mayiya supra*.

309 Also see *S v Mathebula supra*, which is instructive regarding the appointment of an intermediary. Also see *S v Stefaans supra*, where the court laid down certain guidelines for the application of s 170A in light of the Constitution.

the interests of the child witness. Indeed, proper protection of children involved in court proceedings is important for their welfare.

Similarly in the United States, the courts have demonstrated a willingness to place the needs of child victims of sexual assault, above the accused's right to cross-examination. They have found a compelling state interest in protecting child victims of sexual assault. The Sixth Amendment also guarantees the defendant the right, not only to be present during the trial, but also the right to be seen by the witnesses for the prosecution. The following cases illustrate how the American courts have dealt with this issue. In *Coy v Iowa*[310] the question arose whether a large screen, which separated the complainant from the accused violated the accused's right to a fair trial. The court upheld the accused's contention. It's decision was based on the "confrontation clause" of the Sixth Amendment which, according to the majority, guaranteed a criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact. However, in *Maryland v Craig*[311] the complainant in a sexual abuse case, the prosecutor and the defence counsel withdrew to a separate room where the witness was examined and cross-examined while a video monitor recorded and displayed the witness's testimony to the judge, jury and defendant in a courtroom. The majority of the court held that a confrontational clause in the Sixth Amendment did not absolutely prohibit the procedure.[312] Therefore, the use of a one-way screen or closed-circuit video image, which prevents a child sex abuse witness from seeing the defendant, violates the Sixth Amendment unless the trial court specifically finds that full face-to-face confrontation would cause the child serious emotional distress. The Canadian courts have also held that the placing of a screen between the accused and a complainant, does not undermine the presumption of

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310 See *Coy v Iowa supra* at 1012.

311 See *Maryland v Craig supra* at 836.

312 It should be noted that this decision led to the promulgation of the CVCWR statute to protect the needs of child victim witnesses. The constitutionality of this statute was upheld in *US v Farley supra*.

innocence, or hamper cross-examination.[313] Similarly, the European Court of Human Rights has held that where there are potential threats to life, liberty or security of witnesses, it is permissible for them to remain anonymous and to give evidence from behind a screen.[314]

Hearsay evidence is also said to deny to the accused the right to cross-examination. Hearsay evidence is generally excluded unless it falls under the common law or statutory exceptions. Statutory hearsay is presently regulated by the Evidence Amendment Act 45 of 1988. The case law demonstrates the court's reluctance to use the exceptions lightly in criminal cases against the accused. However, it is more readily admitted when it is tendered by the accused.[315] In international law, hearsay is also excluded unless it falls under one of the recognised exceptions. To illustrate this, the Confrontation Clause entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement is sufficiently reliable, and the declarant cannot testify at trial.[316] Similarly, the furnishing of expert documentary evidence in the form of an affidavit or certificate does not *per se* render the trial unfair.[317]

The accused has the right to adduce and challenge evidence in terms of section 35(3)(i) of the Constitution. A presiding officer is obliged to explain the accused's right to adduce evidence in terms of section 151 of the Act.[318] Section 196(1) of the Act

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313 See, *inter alia, R v Levogiannis supra*. A similar approach has been followed in the United Kingdom. See *inter alia*, *R v Lynch supra*.

314 See *Doorson v The Netherlands supra* and *X v United Kingdom supra*.

315 See *inter alia*, *S v Cekiso*, *S v Ramavhale* and *S v Dyimbane supra*.

316 See *Ohio v Roberts supra*. In reviewing the hearsay exception, the court emphasised that the primary purpose of the Confrontation Clause is to ensure the right of cross-examination.

317 See *S v Van der Sandt supra*, where the court rejected the argument that s 212(4) of the Act was unconstitutional because it curtailed the right of cross-examination.

318 See *S v Motaung supra*.

embodies the accused's right to testify in his own defence, and to call witnesses for the defence. The right to call witnesses which is fundamental to a fair trial, is regarded as absolute in South African courts.[319] A court may nevertheless, refuse to allow an accused to call a witness where the witness "cannot possibly give relevant evidence" in terms of the common law. However, it has been held that the court has to be "exceptionally careful" in arriving at such a conclusion.[320] Therefore, a presiding officer must be cautious when he refuses to allow an accused to call a witness. A miscarriage of justice may occur as a result of his refusal, and this will lead to the proceedings being set aside.[321] The right to compel the attendance of witnesses is entrenched in section 179(1) of the Act. Similarly, an accused's right to compel witnesses for the defence is entrenched in the ICCPR and ECHR.[322] In the United States, the Sixth Amendment guarantees to all defendants the right of "compulsory process" to compel the attendance and testimony of witnesses for the defence. This also entitles the defendants to the production of documents in the possession of a witness. This right is the same as the prosecution's right to summon trial witnesses and to obtain the production of physical evidence. The American courts have held that "few rights are more fundamental than that of an accused to present his own defence,"[323] and that such right "is an essential attribute of the adversary system itself".[324] The right to compel the attendance of witnesses now has constitutional

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319 See *S v Gwala supra*. However, see *Engel et al v The Netherlands supra*, where the European Court held that the right to call defence witnesses is not absolute. The right is subject to the principle of "equality of arms". A similar view has been held in *Taylor v Illinois supra*.

320 See, *inter alia*, *S v Selamana* and *S v Tembani supra*. Similarly, it has been held in *US v Valenzuela-Bernal supra*, that the particular witness testimony must be material and favourable to the defence in order to be constitutionally protected.

321 See *S v Hlongwane*, *S v Levin*, and *Rex v Hatch supra*.

322 See art 14(3) of the ICCPR and art 6(3)(d) of the ECHR respectively. Both these articles also state that an accused's right to compulsory process should apply under the same conditions as state witnesses. These articles are more progressive than s 179(1) of the Act, which prefers state witnesses over witnesses for the defence.

323 *Taylor v Illinois supra* at 652, (citing *Chambers v Mississippi supra* at 302).

324 *Id* (citing *United States v Nixon* 418 US 683 (1974)).

status in *Pennington v Minister of Justice*.[325] It has also been held that a court should assist the accused in securing the attendance of witnesses.[326] Similarly, it has been held in *Lloyd v Jamaica* that the court is entitled to secure the attendance of witnesses.[327] In the United States, an accused has a right to testify at trial and to call and interrogate favourable witnesses.[328] To make this latter right effective, the accused is entitled to state assistance in securing the attendance of those witnesses at trial. However, the right to adduce evidence is not absolute.[329] An accused's actions may be

regarded as a valid waiver of the right to adduce evidence where he has made no concerted effort to get a particular witness to court.[330]

The British criminal justice system also demonstrates that an accused has the right to cross-examine witnesses and to be present in the courtroom.[331] The judge's task is to rule on various evidentiary matters and to ensure that both parties conduct their cases according to the relevant procedural rules. However, his task is not to try the case. This can be compared favourably to South African law, where a presiding officer may put questions to the accused during the trial to clarify matters. However, it is undesirable that he should participate extensively in the questioning of the

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325 See *Pennington v Minister of Justice supra* at 279.

326 See *S v Hlongwane supra*.

327 See *Lloyd v Jamaica supra*. Also see *Barber v Page supra*.

328 See *In Re Oliver* 333 US 257, 92 L ed 682 (1948) at 273. See *Barber v Page supra*.

329 See for example, s 342A of the Act.

330 See, *inter alia*, *Perera v Australia supra*.

331 See *R v Hilton supra*.

witness.[332] Nevertheless, the presiding officer may try to obtain favourable information from the accused for the purpose of sentencing.[333]

An accused has a right to address the court in terms of section 175 of the Act. The case law demonstrates that judicial officers should not deprive the accused of this opportunity unnecessarily.[334] Any failure on the part of the judicial officer, will lead to the proceedings being set aside. The case of *Mabote*[335] is authority for the proposition that there seems to be a tendency to regard the failure of a court to afford an accused an opportunity to address the court as a gross and fatal irregularity. This failure is said to constitute a violation of the accused's right to a fair trial.[336] An accused also has the right to address the court on sentence in terms of section 274(2) of the Act.[337]

Thus by far our law is in line with other systems discussed. The ideal is to ensure that the accused can prepare an effective defence. This entails the right to adduce and challenge evidence, the right to call witnesses, the right to address the court on evidence and on sentence. If the accused is illiterate or unrepresented, his rights must be explained to him. Then only, will he be able to present his case effectively, and exercise his right to a fair trial. Some diminution of the procedural rights of the accused is necessary to ensure protection of considerations of public policy and the necessities of the case. The balancing process accepts that "justice is not perfect, or even as perfect as human rules can make it ... A fair trial according to law does not

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332 See *S v Adriantos supra*.

333 See *S v Sithole supra*.

334 See, *inter alia*, *R v Parmanand* , *R v Cooke* and *S v Brand supra*.

335 See *S v Mabote supra* at 745. However, a somewhat different view was taken in *S v Vermaas supra* at 454, where the court held that although any denial of the right of address will be regarded as a gross irregularity, an accused is not obliged to address the court. As long as the accused is given the opportunity to make the address, any subsequent refusal or failure on the accused's part, will mean that the right has been either abandoned or lost.

336 See *S v Zingilo supra* at 1186 and *S v Mbeje supra* at 252 respectively.

337 See *S v Louw supra*.

mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused".[338] Nevertheless, any measure restricting the defence must be strictly necessary, and if a less restrictive measure can be found, then that measure must be applied.[339] Therefore, a concerted effort is needed to reform the justice system to find a better balance between the rights of the accused and the interests of society. This means that the courts must be objective in safeguarding the interests of society. At the same time, they must be vigilant in protecting the constitutional rights of the accused. The courts as guardians of the Constitution, must ascertain the truth and do justice according to the law. The concluding chapter will elaborate on how our courts have risen to the challenge.

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338 See Momeni *op cit* 178 (citing *Jarrie v The Magistrates' Court of Victoria at Brunswick* (1995) 1 VR 84, 90).

339 See *Van Mechelen v The Netherlands supra*.