CHAPTER FIVE

THE RIGHT TO INFORMATION

5.1 INTRODUCTION

The word "information" is derived from the Latin word "informo", which was adopted as "inform" and "information" in English.[1] Numerous definitions have been subscribed to the word "information", depending on the context in which it is used. The Merriam-Webster Online Dictionary defines "information", *inter alia*, as "the communication or reception of knowledge or intelligence, or knowledge obtained from an investigation or study".[2] This definition of information is more relevant to the legal context. The right to information entails more than giving an individual access to documents compiled during an investigation. It also involves communication or reception of knowledge to enable an individual to exercise his rights.[3] Man's interest in information stems from the fact that he is a social animal since his creation, and he needs to interact with other people and his surroundings in order to survive. Thus the collation, reception and communication of information is seen as an important part of man's existence, and the manner in which he conducts these activities will enhance his quality of life.

The law is constantly transforming to reflect the social realities of the time. An individual needs to be informed about these changes, especially where these changes would impact on his daily life. This knowledge is necessary for the exercise and protection of the individual's rights. The individual should receive sufficient notification of these changes and proper guidelines should be furnished to law enforcement officers. However, one also needs to protect information against misuse and abuse. Legal protection is not only accorded to information itself, but it is also accorded to those individual and community interests which are considered as being worthy of legal protection.[4] Legal rules are formulated in the Act to prohibit the infringement of these interests.[5]

The Constitution consolidates the position in the Act. The principle provisions which are relevant to the right to information are sections 32, 35(2)(a) and (b), 35(3)(a), (b)

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1 Geldenhuys *Die regsbeskerming van inligting* (unpublished doctoral thesis) Unisa (1993) at 40.

2 Available at http://www.m-w.com/cgi-bin/dictionary 6 June 2000.

3 To illustrate this, an individual should know why he is being arrested or detained in terms of s 39(2) of the Act. This will enable him to exercise a choice whether to remain silent or obtain legal representation.

4 Individual interests relate to, for example, the rights of an arrested person to be informed of the reason for his arrest in terms of s 39(2) of the Act. Community interests relate to, for example, state security and the investigation and the solving of crime by the police.

5 The ensuing discussion in para 5.2 below will focus on the arrestee's or accused's rights to information in the Act.

and (f) and section 35(4) of the Constitution.[6] The above provisions have important implications for access to documents in the police docket, access to particulars relating to charge sheets, lawful arrest and the right to be informed about legal representation.

This chapter will first address the accused's right to information during the pre-trial stage. This discussion will focus on the accused's right to information in the summons, written notice, indictment and charge sheet, further particulars, arrest warrant, entry of premises for purpose of interrogation, search and seizure and statements to the police officer. Thereafter, it will address the pre-constitutional and constitutional position on an accused's right to information. To this end, police docket privilege, the Promotion of Access to Information Act 2 of 2000, the right to be informed of the reason for detention, the right to be informed of the right to legal representation and the right to be informed of the right to remain silent will be discussed respectively. Principles extracted from other countries will be applied to the relevant South African context. Finally, the conclusion will propose interim conclusions and recommendations drawn extensively from case law and legislation in South African law and foreign jurisdictions.

5.2 AN ACCUSED'S ACCESS TO INFORMATION DURING THE PRE-TRIAL STAGE

The notion that the accused in a criminal case should be informed in advance of the evidence against him is not foreign to South African criminal procedure. Under section 54 the Criminal Procedure Act 56 of 1955, the standard procedure in criminal trials in the High Court was for a preparatory examination to be held in the magistrate's court first, at which the state produced its evidence to establish a *prima facie* case against the accused.[7] The record of those proceedings was made available to the accused so that he had sufficient opportunity to prepare for the trial. However, since 1977, this procedure has in practice been substituted by the procedures under Chapter 19 of the Act.[8] Although sections 123 to 143 of the Act make express provision for the holding of a preparatory examination in anticipation

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6 Section 32 of the Constitution provides that everyone has the right of access to any information held by the state, and any information that is held by another person and that is required for the exercise of any rights. Section 35(2)(a) refers to the right of a detainee to be informed promptly of the reason for his detention whilst s 35(2)(b) refers to the right of a detainee to be informed of his right to legal representation. The latter right is similar to s 35(3)(f) which refers to the right of an accused to be informed of his right to legal representation. Section 35(3)(a) provides that an accused person has the right to be informed of the charge with sufficient detail to answer it. Section 35(3)(b) provides that an accused is entitled to adequate time and facilities to prepare a defence, whilst s 35(4) provides that information provided to a person must be given in a language that he understands. Please note that for future reference, the terms "accused" and or "detainee" will be interpreted in the masculine form for purposes of convenience. Nevertheless, this does not detract from the fact that the terms also apply to the feminine form as well.

7 A preparatory examination was also known as a "mini-trial". It involved proceedings before a magistrate which preceded the actual trial before the High Court. This gave the accused an opportunity to effectively prepare for his case.

8 Chapter 19 refers to a plea in the magistrate's court on a charge justiciable in the High Court. It encompasses a plea of guilty in terms of s 121 and a plea of not guilty in terms of s 122.

of a trial before the High Court, this procedure is seldom used nowadays.[9]

A suspect or an accused has access to information during various stages of the criminal proceedings. The following discussion on pre-trial rights will illustrate this:

5.2.1 SUMMONS

A summons is used for summary trial in a lower court where the accused is not in custody or is about to be arrested.[10] A summons can be described as a document containing details of the charge and personal information of the accused.[11] The summons is issued by the clerk of the court and it specifies the place, date and time when the accused must appear in court.[12] Where a summons is served upon an accused, this must take place at least 14 days before the date of the trial.[13] However, if the accused finds that this period gives him insufficient time to prepare his defence, he may apply for, and the court will in appropriate cases grant a postponement for this purpose.[14] The summons therefore informs the accused of the charge/s against him and instructs him to appear in court to answer the charge/s against him. If the person who is summoned to appear fails to appear at the designated time and place, he is guilty of an offence and is liable for a punishment of a fine or imprisonment for a period not exceeding three months.[15] A warrant will be issued if the accused either fails to pay an admission of guilt fine or fails to appear in court on the specified date. Therefore, the summons secures the accused's attendance at the trial. However, the summons makes provision for the accused to pay an admission of guilt fine without appearing in court.[16]

The position in **Australia** is somewhat similar. A summons is issued by the court to

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9 Section 143(1) expressly states that an accused may inspect the preparatory examination record and be furnished with a copy of such record.

10 It is preferable to use a summons where there is no likelihood that the accused will abscond, attempt to hamper police investigation or attempt to influence state witnesses.

11 This information pertains to the name, address, occupation and status of the accused. See s 54(1) of the Act.

12 See s 54(1) of the Act. Also see *Joubert et al Criminal procedure handbook* Juta (2001) at 92, for a detailed discussion about service of the summons.

13 This is in terms of s 54(3) of the Act. Sundays and public holidays are excluded.

14 See *S v Thane* 1925 TPD 850 and *S v Van Niekerk* 1924 TPD 486.

15 See s 55(1) of the Act. The court may issue a warrant for his arrest if satisfied that the summons was duly served and that the accused has failed to appear or to remain in attendance. Also see *Minister van Polisie v Goldschagg* 1981 (1) SA 37(A).

16 See s 55(2A) of the Act. Also see the proviso regarding s 55(2) which provides for instances when the accused need not be arrested in terms of the warrant. See *Joubert et al* (2001) *op cit* 93.

the defendant to attend court to hear the information, complaint or charge.[17] It is issued on application by the informant.[18] The purpose of the summons is to notify the defendant of the proceedings so that he may answer the charge.[19] The decision to issue a summons must be exercised judicially.[20] The person issuing the summons should not be seen to have any interest in the subject matter of the information in order to exclude bias.[21] Before the summons is issued, the person must satisfy himself that it is not vexatious, that the information is not out of time and that there is *prima facie* evidence of the offence which requires the alleged offender to answer the charge.[22] The summons should also be issued within a reasonable time after the information is furnished.[23] The Australian experience illustrates that great care should be exercised in issuing a summons to avoid bias or unfairness.

5.2.2 WRITTEN NOTICE

A written notice to appear is prepared, issued and handed directly to the accused by a peace officer. It is used when minor offences are committed such as traffic offences.[24] The written notice specifies the name, residential address, occupation and status of the accused, and instructs the accused to appear at a designated time and place to answer a charge of having committed the offence. It also contains an endorsement in terms of section 57 of the Act that the accused may admit his guilt and pay a stipulated fine without appearing in court. It also comprises a certificate signed by a peace officer, which states that the original notice was handed to the accused and that the significance of the notice was explained to the accused.[25] If the accused fails to respond to the written notice, the provisions of section 55 with regard to the summons apply.[26] Therefore, the written notice also informs the accused of the charges against him and the options available to him.

5.2.3 INDICTMENT AND CHARGE SHEET

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17 It should be noted that in foreign jurisdictions, the term "defendant" is constantly used. This term is merely a synonym for the term "accused".

18 See eg s 68(1) of the Judiciary Act 1903 (CTH), s 37 of the Magistrates' Court Act 1930 (ACT).

19 See *Plenty v Dillon* (1991) 171 CLR 635 at 641-644, where it was held that the essential purpose of the summons is to afford natural justice, and not to coerce a defendant to appear.

20 See for example, *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39. However, in Victoria, once the Registrar is satisfied that the charge discloses an offence, a summons must be issued. See s 28(4) of the Magistrates' Court Act 1989 (VIC).

21 See *Electronic Rentals Pty Ltd v Anderson supra* at 45-46.

22 See *Ex parte Qantas Airways Ltd*; *Re Horsington* (1969) 71 SR (NSW) 291 at 301.

23 See *Metaxas v Ferguson* (1991) 4 WAR 272 at 274.

24 This is to expedite the course of justice in minor offences.

25 See s 56(1) of the Act.

26 See s 56(5) of the Act.

Section 144 of the Act provides that an accused in the High Court must be served with an indictment which contains, *inter alia*, details of the crime and the accused's personal details.[27] The indictment must be accompanied by a summary of the important facts of the case together with a list of witnesses and addresses, where no preparatory examination is held.[28] According to Joubert *et al*, the indictment informs the accused of the allegations against him provided that this will not be prejudicial to the administration of justice or the security of the state.[29] However, the state is not bound by this summary of facts, and can lead evidence to contradict it.[30] Section 144(3) of the Act provides that an indictment must also contain a list of the names and addresses of witnesses. However, this may be withheld if the prosecution believes that this may lead to witness tampering or intimidation. The position is slightly different in the magistrate's court in that the accused is not served with a charge sheet, but it is presented in court. Rather, he is at liberty to examine the charge sheet at any stage of the criminal proceedings in terms of section 80 of the Act. The charge sheet should inform the accused of the case against him. Thus, both the indictment and the charge sheet inform the accused of the case that the state intends to prove against him.

Section 84(1) of the Act stipulates that a charge sheet "shall set forth the relevance offence in such a manner and with such particulars regarding the time and place at which the offence is alleged to have been committed". The relevant offence should also be set out in such a manner that the accused is sufficiently informed of the nature of the charge brought against him.[31] The accused is also entitled to know exactly what the charge against him is.[32] Charge sheets should also be simple and

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27 The indictment is drawn up in the name of the Director of Public Prosecutions. The accused's personal details pertain to his name, address, sex, nationality and age. The term "indictment" refers to prosecutions in the superior court, whilst the term "charge" refers to a prosecution in the lower courts.

28 Also see *S v Mpetha* (1) 1981 (3) SA 803 (C), where it was held that the purpose of the summary of substantial facts is to fill out the terse picture presented by the indictment.

29 Joubert *et al* (2001) *op cit* 171.

30 See *S v Kgoloko* 1991 (2) SACR 203 (A).

31 Also see s 35(3)(a) of the Constitution which provides that the accused has the right to be informed of the charge with sufficient details to answer it. Also see *S v Chauke* 1998 (1) SACR 354 (V), where the presiding magistrate failed to inform the accused, that he was in danger of being convicted of an offence which was a competent verdict on the original charge. This constituted a violation of the accused's right to be informed of the charge against him with sufficient details to be able to answer it in terms of s 35(3)(a) of the Constitution. Therefore, the trial was rendered unfair in terms of s 35(3) and the conviction was set aside. Also see *S v Singo* 2002 (4) SA 858 (CC). Similarly, it has been held in the **United Kingdom** that an individual who is likely to be directly affected by the outcome of a decision should be given prior notification of the action to be taken and be given sufficient particulars of the case against him so that he is able to prepare his case to meet them. See, *inter alia*, *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155.

32 See *S v Hugo* 1976 (4) SA 536 (A), where it was held that an accused is entitled to be informed by the charge with precision, or with at least a reasonable degree of clarity, what the case is that he has to meet. This is especially true of an indictment in which fraud by misrepresentation is alleged. The court also held that once the charge is furnished, the prosecution can't deviate from

intelligible.[33] Thus, section 84(1) prescribes the requirements with which a charge sheet should comply.[34] The case in point is *S v Heugh*[35] where the court concluded that section 84(1) emphasises the difference between a charge and an offence. The charge must set out the details of the offence as well as particulars regarding time and place where the offence is alleged to have been committed. The court concluded that section 84 does not require a charge to specify the district where the offence was committed for the purpose of establishing the court's jurisdiction, but merely to give particulars regarding the place where the offence was alleged to have been committed. Therefore, the intention of section 84 is to place an accused in possession of such information as would enable him to prepare his defence.[36]

Section 81(1) of the Act provides that a number of charges may be joined in the same proceedings against the accused, but before any evidence is led in respect of the particular charge.[37] The basic premise of the Act is that a person arraigned before a criminal court must know the exact extent of his potential exposure to conviction and sentence in the case before the trial proceeds.[38] A detailed charge also binds the prosecution to a specified offence and particularised factual allegations. The information obtained is thus of a more limited nature and does not include the disclosure of evidence.[39]

It should be noted that in the **United States of America**, the accused has a constitutional right in terms of the 6th Amendment, to be informed of the nature and cause of the accusation against him.[40] This right entitles the accused to insist that the indictment inform him of the crime charged with such reasonable certainty that he can prepare his defence and protect himself after judgment against such prosecution on

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the charge during the trial because it sets the framework of the trial.

33 See *S v Rautenbach* 1991 (2) SACR 700 (T). Also see *S v Hugo supra* at 536.

34 Also see Joubert *et al* (2001) *op cit* 172-173, for a detailed discussion of the necessary averments in the charge sheet.

35 1997 (2) SACR 291 (E). The accused had pleaded guilty to a charge of dealing in dagga. However, the magistrate had failed to question the accused regarding the time and place of the offence during interrogation in terms of s 112(1)(b) of the Act. The issue was raised as to whether it had been proved that the offence was committed within the area of jurisdiction of the magistrate's court.

36 See *S v Ismail* 1993 (1) SACR 33 (D) at 40 C.

37 Section 81(1) also provides that where the provisions are not complied with in that further charges are added after evidence had already been led, such proceedings are void. See *S v Thipe* 1988 (3) SA 346 (T).

38 *Id*.

39 *S v Thobejane* 1995 (2) SACR 339 (T).

40 Also see s 11(a) of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right "to be informed without unreasonable delay of the specific offence".

the same charge.[41] In order for an indictment to be sufficient, it must allege all the elements that constitute the crime. An indictment in general language is regarded to be good if it describes the unlawful conduct in such a manner so as to reasonable inform the accused of the charges against him.[42] The Constitution does not require the Government to furnish the accused with a copy of the indictment.[43] However, the right to notice of accusation is regarded as such a fundamental part of the procedural due process, that the states are required to observe it.[44]

In **English law**, if the custody officer determines on arrival at the police station, that there is sufficient evidence to charge the person arrested with the offence for which he was arrested, he must be charged or released without charge.[45] Where a person is charged, he must be given a written notice showing the particulars of the offences. This must be "stated in simple terms" but also show "the precise offence in law with which he is charged".[46] Regarding a trial on indictment, each offence charged should be set out in a separate count, and each count must include a statement of the offence and such particulars as may be necessary to give reasonable information regarding the nature of the charge.[47] Similar principles apply to information which forms the basis of summary trials.

In **Scotland**, a solemn procedure takes place, whereby the crown must frame a relevant indictment, setting forth with sufficient specification the time of the alleged crime, the place where it occurred, and the modus by which it was committed.[48] In summary proceedings, the prosecutor must frame a complaint stating the substance of the charge. The indictment or complaint must be served on the accused.[49]

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41 See *United States v Cruikshank* 92 US 542, 544, 558 (1876); *Bartel v United States* 227 US 427 (1913). Thus, the right to be informed is linked to the right to be prepared.

42 *Rosen v United States* 161 US 29, 40 (1896).

43 See *United States v Van Duzee* 140 US 169, 173 (1891). The American position is similar to that in the magistrate's court, where the accused is not served with a charge sheet.

44 *Rabe v Washington* 405 US 313 (1972). The constitutional requirement of due process is said to be violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that his contemplated conduct is prohibited, or the statute is so worded that he could not reasonably understand his conduct to be unlawful. Thus, statutes or ordinances have been held to be "void for vagueness". See *Papachristou v Jacksonville* 405 US 156 (1972). Thus, similarly, in the **United States**, the accused is entitled to be informed with a reasonable degree of clarity about the case against him.

45 See s 37 of the Police and Criminal Evidence Act of 1984 (PACE).

46 See para 16.3 of the Code of Practice (Code C) for the detention, treatment and questioning of persons by police officers.

47 See s 3(1) of the Indictments Act.

48 Harris and Joseph *The international covenant on civil and political rights and United Kingdom law* Clarendon Press Oxford (1995) at 222.

49 *Id*.

Section 9(2) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") provides that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Article 14(3)(a) of the European Convention for the Protection of Human Rights (hereinafter referred to as the "ECHR") refers to the right to be informed of the charge. It is expressly required that this right must be exercised in a language that the accused understands. The right is said to apply in all cases, and the information may be oral or written. However, the information must indicate both the law and the alleged facts on which it is based. The information must be given as soon as the charge is first made by a competent authority. Therefore, article 9(2) applies where a person is in custody "pending the result of police investigations", whilst article 14(3)(a) applies "once the individual has been formally charged".[50]

In **Canada**, section 11(a) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be informed without unreasonable delay of the specific offence. Section 11(a) therefore guarantees that a person charged with an offence will be informed of the precise offence forming the charge. The purpose of the right guaranteed by section 11(a) is to ensure that the accused knows whether the offence is one known to law and what case must be met. Thus, this provision gives constitutional basis to the requirement at common law and under the Criminal Code that the charge must be one known to law and be sufficiently precise that the accused can defend himself effectively.[51] The appropriate and just remedy for a violation of section 11(a) is not a judicial stay of the proceedings, but an order squashing the indictment.[52]

A count must contain a statement that the accused has committed an indictable offence.[53] The statement that the accused has committed an indictable offence may be found in the words of the enactment that describes the offence or declares it to be

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50 See *Kelly v Jamaica* 253/1987. *Id*.

51 See *Cotroni v Quebec Police Commissioner* (1978) 38 CCC (2d) 56 at 63 (SCC). Also see *R v Côté* [1978] 1 SCR 8 at 13, where the majority of the Supreme Court of Canada stated that:

> "The golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."

It should be noted that s 11(a) does not apply until the charge is laid. See *R v Heit* (1984) 11 CCC (3d) 97 (Tallis JA). However, the court pointed out that the accused might successfully invoke s 11(d) or s 7 of the Charter, or possibly establish an abuse of process, if it could be shown that an injustice was caused by the pre-charge delay on the police's part or the crown for an ulterior motive. A delay of 5 days from the date that the charge was laid until the accused was informed of the specific offence in the charge has been held not to violate s 11(a). See *Re Lamberti* (1983) 26 Sask R 213 (QB McIntyre J). Section 11(a) also does not require notice to be given in writing. See *R v McGregor* (1983) 2 CRD 725.120-02 (Ont HC, Callon J) in this regard.

52 See *R v Dennis* (1983) 8 CCC (3d) 411.

53 See s 581(1) of the Criminal Code. Also see *R v Brodie* [1936] SCR 188 (SCC) [Que] where it was stated that statements must be specified.

an indictable offence.[54] A count must contain sufficient details of the circumstances of the alleged offence to provide the accused with reasonable information as to the act or omission of the offence and to identify the transaction referred to so as to enable him to prepare a defence accordingly.[55] The lack of certain allegations is not fatal provided the count satisfies the requirements of the Code in terms of reasonably informing the accused of the charge to be met.[56] Therefore, a charge is acceptable even if it does not name the person injured; the person who owns or has special interest in the property; or the person intended to be defrauded or it does not name or describe with precision, any person, place or thing.[57] It is also not necessary that the charge describe the means by which the alleged offence was committed.[58] The nature of the offence charged frequently determines the assessment of whether the standard of reasonable notice to the accused has being met.[59] An indictment which reasonably informs the accused of the case to be met will be upheld.[60]

In **Australia**, it is necessary that the information, complaint or charge must describe an offence known to law, including all the necessary elements of the offence.[61] It suffices if it sets out the offence in the words of the provision creating the offence.[62] The position at common law was that an information, complaint or charge which fails to disclose an offence known to law is null and void and does not give the court jurisdiction.[63]

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54 See s 581(2)(b) and s 581(5) of the Criminal Code.

55 See s 581(2)(c) of the Criminal Code. Also see *R v Goldstein* (1986) 70 AR 324 (Alta CA) where it was held that the original count in the information does not have to contain all the material required so that the accused is reasonably informed. Also see *R v Pretly* (1984) 31 Man. R (2d) 56 (Man QB), where it was held that multiple counts fail to provide sufficient particularity to enable the accused to plead *autrefois acquit* or rely on defence of *res judicata*. Consequently, the indictment was squashed. Also see *R v Dennis supra* where the information and indictment did not particularise the alleged offence sufficiently to allow preparation of the defence. There was thus a breach of the accused's right to be informed of the specific offence without reasonable delay.

56 See s 581 of the Criminal Code.

57 See s 583 of the Criminal Code.

58 See s 583(f) of the Criminal Code. Also see *R v B (AJ)* (1990) 80 Nfld and PEIR 76 (Nfld Prov Ct), where the information did not describe the manner in which indecent assaults occurred. However, the information contained sufficient information to avoid being squashed.

59 This especially applies in conspiracy charges, where it is insufficient to charge conspiracy in the abstract. See s 583 of the Criminal Code.

60 Where it is necessary, the court will order amendments or particulars or squash duplicate counts. See s 601 (regarding amendments)and s 587 (regarding particulars).

61 See, *inter alia*, *Reedy v O' Sullivan* [1953] SASR 114 at 129.

62 See for example, *Gabriel v Williamson* (1979) 1 NTR 6.

63 See for example, *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508. However, an amendment will not fail because it contains an error or omission in the factual particulars. See for example, s 182 of the Justice Act 1928 (NT), s 31 of the Justices Act 1959 (TAS), s 50 of the Magistrates' Court Act 1989 (VIC).

The above discussion demonstrates that a charge or indictment should contain sufficient particulars so as to inform the accused of the case against him. A violation of this right will lead to the trial being rendered unfair.

5.2.3.1 THE REQUEST FOR FURTHER PARTICULARS

If the accused feels that the particulars in the indictment or the charge sheet are insufficient and do not inform him properly about the charges against him, the accused or his lawyer may request further particulars from the prosecutor in terms of section 87 of the Act.[64] Section 87 forms the basis of the procedural avenue available to an accused to enforce his right to be sufficiently informed of the charge against him.[65] The purpose of further particulars is to clarify the charge and to enable the accused to prepare his defence.[66] The further particulars should also clear up the points in dispute but should not encumber the dispute further with excessive alternatives.[67] The purpose of the particulars is also to promote justice and equity for both the state and the defence.[68] The trial proceeds as if the charge has been amended in accordance with the particulars provided. The charge sheet can only be supplemented by the further particulars. There is no principle in the Act which justifies the state to refuse essential information simply because the provision of such

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64 The accused could obtain the particulars in the following two ways: Firstly, he can object against the charges in terms of s 85(1)(d) because they contain too little particularity. This will lead to the public prosecutor providing the particulars. If the prosecutor fails to furnish the particulars, the court can make an order if the objection is justified. If the state does not comply with the order, the court can declare the charge null and void. Secondly, the accused can ask for particulars before evidence is led.

65 However, see Plasket "The right to further particulars and to object to a charge: the constitutionality of the provisos to ss 85 and 87 of the Criminal Procedure Act when applied to ss 119 and 122A proceedings" (1995) *South African Journal on Human Rights* 303-310, where the writer argues that these amendments are challengeable against the equality before the law and fair trial provisions of the Bill of Rights contained in Chapter 3 of the Interim Constitution. He also states, (at 305), that these amendments give prosecutors a free hand to draft sloppy and inadequate charge sheets in the most serious of cases, and protects them from the normal consequences of their failure to do their work properly. It should be noted that s 119 refers to the appearance of an accused in a magistrate's court on an offence that may be tried in the High Court, whilst s 122A refers to pleas in the magistrate's court in which the offence may be tried in the regional court.

66 Also see *S v Cooper and Others supra*, where the court stated that the object of asking for further particulars is to enable the accused to know the case which is proposed to be made against him and thus to enable him to prepare his defence. Also see *R v Mokgoetsi* 1943 AD 622.

67 See *S v Sadeke* 1964 (2) SA 674 (T).

68 See *S v Cooper and Others supra* at 875, where the court held that the use of particulars is intended to meet a requirement imposed in fairness and justice to both the accused and the prosecution. Also see Watney "Particulars to a charge in cases where the state relies on the doctrine of common purpose: easy answers to difficult questions?" (1999) *Tydskrif vir die Suid-Afrikaanse Reg* 323 at 337, where the writer states that if proper regard is not paid to the purpose of a request for further particulars, a situation may develop in which a factual or legal argument is conducted on paper whereby the defence sets out to attack the strength of the state case and the decision to prosecute under the guise of a request for further particulars.

information will disclose evidence. The accused is entitled to ask which facts will be proved, but **not how** they will be proved.[69] Therefore, the duty to furnish further particulars does not mean that the prosecution is obliged to disclose the evidence it intends using to prove the facts.[70]

Where the accused requires particulars of the substantive allegations against him to ascertain the true nature of the case he has to meet, the court will order the prosecution to furnish such particulars unless this is shown to be impracticable.[71] If a charge sufficiently discloses an offence, but contains inadequate particulars, the accused must apply for such particulars at the trial. His failure to do so will mean that he has waived his right to apply for particulars and he cannot set up such defect on appeal if he has failed to apply for such particulars at the trial.[72] In *S v Adams*[73] it was held that where further particulars are applied for the state may not merely refer to the record of the preparatory examination if such record is voluminous. The state may not reply to a request for particulars by stating simply that the particulars sought "are matters peculiarly within the knowledge of the accused", as such reply may lead to the indictment being squashed.[74] Where there is more than one count, the particulars applicable to each count must be set out.[75] Where particulars are given, the state must prove the charge as particularised,[76] and where a conviction is based on evidence not covered by the particulars supplied, the conviction may be set aside on review.[77]

If the state fails to provide the particulars, the accused can approach the court for an order to compel the state to grant the particulars. If the magistrate refuses to grant the order, the accused can apply for a *mandamus* against the magistrate in the High

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69 See *Behrman v Regional Magistrate* 1956 (1) SA 318 (T) at 321. Also see *S v National High Command* 1964 (1) SA 1 (T), where it has been held that in a summary trial, the accused is not entitled to be supplied with the evidence which the state proposes to lead, for example statements of witnesses, documents and so on.

70 See *R v Heyne* (1) 1958 (1) SA 617 (W). However, Schwikkard maintains that the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts. See Schwikkard "Access to police-dockets – confusion reigns" (1994) *South African Journal of Criminal Justice* 323. Also see *S v Cooper and Others supra* at 885, where the court held that the prosecution must furnish further particulars of the relevant or material facts which it proposes to prove, but is under no obligation to disclose its evidence by which it proposes to prove the facts.

71 *S v Abbass* 1916 AD 233.

72 *S v Lotzoff* 1937 AD 196.

73 1959 (1) SA 646 (P).

74 *S v National High Command supra*. The prosecution must supply information in its possession which is reasonably necessary to enable an accused to properly prepare his defence.

75 *S v Nkiwani* 1970 (2) SA 165 (R).

76 *S v Anthony* 1938 TPD 602.

77 *S v Kroukamp* 1927 TPD 412.

Court, in terms of which the magistrate can be ordered to direct that the particulars should be furnished.[78] In *Nangutuuala*[79] the High Court rejected the proposition that post-ponements and recalling of witnesses could serve as a substitute for the right of an accused to be sufficiently informed of the charges before he pleads and before he presents his defence. Courts are extremely reluctant to issue a *mandamus* directing the furnishing of further particulars.[80] However, if the trial court has refused an application for particulars and it appears on appeal that the accused has been prejudiced by such refusal and that it cannot be said that no failure of justice has resulted, the court will set aside the accused's conviction.[81]

In the **United States**, another conventional discovery tool is a Rule 7(f) motion for a bill of particulars. When the defendant is confronted with a vague or confusing indictment, a motion for a bill of particulars should be made.[82] The purpose of the bill is to supply sufficient details to enable the defence to prepare for trial and to minimise the danger of surprise at the trial.[83] Similarly, in **Australia**, an information need not contain all the particulars necessary for the defendant to defend the charge.[84] However, the court can request the prosecution to furnish further particulars and if the prosecution refuses, the charge should be dismissed.[85]

The above discussion illustrates that obtaining further particulars to the charge is regarded as an essential part of the preparation for trial. Not only does further particulars clarify the charge, but it also enables the accused to prepare his defence.

5.2.3.2 AMENDMENT OF CHARGE SHEET/INDICTMENT

Section 86(1) of the Act refers to the instances when an indictment may be amended.[86] Section 86(1) further provides that the court may order an amendment

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78 In *Weber v Regional Magistrate Windhoek* 1969 (4) SA 394 (SWA), the court granted a *mandamus* directing that the magistrate order the prosecutor to deliver to the applicants further particulars regarding the charges against them.

79 1973 (4) SA 640 (SWA).

80 See *Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T).

81 See *S v De Coning* 1954 (2) SA 647 (N), *S v C* 1955 (1) SA 464 (T).

82 See *US v Salazar* 415 US 985 (1974).

83 See, *inter alia*, *US v Schemban* 484 F 2d 931 (4th Cir 1973).

84 See for example, *Lafitte v Samuels* 1972 (3) SASR 1 at 17. Nevertheless, where the prosecution is relying upon an aggravating matter, it should furnish particulars of it to the defendant before a plea is made. See *Blair v Miller* [1988] WAR 19.

85 See for example, *Lafitte v Samuels supra* at 17. The information should disclose where possible, the manner in which the defendant is liable for the offence. See *inter alia*, *King v R* (1986) 16 CLR 423 at 425-6.

86 Section 86(1) provides that an indictment may be amended where it is defective for want of an essential averment; where there is a variance between the averment in the charge and the evidence offered in proof of such averment; and where words have been omitted or

only if it considers that the making of an amendment will not prejudice the accused in his defence.[87] The test for prejudice is whether the accused will be worse off after amendment of the charge.[88] However, the question of prejudice is said to depend upon an examination of the facts and circumstances in each particular case.[89] The prosecution is also bound by particulars of the charge and may not substitute another offence for the original one where the evidence supports the former.[90] Thus, section 86 makes provision for amendment of the charge and not for replacement thereof by a new charge.[91] The accepted approach is to establish whether the proposed amendment differs from the original charge in such a way that it is in essence an another charge.[92] If a new charge is framed during the course of the trial, then the possibility of prejudice to the accused is strong.[93]

Section 88 was introduced to overcome technical errors made by persons drawing up the charges.[94] Section 88 provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. This means that the accused can now be found guilty, even though the indictment does not disclose an

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unnecessarily inserted or any other error is made. The object behind s 86 is said to facilitate the rectification of charge sheets by way of amendment in order to ensure that accused persons do not escape conviction on a mere technicality arising from a defective charge.

87 *S v Taitz* 1970 (3) SA 342 (N). Also see *S v Kariko* 1998 (2) SACR 531 (NmHC), where the issue concerned the amendment on appeal of a defective charge sheet. The accused was charged with stock theft, and although the charge sheet alleged that such stock was stolen from a named complainant, the evidence failed to establish any person from whom the stock was stolen. The state tried to amend the charge sheet on appeal, by substituting "persons unknown" for the complainant's name originally specified in the charge sheet as the person from whom the stock had been stolen. An objection was lodged against the amendment on the basis that it would prejudice the accused in his defence. The court noted that throughout the trial in the lower court, the accused had raised the defence that the stock belonged to another person. Therefore, the amendment did not affect his defence, and he did not suffer prejudice.

88 See *S v Kuse* 1990 (1) SACR 191 (E).

89 *S v Pillay* 1975 (1) SA 919 (N). Also see *S v Coetzer* 1976 (2) SA 769 (A) at 772, where it was held that if an amendment would not have prejudiced the accused in his defence, the failure to effect an amendment will not invalidate the proceedings except where the court refused to allow an amendment. In **Canada**, the court has held in *R v McDougall* (1984) 50 Nfld and PEIR 275 (Nfld Dist Ct), that the amendment was possible at any time before judgment. However, in *R v Campbell* [1986] 2 SCR 376 (SCC) [Ont], the crown's motion to amend the indictment was dismissed where the amendment would cause irreparable prejudice to the accused's conduct of the case.

90 See *S v Kuse supra, S v Sarjoo* 1978 (4) SA 520 (N).

91 See *Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A).

92 See Joubert (2001) *et al op cit* 177.

93 See *S v Slabbert* 1968 (3) SA 318 (O).

94 Prior to 1959 our courts have held that an indictment could not be amended unless it disclosed an offence. See *S v Desai* 1959 (2) SA 589 (A).

offence as long as the evidence proves the offence. This reduces the burden on the prosecution. The language of the section indicates that the offence with which the accused is charged should be named in the indictment.[95] The prosecutor should exercise caution by framing the indictment in such a way that it does disclose an offence. If he fails to do so, the accused can raise an exception to the charge before pleading to the charge. If the accused brings the defective charge sheet to the court's notice before the judgment, and the court refuses to order the amendment, then the accused may rely upon the defect on appeal, if he has been convicted by the trial court.[96] The defect can only be cured by proper evidence.[97] However, section 88 does not authorise replacement of one offence by another offence proved by evidence.[98]

The position in **Australia** is that the magistrate or justice has power to amend the information or complaint in some jurisdictions.[99] It has been held that an amendment can only be made where an objection has been raised against the information.[100] An amendment may be made at any time during the trial unless it would cause injustice.[101]

The above discussion demonstrates that the court will order an amendment unless it will cause prejudice or injustice to the accused.

5.2.4 ARREST

The Act has prescribed strict rules concerning the arrest of a person. This is due to the fact that an arrest infringes an individual's right to freedom and security of the person and the individual's freedom of movement.[102] An arrest is preferably effected only after a warrant has been obtained in terms of the Act. However, in exceptional circumstances a private individual or the police may execute an arrest without a warrant. One of the requirements for a lawful arrest is that the arrestee must be

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95 See *S v Mcwera* 1960 (1) PH H 43 (N). Thus, the charge must contain some recognisable offence, even though no offence is, technically speaking, disclosed. See *S v Dhludhla* 1968 (1) SA 459 (N). Also see *S v Mayongo* 1968 (1) SA 443 (E), where the court was asked to consider when s 179 bis of Act 56 of 1955 should be invoked. The section should not be invoked when a charge is framed in an embarrassing fashion under the statutory enactments without clearly indicating which offence is intended to be charged. The section cures an indictment lacking essential averments, and not a poorly drawn indictment which leaves the person to whom it is addressed to in doubt as to the substantive offence which he is alleged to have committed.

96 See *S v Gaba* 1981 (3) SA 745 (O).

97 *S v AR Wholesalers* 1975 (1) SA 551 (NC).

98 See *S v Sarjoo supra*.

99 See for example, *Australian Federation of Air Pilots v Australia Airlines Ltd* (1991) 28 FCR 360, s 48 Justices Act 1886 (QLD) and s 31(3) of Justices Act 1959 (TAS).

100 See *R v Du* 1990 Tas R (NC 10) 257.

101 See for example, s 15c of the Crimes Act 1914 (CTH), s 365(1) of the Crimes Act 1900 (ACT). Also see *Maher v R* (1987) 163 CLR 221.

102 See s 12(1)(a) and s 21(1) of the Constitution respectively.

informed of the reason for his arrest in terms of section 39(2) of the Act.[103] The arrestee's custody will be unlawful if this requirement is not complied with.[104] Joubert *et al* submit that the question of whether the arrestee was given an adequate reason for his arrest depends on the circumstances of each case, particularly the arrested person's knowledge concerning the reason for his arrest.[105] However, the exact wording of the charge need not be conveyed at the time of the arrest.[106] The detention will also be lawful if the arrestee is later informed of the reason for his arrest.[107] However, the procedure differs when the arrestee is caught in the act, in that detailed information need not be given.[108]

Section 43(2) of the Act provides that a warrant for the arrest of a person is a written order directing that a person described in the warrant be arrested by a peace officer, in respect of the offence set out in the warrant. The arrested person must be brought before a lower court in terms of section 50 of the Act.[109] It is recommended that a warrant should be obtained before the liberty of a person is infringed, unless exceptional circumstances call for the summary arrest of the offender.[110] A charge of resisting an arrest made in terms of a warrant will fail provided it appears that the warrant was shown and explained to the arrestee, and that he knew or was informed that it was being executed by the police.[111]

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103 Section 39(2) provides that the arrestor must inform the arrestee of the reason for his arrest at the time of effecting the arrest or immediately thereafter or if the arrest occurred by means of a warrant, hand the arrestee a copy of the warrant upon demand. This requirement is also entrenched in s 35(2)(a) of the Constitution, which provides that the detainee must be informed promptly of the reason for his detention.

104 See *S v Kleyn* 1937 CPD 288 and *S v Ngidi* 1972 (1) SA 733 (N) respectively. Also see *Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A), where it was held that if the person effecting the arrest is not in possession of the warrant, and realises that he will not be able to comply with a demand made in terms of s 39(2), the arrest will be unlawful. The debate has recently arisen whether traffic and metropolitan police officers are legally able to execute warrants of arrest. According to the Automobile Association, an original warrant had to be produced by the officer concerned in arresting a motorist. However, a spokesperson for the Institute of Traffic and Municipal Police Officers has stated that s 39(2) of the Act clearly stated that in the event of an arrest being effected in terms of a warrant of arrest, a copy of the warrant had to be shown to the arrested person upon his request. He said that a certified copy need not be shown, but a copy was sufficient. Available at http:// legalbrief.co.za on 24-04-2003. Also see *Saturday Star* "Legal opinion on roadblock arrests" 10 May 2003: 5.

105 Joubert (2001) *et al op cit* 95.

106 See *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) and *Brand v Minister of Justice* 1959 (4) SA 712 (A).

107 See *Nqumba v State President* 1987 (1) SA 456 (E).

108 See *Macu v Du Toit* 1982 (1) SA 272 (C) and *Minister of Law and Order v Parker* 1989 (2) SA 633 (A). It is a trite fact that where the reason for arrest is known to the arrestee as when he is caught red-handed, the purpose of notification falls away and with it the duty to inform.

109 This relates to procedure after arrest.

110 For a detailed discussion about arrest with a warrant, see Joubert (2001) *et al op cit* 97.

111 *Id*.

It should be noted that in the **United States of America**, arrested suspects are often informed of reasons for their arrest when they are first taken into custody. They are usually so informed when they arrive at the police station for "booking". However, there does not seem to be any legal requirement for such notice.[112] Article 9(2) of the ICCPR, requires that there must be prompt notice of charges.[113] However, the United States does not comply with the Covenant in that after arrest, there is no established legal right to such notice prior to appearance in court. Even during custodial interrogation, police need not disclose all crimes they suspect.[114] Therefore, the South African position appears to be more progressive than the United States in that legal right to notice of arrest is entrenched in section 39(2) of the Act.

In **Canada**, anyone who arrests a person, whether with or without a warrant, must give notice to that person, where feasible, of the warrant or the reason for the arrest.[115] Section 10(a) is said to reflect the common law rule that, apart from special circumstances, an arrest without a warrant can be justified only if at the time of the arrest the reason for the arrest is made known to the accused.[116] Section 10(a) is said

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112 Frase in "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 42.

113 *Ibid* at 76. It should be noted that art 9(2) of the ICCPR provides that:

"Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

The latter obligation is said to be confined to arrests in criminal cases. The provision contemplates that a general description of the reasons for arrest must be given at the time and that the specific allegations must enable the persons to challenge the detention. Indeed, the United Nations Human Rights Committee has found breaches of these obligations in circumstances where reasons have been withheld altogether. See *Portorreal v Dominican Republic* (188/1984); *Carballal v Uruguay* (33/1978) in this regard. Where reasons were given after a delay of a week or more, see *Fillastre v Bolivia* (336/1988), where there was detention in custody for 10 days before being informed of the charges. Also see *Kelly v Jamaica* (253/1987), where details of the reasons for the arrest were not given for "several weeks" or where the reasons were insufficiently detailed in *Drescher Caldas v Uruguay* (43/1979), where mere references to the legal basis of prompt security measures without indication of the substance of the complaint was found to be inadequate. Also see Harris and Joseph *op cit* 202.

114 *Id*.

115 See s 10(a) of the Charter and s 29 of the Criminal Code respectively. Section 10(a) provides that: "Everyone has the right on arrest or detention ... to be informed promptly of the reasons therefore." Section 29(2) of the Criminal Code of Canada RSC 1970, CC-34 requires anyone arresting a person with or without a warrant "to give notice to that person, where it is feasible to do so of (a) the process or warrant under which he makes the arrest or (b) the reason for the arrest." Also see *R v Gamracy* [1974] SCR 640 (SCC) [Ont] where it was held that the existence of a warrant is sufficient reason. However, the Canadian courts have also held that it is not necessary to inform the arrested person where the circumstances are obvious. See, *inter alia, Eccles v Bourque* (1974) 27 CRNS, 325 (SCC) [BC]; *Garthus v Van Caeseele* (1959) 30 CR 67 (BCSC). In *R v Leemhuis* (1984) 11 CRR 337 (BC Co Ct) it was held that the right to be informed of the reason for detention arises upon being taken to the police station for a breathalyser test. It was further held that the questions regarding the accused's drinking and taking him to a breathalyser machine, sufficiently informed the accused.

116 See *Pedro v Diss* [1981] 2 All ER 59 (Div Ct).

to be similar to article 9.2 of the ICCPR and article 5(2) of the European Convention, which require that everyone arrested must be informed promptly of the reasons for his arrest and of any charges against him.[117] A breach of section 10(a) has occurred when the accused was not told of the reason for his arrest for three hours.[118] It has also been held that the word "promptly" does not require a police officer to give the arrestee reasons for his arrest until after the police officer has searched the arrestee incidental to the arrest.[119]

The position in **England and Wales** is that a requirement to give reasons on arrest was imposed at common law, and is now found in section 28 of PACE.[120] However, the requirement did not apply where the circumstances were such that the person must have known the general nature of the alleged offence for which he was arrested or made it practically impossible for him to be informed, for example by running away.[121] The requirement to give reasons also applies to stop searches in terms of section 2(2) of PACE. Therefore, a person arrested must be informed of both the fact and the reason for arrest at the time of the arrest or as soon as practicable thereafter. Where a person is arrested by a constable, these obligations apply regardless of whether these matters are obvious. A stop search may not commence until the constable has taken reasonable steps to inform the person of the proposed search and the grounds for making it. These requirements do "not mean that technical or precise language need to be used but that the person is entitled to know what ... are the facts which are said to constitute a crime on his part".[122] It has been held in *Geldberg v Miller*[123] that an arrest for "obstructing the arresting officer in the execution of his duty by refusing to move his car and refusing to furnish his name and address" was sufficient for an arrest for "obstructing the thoroughfare". Where no reason for arrest is given, the arrest is unlawful although the defect can be corrected, rendering the arrest valid prospectively.[124] According to Harris and Joseph, there is also a duty to give reasons at the time of arrest in Scotland.[125] A person detained in terms of

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117 The European Convention requires further that the person arrested must be so informed "in a language he understands". Thus, the right to be informed of the reason for one's arrest is linked to the right to understand.

118 See *R v Mason* (1983), 9 WCB 384 (BCSC Berger J). However, the court found that the violation of s 10(a) had no causal relationship to the answers being given to questions by the police after the accused had been told of the reason for his arrest. Therefore, the evidence was not excluded under s 24(2).

119 See *R v Maitland* (1984) 4 CRD 850.60-15 (NWTSC, De Weerdt J).

120 See the common law – *Christie v Leachinsky* [1947] AC 573 (HL).

121 See Harris and Joseph *op cit* 202.

122 See *Christie v Leachinsky supra* at 588-593.

123 [1961] 1 WLR 153. Also see *R v Telfer* [1976] Crim LR 562, where it has been held that the arrest "on suspicion of burglary" was insufficient as the person should have been told of the particular burglary in question.

124 See *Lewis v Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206.

125 See *Forbes v HM Advocate* 1990 JC 215. Also see Harris and Joseph *op cit* 204.

section 2 of the Criminal Justice (Scotland) Act 1980 must be informed of the constable's suspicion, of the general nature of the offence, and of the reason for the detention.[126] There is also a general rule that an arrest must be accompanied by a charge.[127]

Therefore, an arrestee is entitled to be informed of the reasons for his arrest so that he can challenge his detention.

5.2.5 ENTRY OF PREMISES FOR PURPOSE OF INTERROGATION

Police officials may not enter private premises to interrogate the occupiers **without informing them of the reason for such entry** in terms of sections 26 and 27 of the Act respectively. Section 26 of the Act provides that a police official may whilst investigating an offence or alleged offence where he reasonably suspects that a person who may furnish information with regard to the offence, is on any premises, **not enter such premises without a warrant** to interrogate such person, and obtain a statement from him.[128] Thus the occupier must be furnished with a warrant informing him of the reason for such entry. Section 27(1) of the Act provides that a police official who may lawfully enter any premises in terms of section 26 may use such force as may be reasonably necessary to overcome any resistance against such entry including the breaking down of any door or window of such premises. However, a proviso to this subsection provides that such police official must first **audibly demand** admission to the premises and **notify** the occupier of the **purpose** for which he seeks entry into such premises. Therefore, the occupier must be informed of the reason for such entry.

5.2.6 SEARCH AND SEIZURE

Section 21 provides that searches and seizures should be conducted only in terms of a search warrant issued by a judicial officer such as a magistrate or judge. Even though section 21 does not require that the suspected offence be described in the warrant, it is desirable to do so to facilitate the interpretation of the warrant.[129] It is also desirable that when law enforcement officials act in terms of a warrant, that the subject involved has access to the document which infringes upon his private rights. Section 21(4) provides that a police official who executes a warrant in terms of section 21 or section 25 must, once the warrant has been executed, and upon the request of the other party whose rights are effected by the search or seizure of an object in terms of the warrant, provide such person with a **copy** of the warrant.

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126 See s 2(4) of the 1980 Act.

127 See *Chalmers v HM Advocate* 1954 JC 66, 78.

128 Section 26 was enacted to prevent private property owners from hindering police from questioning them regarding an offence that is being investigated.

129 *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W) 581. In **Canada**, the offence in respect of which a search is to be conducted must be set out in the search warrant, and its omission renders the warrant invalid. See for example, *R v Dombrowski* (1985) 44 CR (3d) 1 (Sask CA), where the search warrant failed to disclose an offence; so the warrant was invalid.

According to *Joubert et al,* two objections may be raised against this subsection, namely, that if the subject is present at the time of the execution of the warrant, he should be provided with a copy of the warrant before the search and or seizure. Secondly, the delivery of the copy of the warrant should not depend on the subject requesting it, as many subjects won't be aware of this as a result of a lack of knowledge of the law.[130]

Section 48 provides that a peace officer or private person who is authorised by law to arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may if he **first audibly demands** entry into such premises and states the **purpose** for which he seeks entry and fails to gain entry, break open and enter and search such premises for the purpose of effecting an arrest. In *R v Jackelson*[131] certain people had ejected a police official who had entered the premises without first demanding permission and being refused permission. The court held that they could not be convicted of obstructing such police official in the execution of his duty. In *R v Rudolf*[132] a police official wanted to arrest a man who he had seen drinking wine in a public place. The man ran into the house followed by the constable and was arrested. The two accused tried to rescue the "wine drinker" from the custody of the police official. The defence contended that the police official had made an unlawful entry when he entered the premises without first demanding admission. However, the court found that the constable was justified in the circumstances of the case of entering the house to arrest the "wine drinker", and the arrest was lawful.[133]

Section 198 of the Summary Proceedings Act 1957 furnishes the search warrant authority in **New Zealand**. The relevant section provides that if the district court judge or the issuing judge has reasonable ground for believing that the fruits, instrument or evidence of a crime punishable by imprisonment is in particular premises, the justice may issue a search warrant to any constable.[134] However, section 198 differs from section 21 of the Criminal Procedure Act in that the executing constable must have the warrant in his possession and must show it, but not give it to the occupier on demand. Section 317 of the Crimes Act 1961 gives a police officer the power to enter premises for the purpose of arresting a person without a warrant.[135] If the police officer has found the person at some place off the premises committing an offence punishable by imprisonment and the officer is pursuing the offender, then the officer

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130 Joubert (2001) *et al op cit* 127.

131 1926 TPD 685.

132 1950 (2) SA 522 (C).

133 The court distinguished *Rudolf* from *Jackelson* in that the accused in *Jackelson* had ejected the constable before he had effected the arrest while in *Rudolf*, the arrest had been effected when the accused tried to rescue the "wine drinker".

134 See Doyle and Hodge *Criminal procedure in New Zealand* 3rd ed The Law Book Limited (1991) at 55.

135 *Ibid* at 57-58.

can enter the premises, using force if necessary to make the arrest.[136] The officer also has power to enter any premises by force where there are reasonable and probable grounds to believe that an offence likely to cause immediate and serious harm to any person or property is being committed inside. Therefore, the purpose of section 317 is to confer a right of entry to the police officer in an emergency situation where it is not practicable or desirable to obtain a warrant first from the District Court.[137] The power to enter premises in "hot pursuit" or to prevent a crime from occurring or continuing on those premises is a recognition of the common law authority applied in *Thomas v Sawkins*.[138]

Section 8 of the Canadian Charter provides that: "Everyone has the right to be secure against unreasonable search or seizure". The meaning of section 8 has been examined in a number of cases.[139] In *Collins v The Queen*[140] the Crown had failed to prove that the police officer had reasonable grounds for his search. Similarly, in *R v Dyment*[141] a medical doctor treating a victim of a motor accident, handed over the patient's blood sample to a police officer. The blood analysis showed a blood alcohol level exceeding the permissible limit. The Supreme Court held that the taking of the blood sample by the police officer was an unreasonable seizure. The doctor only had authority to take blood for medical purposes.

In the **United States**, Rule 41(d) refers to search warrants, and requires an officer to prepare an inventory of the items seized and, upon completion of the search to give the person from whom the property was taken a copy of the warrant and a receipt that the property was taken.[142] Several appeal courts have interpreted Rule 41(d) to require federal officers to serve warrants at the outset of a search, absent exigent

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136 The same principles apply if the police officer has good cause to suspect that a person has committed an imprisonable offence on the premises.

137 Doyle and Hodge *op cit* 58.

138 [1935] 2 KB 249. It was held that a constable could enter and remain on private premises if he had reasonable grounds to believe that an offence is imminent.

139 See *inter alia*, *Hunter v Southam Inc* [1984] 2 SCR 145; 11 DLR (4th) 641, where the issue concerned the execution of an authority issued under s 10 of the Combines Investigation Act authorising named officers of the Combines Investigation Branch to enter the respondent's premises and to search for, and take away, documents. The respondents contended that the seizure was illegal because s 10 breached s 8 of the Charter. The Supreme Court agreed. The court considered the competing interests, namely the individual's right to privacy and the government's interest in intruding on that privacy, in order to advance its goals of law enforcement. The court found that the purpose of s 8 is to protect individuals from unjustified state intrusions upon their privacy. A system of prior authorisation as a pre-condition for a valid search and seizure is needed to achieve this. The court also stated that reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard. This is consistent with s 8 of the Charter, for authorising search and seizure, which was not the case in the present situation.

140 [1987] 1 SCR 265 at 278; 38 DLR (4th) 508 at 521.

141 [1988] 2 SCR 417; 55 DLR (4th) 503.

142 See Fed Rule Crim P 41 (d).

circumstances. However, only the Ninth Circuit has found a violation of this interpretation sufficient to warrant suppression.[143] In the absence of a constitutional violation, however, courts generally will not exclude evidence seized in violation of Rule 41.[144]

5.2.7 STATEMENT TO POLICE OFFICER

Section 335 of the Criminal Procedure Act provides that an accused is entitled to a copy of a written statement made by him to a peace officer (including a police official and a magistrate) concerning any matter in connection with which criminal proceedings are instituted against him.[145] If the state decides not to institute criminal proceedings against a person, such a person will not be entitled to a copy of the statement that he made to the police. In *S v Mphetha*[146] it was held that a statement will relate to a matter in connection with which criminal proceedings are instituted if the contents of the statement are **relevant and admissible** at the person's trial, or if the state will be entitled to refer to it during the accused's cross-examination. However, in *S v Mogale*[147] it was held that an oral statement to the police that was recorded and later transcribed does not constitute a written statement for the purposes of section 335.

Thus the above discussion on pre-trial rights indicate that the accused had access to information in terms of the Act prior to the inception of the Constitution.

5.3 POLICE DOCKET PRIVILEGE

5.3.1 POSITION BEFORE THE CONSTITUTION: THE *STEYN* ERA

Prior to the inception of the Interim Constitution, the law had recognised two kinds of communications which had to be protected from disclosure in order to promote the efficient detection of crime. The first related to communications between government officials in the course of an investigation. The public interest would be prejudiced if the methods to investigate crimes contained in a police docket, were generally known. A police docket is a file containing information that is assimilated or collated during the investigation into an alleged offence. It contains, *inter alia*, statements by people who are potential witnesses to the case and also a diary setting out the progress made by the investigating officer during the investigation. This privilege was extended later to include the notes made by a state witness; notes made by the

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143 See *US v Gantt* 194 F3d 987, 1004 (9th Cir 1999), where evidence was suppressed because police intentionally violated Rule 41(d) by refusing to provide a copy of the search warrant at the outset of the search, but rather left the warrant at the apartment after the suspect was arrested and removed.

144 See for example, *US v Burke* 517 F 2d 377, 386-87 (2d Cir 1975).

145 A confession is also a statement to a peace officer, and is therefore also a statement to which the accused is entitled in terms of s 335.

146 1982 (2) SA 253 (C).

147 1980 (1) SA 457 (T).

investigating officer and the advice and instructions of checking officers; the contents of police pocket books and all relevant communications and notes for litigation purposes. These notes were privileged in that they were "part of the prosecution brief".[148]

The second category of communications which needed protection, comprised statements which would tend to reveal the identity of a private individual who has given information concerning the commission of an offence. This is known as "informer privilege" in terms of which the state could refuse to disclose the identity of informers on grounds of public policy. This privilege was regarded as necessary to encourage people to provide the police with information. The police may depend upon the services of informers in some cases. These informers would be unwilling to give assistance if their identities were disclosed. In *Marks v Beyfuss*[149] it was held that no evidence should be admitted if it would tend to reveal the identity of a person who had given information leading to the institution of a public prosecution. The rule in *Marks v Beyfuss* is confined to public prosecutions. The only exception is that the informer's identity is disclosed if it was necessary to enable the accused to establish his innocence. In *Marais v Lombard*[150] the court referred to the practice of the South African Police which is to claim privilege for statements made to them during investigations but to leave the decision to the court. However, it has been said that both in South Africa and in England, the court may overrule the privilege to establish the accused's innocence.[151]

Thus the common law privilege to refuse discovery of documents in the possession of the prosecution was well established, and save for certain exceptions, this privilege was jealously enforced by the prosecution. The classic case of *R v Steyn*[152] upheld the common law privilege in respect of police dockets. The court held that this protection against disclosure applies in both civil and criminal trials. The court also noted that where there is a serious discrepancy between the statement of a state witness and what he says on oath at the trial, the prosecutor must direct attention to that fact. The prosecutor must make the statement available for cross-examination unless there is special and cogent reason to the contrary. Therefore, the Supreme Court of Appeal (formerly known as the Appellate Division) laid down the rule in *Steyn* that a prosecutor must bring contradictions to the court's attention and must make the earlier statement available for cross-examination. In such a case the state also loses the privilege in respect of the statement.

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148 In *R v Abelson* 1933 TPD 277, for instance, the court upheld an objection by a senior police officer to the disclosure of reports which he had received from detectives who had been investigating a liquor offence.

149 (1890) 25 QBD 494.

150 1958 (4) SA 224 (E).

151 Zeffertt *et al The South African law of evidence* Butterworths (2003) at 659.

152 1954 (1) SA 324 (A). This case involved an appeal against a magistrate's refusal to allow the state to provide statements of witnesses to the defence. The court held that when statements are obtained from witnesses for the purpose of being used in a contemplated lawsuit, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance.

When *Steyn* was decided, an accused was relatively well informed prior to the trial of the identity of the prospective state witnesses who could be called and the contents of their testimony. This was so because the trial was usually preceded by a preparatory examination and the record of this examination was made available to the accused.[153] However, various developments thereafter led to the erosion or falling away of such full disclosure. The practice of holding preparatory examinations fell away when the regional court was given jurisdiction to try offences such as treason and murder, which was previously only tried in the High Court.[154] The preparatory examination was therefore deemed unnecessary in such cases. The Director of Public Prosecutions could also dispense with the preparatory examination where he felt that the administration of justice could be endangered. Although the preparatory examination is still part of criminal procedure,[155] it has in practice been substituted by "plea proceedings".[156] Therefore, all that remained to inform the accused of the allegations against him, was merely the right to be furnished with particulars of any matter alleged in the charge in terms of section 87 of the Act.

However, the *Steyn* case did not decide the question whether the privilege continued after the conclusion of proceedings. However, many provincial divisions of the High Court applied the "once privileged always privileged rule" to police dockets and held that the privilege persists after the conclusion of proceedings. The court in *Mazele v Minister of Law and Order*[157] upheld the rule, but recognised that its application leads to unfair treatment of the accused.

5.3.2 THE ISSUE OF INCONSISTENT STATEMENTS AND THE PROSECUTION'S DUTY

The court in *S v Hassim and Others*[158] held that if a witness gives evidence which reveals a serious departure from or contradicts matters contained in the police

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153 The court in *Steyn* also drew a distinction between the record of evidence given at a preparatory examination and the statements made by witnesses to the police in the course of an investigation of a crime and preparation for a prosecution. Numerous precautions were taken at preparatory examinations such as interpreters were used; evidence was taken by the prosecutor under the magistrate's supervision in the accused's presence, and the accused can cross-examine such evidence; and evidence was carefully recorded and read to the witness so that errors may be corrected. This leads to an accurate representation of the witness's views. However, statements made to police are made in different circumstances and may not constitute an accurate representation.

154 See s 89 of the Magistrates' Courts Act 32 of 1944 as amended by s 7 of the Lower Courts Amendment Act 91 of 1977.

155 See ch 20 of the Act.

156 See s 119 of the Act.

157 1994 (1) SACR 406 (E). The court remarked that it is unfair that the prosecution (state) has the entire record of the police investigation including sworn statements of potential witnesses at its disposal, whilst the accused cannot consult with state witnesses once the prosecution has commenced. This is a subtle reference to the principle of "equality of arms", which implies that both the defence and prosecution must come to court on an equal footing.

158 (2) 1971 (4) NPD 493.

statement which is in the prosecutor's possession, then the prosecutor is fully entitled to put the witness's previous inconsistent statement to him in order to discredit him in terms of section 286 of Act 56 of 1955.[159] If he decides not to do this at this stage, then he should, in the interests of fairness, make this statement available to cross-examining counsel in accordance with the finding in *Steyn*.[160]

When a state witness gives evidence which differs from a statement in the prosecution's possession, the prosecutor must consider the question whether or not the discrepancy is of a serious nature.[161] The prosecutor is not required to do anything if the discrepancy is of a minor nature. However, if the discrepancy is clearly a serious one, the prosecutor must as soon as possible make the statement available to the defence. If the accused is unrepresented, the prosecutor must disclose the discrepancy to the court.[162] The court held that the rationale of the rule requiring disclosure of a previous inconsistent statement is to provide a safeguard against the danger of an accused being convicted on the evidence of a witness who is not a credible and reliable witness. The prosecutor may not ignore an averment in a statement which is *prima facie* in conflict with the witness's evidence. If the prosecutor is in doubt, he must disclose it to the defence. If he fails to disclose the discrepancy which is indeed serious, that might well result in a failure of justice.

The prosecutor's duty was to make the original statement of the witness available to the defence in order that the credibility of the witness can be properly tested by cross-examination with the aid of that statement.[163] Where there are two conflicting statements, it is the prosecutor's duty to disclose and make available both statements to the defence. The absence of a request by the defence for the deviating statement to be made available (and, where such is the case, of mutually conflicting statements) does not relieve a prosecutor of this aforementioned duty unless the defence has been made aware of the existence of such statements and has indicated that it does not require them.[164] Thus, the dictum in *S v Xaba* was approved.

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159 However, the court remarked that the state prosecutor is still entitled to use s 286 of the Act after the defence counsel has completed cross-examination, irrespective of whether the defence has made use of the statement which has been handed to him by the state prosecutor.

160 See *R v Steyn supra*.

161 See *S v Xaba* 1983 (3) SA 717 (A).

162 The court noted that a prosecutor's duty of disclosure in these circumstances is one of the rules or principles of prosecutors which must be adhered to in a criminal trial in order to ensure that the accused has a fair trial and that justice is done. The failure of a prosecutor to observe this duty is an irregularity in the proceedings for the purposes of s 317(1) of the Act.

163 See *S v Ncaphayi en Andere* 1990 (1) SACR 472 (A), where the court had to entertain an application where the state prosecutor had failed to make the police statements of two state witnesses available to the defence when it appeared that their evidence differed materially from certain further particulars to the indictment. Further particulars were based on their police statements.

164 The court found no suggestion of any special circumstances which could justify non-disclosure of the statements in question. The court held that failure of the prosecutor to make the original and later statements of the two witnesses available to the defence was therefore a material irregularity in the proceedings.

In *S v Jija and Others*[165] the court was asked to make an order that a copy of the identification parade record be furnished to the defence. The court held that the duty to disclose could embrace documents relating to fingerprint evidence and the holding of identification parades.[166] However, the disclosure is subject to the documents not being privileged. The court's decision to grant the order led to the evidence of a witness identifying one of the accused being rejected because the report (now available to the court and the defence), showed that she had failed to point him out at the identification parade. This case illustrates the danger inherent in the state's refusal to disclose documents which favour the accused in a material way.[167] An accused cannot compel a prosecutor to do his duty in making disclosure. However, it should be pointed out that if the court becomes aware of the existence of such a document and the prosecutor succeeds in preventing its disclosure, an adverse inference can be drawn against the state.[168]

Similarly, in the **United States**, Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor in a criminal trial to disclose evidence that is favourable to the defendant. This requirement is said to be similar to the constitutional disclosure requirements established by the Supreme Court in *Brady v Maryland*,[169] where the court held that a prosecutor commits a due process violation, requiring reversal of a conviction, when it is shown that the prosecutor withheld favourable, material evidence. Nevertheless, there are important differences between the ethical requirements of the Model Rule and the legal requirements of the *Brady* rule.[170]

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165 1991(2) SA 52 (E).

166 The court noted that the defence was entitled to a postponement if it was taken by surprise at the trial. This places a duty on the prosecutor to disclose documents. However, this is not a general duty to disclose, nor does it have the same application as discovery of documents in a civil trial.

167 See Du Plessis JR "The accusatorial system – too much a game" (1991) *South African Law Journal* at 580. Also see *S v Van Rensburg* 1963 (2) SA 343 (N), where the prosecutor had neglected to produce letters during the trial indicating that the accused had been confined in a mental institution. This raised the question of whether the accused should have been sent to a mental institution for observation. This also raised the inference of whether the accused was not criminally responsible for the offence for which he was charged, namely, theft.

168 *S v Jija and Others supra* at 59. Also see *R v M* 1959 (1) SA 343 (A), where a conviction was set aside because a judge told a jury that they could assume that a witness's evidence was consistent with her previous statement since the prosecutor had not drawn attention to the discrepancy.

169 373 US 83 (1963). Since *Brady*, the court has continued to expand the prosecutor's constitutional duty to disclose exculpatory evidence. Thus, *Brady* and the following case law have established a prosecutor's constitutional duty to disclose exculpatory and impeachment evidence when it is in his possession or in the possession of the police. See, *inter alia*, *United States v Agurs* 427 US 97 (1976), *United States v Bagley* 473 US 667 (1985) and *Kyles v Whitley* 514 US 419 (1995).

170 To illustrate this, the ethics rule does not limit the prosecution's disclosure obligation only to evidence that is material to the case. On the other hand, the *Brady* rule, unlike the ethics rule, dictates that the prosecution must disclose evidence that could be used to impeach a prosecution witness. For a detailed discussion about the Model Rule, the *Brady* rule, and the prosecutor's duty, see Kurcias "Prosecutor's duty to disclose exculpatory evidence" 69 (2000) *Fordham Law*

The above case law also emphasises the prosecution's duty. Prosecutors have the benefit of the police that investigates their cases and gathers evidence for them. This access puts the accused (especially the indigent accused) at a great disadvantage in preparing their cases. Thus, the increased ethical obligations of the prosecutor are meant to ensure a fair process and minimise the disparity of resources between the prosecution and the defence in the criminal justice system.[171] The prosecution's duty is two-fold in that it must provide a detailed charge to the accused so that he has adequate time to prepare for his defence and to begin his trial without unreasonable delay. The prosecution must also disclose previous inconsistent statements for example, where a state witness's evidence in court deviates materially from statements to the police. The prosecutor has an ethical duty to disclose previous inconsistent statements and to make it available to the defence in order to enable the defence to test the credibility of witnesses by cross-examination on the contents of the statement[172] and to ensure that the accused has a fair trial.[173] Similarly, the prosecution is also obliged to bring to the court's notice information in its possession which may be favourable to the accused.[174] However, the prosecutor is not obliged to hand a statement by the witness to the defence where the inconsistency is of a minor or irrelevant nature.

5.3.3 RIGHT OF ACCESS TO INFORMATION IN THE CONSTITUTION

5.3.3.1 THE PRE-*SHABALALA* INTERPRETATION

With the advent of the Interim Constitution Act 200 of 1993, police docket privilege became the focus of the court's attention. Numerous applications requesting access to
police dockets have followed the enactment of the Interim Constitution. These applications have evoked different responses from the High Courts.[175] The Criminal Procedure Act provides that the accused has the right to be informed with sufficient particularity of the charges against him.[176] In the past, the accused had no right to obtain information on evidence against him,[177] nor was there any law which required

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Review 1205-1229.

171 *Ibid* at 1209.

172 See *S v Ncaphayi en Andere supra* at 472. Similarly, it has been held in a **New Zealand** case, *Mahadeo v The Queen* [1936] 2 All ER 813, that prior contradictory statements, from a witness who has been called at deposition and who is to be called at trial, must be given to the defence.

173 See *S v Xaba supra* at 717.

174 See *S v Van Rensburg supra* at 343.

175 Some decisions are conservative whilst others are progressive. The ensuing discussion will illustrate this.

176 See ss 80 and 144 respectively.

177 See *R v Steyn supra*.

the prosecution to disclose any evidence that was in favour of the accused.[178] However, the Interim Constitution provides that everyone has a right to receive all information which is in their interest. The two provisions in the Interim Constitution which affect police docket privilege were section 23 and section 25(3)(b).[179] The inclusion of section 23 reflects the concern generally in the Constitution with the openness of government. The right to be informed with sufficient particularity of a charge raises the issue of discovering police dockets and witness statements in criminal trials.

According to Du Plessis and Corder, a finding that accused persons have a right of access to witness statements and police dockets will not necessarily entail a "free for all" or unlicensed exercise of this right.[180] This right can be circumscribed by determining specific conditions for and the mode of *de facto* access. O Hollamby maintains that the accused and the state must approach the court on the same footing and neither should enjoy any substantial advantage over his opponent.[181] The right to a fair trial must go hand-in-hand with the right to equal protection of the law, the entitlement to information in the possession of an organ of the state goes hand-in-hand with the right to a fair trial.

Some of the first constitutional litigation dealt with the question of whether an accused had a right of access to information contained in the police docket. In *S v Fani*[182] Jones J held that if the accused is not sufficiently informed about the case against him, he will not be able to properly prepare his case and cannot be said to have had a fair trial. Therefore, the court held that the accused was entitled before plea to certain evidential information from the docket.[183] However, the court found that the state is not compelled by the Interim Constitution to allow the defence access to the whole

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178 However, see *S v Van Rensburg supra* where the court held that the prosecution was obliged to furnish the accused with favourable evidence.

179 Section 23 reads as follows: "Every person has a right of access to all information held by the state or any of it organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." Section 25(3)(b) provides that the accused's right to be "informed with sufficient particularity of the charge" is part of his or her right to a fair trial.

180 Du Plessis and Corder *op cit* 176.

181 This brings the "equality of arms" principle into play. See O Hollamby "s 23 of the Interim Constitution and access to information in police dockets" (1994) *Consultus* 140 at 142.

182 1994 (1) SACR 635 (E).

183 The accused was entitled to the following information:

(1) copy of any statement by the accused or co-accused;
(2) copy of all relevant medical evidence;
(3) copy of any report of a technical expert nature such as blood alcohol reports, fingerprints and so on;
(4) copies of relevant documents such as the report on an identification parade, a plan of an accident scene and so on;
(5) a list of potential state witnesses;
(6) a summary of the witnesses' statements;
(7) a copy of the accused's previous convictions.

docket. The guidelines proposed in *Fani* have been commended by du Plessis.[184]

The court considered the question whether section 23 of the Interim Constitution intended to have any application to criminal trials in *S v James*,[185] but left the question open. The court concluded that section 23 does not require that witness statements or summaries of them be furnished to the accused. The court held that the requirement in section 25(3) that an accused be informed sufficiently of the charges against him required that he be given adequate information to enable him to understand precisely what the allegations against him are, in order to plead to the charge and to prepare his defence. However, the court refused to order that the whole police docket should be handed to the defence.[186]

It has been held that police docket privilege is not the same as legal professional privilege, and the court has a discretion to override such privilege.[187] The court in *Smith*, approved the finding in *Fani* that witness statement privilege is not inconsistent with the Interim Constitution. It held that the effect of section 25(3)(b) and section 23 was that an accused person is entitled to full particularity of the charge as to enable him to adduce and challenge evidence except where such information is protected by privilege.[188] The court held that as the summary of the substantial facts in the case had failed to inform the accused adequately of the charges he had to meet, and the state had assured the court that handing over of the statements would not compromise any police informers or other interests of state security, the most expeditious method of conveying the necessary information to inform the accused fully of the charges would be to order the
state to hand over copies of statements to the defence. The state was ordered to provide the defence with copies of all the witness statements of the key witnesses.

A two-stage enquiry was followed in *Qozeleni v Minister of Law and Order and*

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184 See Du Plessis "Toegang tot polisiedossiere" (1994) *South African Journal of Criminal Justice* at 307, where she proposes that the guidelines in *Fani* be followed keeping in mind the *desideratum* of a well-defined balance between the interests of the individual and those of the public.

185 1994 (2) SACR 141 (E). The accused had applied for an order compelling the state to furnish the defence with a summary of the intended evidence of each of the state witnesses.

186 Judge President Zietsmann stated that in the circumstances of the case, the summary together with the documents and other information provided to the accused, constituted sufficient detail, and even if it did not, the defence was at liberty to make another application for further particulars in terms of s 87 of the Act.

187 See *S v Smith and Another* 1994 (2) SACR 116 (E). The court was asked to make an order that the state furnish the defence with copies of statements of witnesses or summaries of evidences of such witnesses.

188 This protection must also be justified in terms of s 33. The court also criticised the system of informing an accused of the charges against him in terms of s 144 of the Act where an accused is arraigned for summary trial in a superior court in that it falls far short of the standard applied in progressive jurisdictions such as the United Kingdom, United States of America and Canada.

Another[189] namely, whether a fundamental right had been infringed and if so, whether that infringement constituted permissible limitation in terms of section 33. The court held that the fundamental right contained in section 23 should be considered with section 8(1), because the basis of the right to disclosure can also be founded on the notion that a fair trial envisages an "equality of arms".[190] Therefore, all parties must have access to the same documents. It followed that disclosure of the police docket was necessary for the protection and exercise of plaintiff's rights during the civil trial. Therefore, the section 23 right had been infringed. The respondent had to justify non-disclosure in terms of section 33, which he had failed to do so. Therefore, the court concluded that the applicant was entitled to discovery of the police docket.

The issue arose in *S v Sefadi*[191] whether the state could rely on the common law privilege attached to police dockets in terms of sections 23 and 25(3) of the Interim Constitution. The court concluded that the privilege constitutes an unjustifiable limitation on the right of access to information and negates the right. The privilege also limits the rights contained in section 25(3) unjustifiably. The court also remarked that a trial is not fair when only one of the parties (state) has access to statements taken by the police. The court concluded that the privilege is in conflict with sections 23 and 25(3) of the Interim Constitution. Therefore, it held that the state is compelled to allow the defence access to the docket. The state was ordered to provide the summaries which had been requested by accused's counsel.

In *S v Majavu*[192] the court concluded from a survey of foreign jurisdictions such as Canada, the United States of America and the United Kingdom, that generally other jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right. The court held that while section 23 is not a discovery measure, it applies equally to the prosecution and the right of access of information has to be considered in conjunction with the rights contained in section 25(3). This means that in order to have a fair hearing, the need may arise to have access to information in the possession of the prosecution or police in order to prepare the defence of an accused properly. The court also noted that the words chosen in framing section 23 indicate the wide ambit of the intention and this is in keeping with the transparency and openness sought by the framers of the Constitution. The court therefore concluded that an accused is generally entitled to the information contained in the police docket at any stage of the investigation or prosecution in order to protect his rights. The onus rested on the state to establish that the limitation on that right was justifiable in terms of section 33. However, the state had failed to do this in the

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189 1994 (1) BCLR 75 (E). In this case the plaintiff in an action for damages for unlawful arrest and detention and assault by members of the police force, brought an application for an order compelling the police to disclose the relevant police docket.

190 Section 23 refers to access to information, whilst s 8(1) refers to equality before the law.

191 1994 (2) BCLR 23 (D). Counsel for an accused arraigned in the High Court, had applied for a ruling that he was entitled to access to the statements or summaries of potential witnesses contained in the police docket.

192 1994 (2) BCLR 56 (Ck). The court was asked to make an order that the state furnish the accused with copies of all documentation and information in its possession relating to an intended prosecution.

particular case. The court also remarked that the prosecution is obliged to inform an undefended accused of his rights to discovery and to supply him with the relevant documentation and information.

The above discussion demonstrates that in *James*, *Fani* and *Smith*, the court found that the common law privilege was not inconsistent with the provisions of the Constitution. According to Schwikkard, this conclusion arose as a result of the failure to distinguish between establishing the existence of a right, and the justification of the limitation of an existing right in terms of section 33(1).[193] On the other hand, in those cases such as *Majavu* and *Qozeleni*, where a clear distinction was made between these two enquiries, the courts found that the privilege of non-disclosure was inconsistent with the provisions of the Constitution. However, a refusal to disclose some or all of the information contained in the police docket might, depending on the circumstances, be justified in terms of section 33(1).[194]

The issue arose in *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others*[195] whether an accused person should be given access to witness statements and other information prior to his prosecution. The court concluded that on a proper interpretation, section 23 gives an accused person the right of access to information contained in the police docket. However, it is not an absolute right and remains subject to section 33(1) qualification. The court compared the position of an accused under our constitution with his position in other democratic countries and noted that our practice of criminal discovery should be brought in line with the international trend towards greater openness. The court concluded that the blanket docket privilege of common law is *prima facie* inconsistent with the Interim Constitution. Docket privilege *per se* was regarded as a limitation on the right which is not reasonable and justifiable in terms of section 33(1).[196]

A purposive approach was followed by the court in *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal*.[197] The court held that section 23 provided for a purposive approach in that the purpose for which it was being invoked

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193 See Schwikkard (1994) *SACJ op cit* 333.

194 *Id*.

195 1994 (5) BCLR 99 (E). The first applicant had sought an order that the prosecution furnish him with statements contained in the police docket relating to charges on which he was arraigned. The second applicant, the Commissioner of the South African Police Services sought a declaratory order that the common law relating to docket privilege which was in force prior to the commencement of the Constitution remained in force and was consistent with ss 23 and 25 of the Constitution.

196 Therefore, the court declined to grant the declaratory order sought by the Commissioner. The court also considered the question of who is entitled to claim privilege in respect of those contents of the docket which are subject to privilege proper or who could justify refusal to make disclosure. The court held that in each case it will be the Attorney-General (now known as Director of Public Prosecutions), until the stage when the prosecution is complete, and thereafter the police. The court thus granted the first applicant an order that the information in the docket be disclosed to him.

197 1995 (1) SACR 88 (T).

had to be considered. The court noted that there were sound reasons for not making available copies of the statements of state witnesses namely; the risk of perjury and intimidation of witnesses. The court also noted that the public interest in ensuring that the accused was given a fair trial could be served without allowing the accused access to the police docket and thereby weakening the position of the prosecutor. The court concluded that the applicants in the present case had not shown that they were entitled to access to statements in the police docket. The court therefore found that no such duty exists and dismissed the application. However, the court referred the issue of constitutionality of the following rules to the Constitutional Court namely:

(1) Whether the common law rules of privilege precluded an accused person from having access to the contents of a police docket in all circumstances and,

(2) Whether an accused was precluded by the common law rule of practice from consulting with state witnesses without first obtaining the consent of the prosecution which was entitled to refuse consent in its sole and absolute discretion.

The court examined the right in section 23 in *Nortje and Another v Attorney-General of the Cape and Another*[198] and noted that statements in the police docket would ordinarily be reasonably required by an accused to exercise his right to defend himself. The court noted the benefits of disclosure to the accused such as assisting an innocent person in obtaining his acquittal. The court also noted that the risks of "tailoring" and other adverse consequences to the administration of justice could not be eliminated without simultaneously negating the essential content of the right. The enactment of section 23 would eventually lead to the demise of general docket privilege in *Steyn's* case. The court concluded that in the absence of some specific reason found to be good and sufficient, an accused is entitled to pre-trial disclosure of statements of both the witnesses the state intends to call and those of persons whom it does not intend to call. Therefore, the applicants were entitled to the statements they sought.[199]

The above cases illustrate a gradual shift in the courts' thinking towards granting the accused greater access to police dockets on the basis of a fair trial. The above discussion also illustrates that the right of access to information contained in section 23 of the Interim Constitution, has been considered and enforced in a number of cases relating to access to information in police dockets.[200] These cases demonstrate

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198 1995 (2) BCLR 236 (C).

199 Also see *S v Thobejane* 1995 (1) SACR 329 (T) where the court stated that an accused has a right of access to police docket as a matter of course. If s 23 was applicable as a matter of course, then the privilege was a justifiable limitation. However, the court found that it had not been shown that the information in the docket was required by the accused in terms of s 23 for the protection of his rights. The information given to the accused such as copies of post-mortem reports, medical examination reports, notes and photographs pertaining to pointing out, ballistic and identification parade forms were found to be adequate for the purpose of meaningful consultation and for the accused to plead to the charge.

200 According to Schwikkard, the cases favour the view that s 23 provides the accused with a right to disclosure of the contents of the police docket. A pre-requisite for the exercise of such right is that the information is required to enable the accused to exercise or protect any of his rights.

that it was essential for the applicant to show that the information sought was required to protect a right. Where this could not be shown, the applicant was unable to enforce any constitutional right to the information sought.

5.3.3.2 THE *SHABALALA* DECISION AND THE RIGHT TO A FAIR TRIAL

The Constitutional Court finally clarified the situation in *Shabalala v Attorney-General of the Transvaal*.[201] The Constitutional Court was required in *Shababala* to determine *inter alia,* whether or nor the common law privilege pertaining to the contents of police dockets, defined in *R v Steyn*[202] is consistent with the Constitution. The question thus arose whether an accused was entitled, in addition to the particulars in the indictment read with the summary of substantial facts and any particulars obtained under section 87 of the Criminal Procedure Act, to access to the contents of the police docket itself and whether such access was required to ensure a fair trial.[203]

The Constitutional Court in *Shabalala* found that the answer to the question actually lay in section 25(3), namely that the accused has a right to a fair trial. The court found that the police docket privilege is unconstitutional because it protects all the documents in a police docket from disclosure whether or not the accused requires those documents for a fair trial. However, the court held that if the state can show that the accused does not need access to the docket for purposes of a fair trial, disclosure will not be necessary. The state could also justify refusal of access in terms of section 33, for example, where there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or of state secrets, intimidation of witnesses or prejudice the proper ends of justice. However, the trial court retains a discretion to order disclosure even where such disclosure prejudices the state and the ends of justice because the right to a fair trial is a fundamental right of the accused.[204]

Denying the accused access to state witness statements in the police docket is said to violate the accused's right to a fair trial in that the accused is not fully informed of

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The existence of such a right will be established if the information in the docket is relevant to any issue before the court. The state will have to discharge its onus of proving that non-disclosure of any information contained in the docket is reasonable and justifiable in an open and democratic society. See Schwikkard (1994) *SACJ op cit* 337.

201 See *Shabalala and Others v Attorney-General of the Transvaal supra* at 1593. Please note that this case will also be discussed in subsection 7.4.2.2 below.

202 See *R v Steyn supra* at 324.

203 The three constitutional provisions which were relevant, were s 23 which pertains to the fundamental right of access to all information held by the state, s 25(3) which pertains to the fundamental right to a fair trial, and the limitation clause in s 33.

204 *Shabalala* approaches the issue from the fair trial angle and conforms with the position in the United States, United Kingdom, Germany and New Zealand. The basis for furnishing the accused with material in the United States is the accused's right to a fair trial. See *S v Majavu op cit* 67. Similarly, the accused's right to a fair trial is used to grant the accused access to evidence in the United Kingdom, Germany and New Zealand. For a detailed discussion about this, see the discussion in 5.3.6.

the case he has to meet and is unable to prepare an adequate plea or defence. Without prior access to such statements the defence cannot adequately challenge or assess the evidence for the prosecution.[205] In *Shabalala* it was held that "details of how the court should exercise its discretion in all these matters must be developed by the Supreme Court from case to case but it is always subject to the right of an accused to contend that the decision made by the court is not inconsistent with the Constitution".[206] *Shabalala* illustrates that the accused has in principle the right of access to all witnesses statements in the police docket. Those statements which are least contested are those which are exculpatory from the accused's perspective.[207] There is a general duty to disclose as far as all other witness's statements are concerned.

The right to a fair trial also means that information in the possession of third parties could be necessary for the adequate preparation of a defence. The principle of "equality of arms" should also apply during the preparation for trial and should entail the compulsory process of obtaining documentary evidence from third parties, such as private therapeutic records of sexual assault complainants held by psychiatrists or psychologists.[208] However, an accused's claim to a fair trial may conflict with a third party's right to privacy. The Supreme Court of Canada has tried to balance these rights by requiring an accused to first approach the trial court to obtain a court order by convincing the court that there are reasonable grounds to believe that a specified document is in the third party's possession and that it is "likely to be relevant" for the preparation of the defence.[209]

The defence's ability to competently challenge expert evidence depends on the extent of information available to it. The timing of disclosure relating to expert

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205 See *S v Nortje supra*. Also see *S v Nassar* 1995 (1) SACR 212 (Nm), where the court held that to do justice to a fundamental right that the accused was presumed innocent until proven guilty in terms of art 12(1)(d) of the Namibian Constitution, was the prerequisite that an accused be placed in the position whereby he knew what case he had to face so that he could properly and fully prepare his defence. The court stated further that the accused was entitled to be provided with all reasonable practicable time and facilities to ensure that the trial was fair. "Facilities" in terms of art 12(1)(e) of the Constitution was interpreted to include providing an accused with all relevant information in the state's possession including copies of witness statements and relevant evidential documents.

206 See *Shabalala and Others v Attorney-General of the Transvaal supra* at s 58.

207 The accused is entitled to documents which are "exculpatory" (documents which are helpful to the defence) unless the state can justify refusal.

208 See Meintjies-Van der Walt "Expert evidence and the right to a fair trial: a comparative perspective" 17 (2001) *South African Journal on Human Rights* 301 at 314.

209 Thus, it has also been held in Canada that information in the hands of third parties may in certain circumstances be necessary for the adequate preparation of a defence. See *R v O'Connor* (1995) 103 CCC (3d) 1 SCC at 15, where it was held that there must be reasonable grounds for disclosure and disclosure must be relevant for preparation of the defence. Also see *R v Beharreill* (1995) 103 CCC (3d) 92 SCC. This two stage enquiry is now regulated by legislation, namely, Bill - C 46 Production of Records in Sexual Offence Prosecutions, which became law on 12/5/97. The aim of these amendments is to improve the protection and equality rights of complainants while recognising the rights of the accused. Also see Meintjies-Van der Walt (2001) *SAJHR op cit* 314.

evidence could be crucial to the proper preparation of the defence case. This is because access to comprehensive expert reports and pre-trial meetings between experts can contribute to delineating the issues in the dispute.[210] According to *Shabalala*, the timing of disclosure will depend on the circumstances of the case. Disclosure can occur at a later stage provided the accused has sufficient time to prepare the defence.[211] The Constitutional Court stated in *Shabalala*, that the primary reason for disclosure is that an accused may prepare a defence by being fully informed of the case that he has to meet, and that disclosure should take place at a time "when the accused is acquainted with the charge or indictment or immediately thereafter".[212] However, the duty to disclose is said to be a continuing one.[213]

The *Shabalala* decision has been endorsed in a number of decisions.[214] The *Shabalala* decision also led to the perception that the defence had extensive rights of access even at the bail stage. Consequently, the need arose for necessary legislation.[215] Section 60(14) empowers a prosecutor to deny a bail applicant access to the contents of the police docket. The constitutional validity of section 60(14) was attacked in *S v Dhlamini*; *S v Dladla*; *S v Joubert; S v Schietekat*[216] where the

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210 See Meintjies-Van der Walt (2001) *SAJHR op cit* 313.

211 See *S v Scholtz* 1997 1 BCLR 103 (NmS). Also see *S v Smile* 1998 (1) SACR 688 (SCA), where the accused had initially been denied access to statements of state witnesses. However, once it had been ascertained that they were entitled to such statements as a constitutional right the latter were made available to the accused. However, this was during the trial and after some of the witnesses had already testified. The court held that although the initial refusal to furnish the statements was a constitutional irregularity, this in itself was not a ground for setting aside the convictions. The subsequent availability of the statements remedied the defect which, was not of such a nature as to immediately warrant the vitiating of the trial.

212 See *Shabalala v Attorney-General of the Transvaal supra* at s 56.

213 See *R v Stinchcombe* (1991) 68 CCC (3d) 1 at 14 (SCC) where the Canadian court held that the duty to disclose is also a continuing one.

214 The decision was favourably referred to in *S v Kandovazu* 1998 (9) BCLR 1148 (NmS), where the court held that the order refusing disclosure of the witness statements to the defence was tantamount to a denial of the right to a fair trial to an accused person. Also see *S v Makiti* 1997 (1) All SA 291 (B), where the court held that although *Shabalala* does not require witness statements to be handed over to the defence in all cases, if the matter appeared not to be trivial and there was no prejudice to the state, the statements should be made available to the defence in order to give effect to the spirit and tenor of the Constitution.

215 See s 60(14) of the Act, which provides that "notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket ... unless the prosecutor otherwise directs". It also contains a proviso that this subsection "shall not be construed as denying an accused access to any information, record or document to which he ... may be entitled for purposes of his trial". Thus, this proviso ensured that s 60(14) would not be in conflict with the decision in *Shabalala*.

216 1999 (2) SACR 51 (CC). Also see Van der Merwe "Borgverrigtinge en toegang tot die polisiedossier: het die staat 'n regsetiese beskikbaar stellingsverpligting?" 12 (2001) *Stellenbosch Law Review* at 215-221, where the writer argues that there is at least one special situation where a prosecutor who has decided to rely on s 60 (14) in withholding the contents of the police docket from a bail applicant, will on the grounds of legal ethics be compelled to reserve

Constitutional Court confirmed the
constitutional validity of this provision. However, the *Shabalala* decision has been the butt of some critical comment.[217]

5.3.4 RIGHT OF ACCESS TO INFORMATION IN THE FINAL CONSTITUTION

Section 35(3)(a) of Constitution 108 of 1996 provides that the accused has a right to be informed of the charge with sufficient details to answer it.[218] This right is linked to the right to have adequate time and facilities for the preparation of his defence. The accused's rights to have adequate time and facilities to prepare a defence is linked to his right of access to information.[219] Section 35(3)(b) provides that every accused has a right to a fair trial which includes the right to have adequate time and facilities to prepare a defence.[220]

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his decision. This situation will arise where there is a material discrepancy between the oral evidence of a state witness at the bail proceedings and his written statement contained in the police docket. Also see Van der Merwe "Artikels 60(14) en 335 van die Strafproseswet: het 'n borgapplikant 'n reg van toegang tot sy eie verklaring in die polisiedossier?" 14 (2001) *South African Journal of Criminal Justice* 297, where the writer argues that despite the fact that s 60(14) applies "notwithstanding anything to the contrary contained in any law", a prosecutor should as a rule permit a bail applicant to have access to a copy of a statement falling within the ambit of s 335 of the Act.

217 See Senatle "Access to information in the police docket" (1999) *The Judicial Officer* 55 at 72-73, where the writer states that the *Shabalala* decision has not taken the position regarding police docket privilege any further. The effect of the case is that the state can no longer make a unilateral claim of non-disclosure. The decision is also silent regarding the stage at which the disclosure should be made. The writer proposes that disclosure should be made after the completion of investigation, but before commencement of the trial. The decision is also silent regarding reciprocal disclosure which requires the defence to disclose to the prosecution certain elements of the case that it plans to present at the trial, such as names of defence witnesses, their addresses and their statements. However, the South African Law Commission does not support reciprocal disclosure by the defence. It sees no scope for any duties upon the accused during the course of the trial which do not already exist at common law and in the rules and practices of cross-examination. See the *South African Law Commission (Project 73) Report* "A more inquisitorial approach to criminal procedure – police questioning, defence disclosure, the role of judicial officers and judicial management of trials" (August 2002) at 109.

218 See *S v Lavhengwa* 1996 (2) SACR 453 (W) 482 at 484, where the court examined whether the nature of the statutory offence of contempt of court was sufficiently clear and unambigious to comply with the constitutional right to be informed with sufficient particularity of the charge. The court held that if the definition of an offence is so vague about the prohibited act, it not only allows the unfair prosecution of an unwitting person but it also grants the state a widespread prosecuting discretion which it may abuse. Thus, there should be a fair notification to those citizens subjected to the law and adequate guidance for law enforcement agencies. The South African Law Commission also prefers the *Lavhengwa* approach, as the offence and field of prohibition is clear. See *South African Law Commission Discussion Paper 90* "The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing" (31 March 2000) at 64.

219 See chapter 7 on "The Right to be Prepared" for a more detailed discussion about the accused's right to adequate time and facilities to prepare a defence.

220 Article 14(3)(b) of the ICCPR and art 6(3)(b) of the ECHR have similar provisions. The United Nations Human Rights Committee (hereinafter referred to as the "HRC") defines "adequate time" as depending on the circumstances of each case while the word "facilities" means that an

The right of access to adequate facilities also imposes a positive duty on the state to furnish the accused with such facilities which include allowing an accused access to results of the police investigation.[221] In *Edwards v UK*[222] the European Court held that it is a requirement of a fair trial that "the prosecution authorities disclose to the defence all material evidence against the accused". The HRC also held in *Harvard v Norway*[223] that it is important for the guarantee of a fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against the accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel.[224]

The information must also be given to the accused in a language that he understands.[225] The ICCPR provides that the accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.[226] The ECHR has a similar provision in terms of article 6(3)(a).[227] In *Kamasinski v Austria*[228] the court accepted that information could be given orally as long as the accused is adequately informed. The court also noted that an accused who is "not conversant in the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a

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accused should be granted access to documents and records necessary for the preparation of the defence, but it does not include an entitlement to be furnished with copies of all relevant documents.

221 Steytler *Constitutional criminal procedure* 232.

222 (1992) 15 EHRR 417. Also see *Bendenoun v France* (1994) 18 EHRR 54, where the principle was applied to an administration court; certain documents or even the whole file may have to be supplied, but then the applicant has to give specific reasons, even briefly for the request to have access.

223 Case no 451/1991.

224 See De Zayas "The United Nations and the guarantees of a fair trial in the International Covenant on Civil and Political Rights and the Convention against torture, and other cruel, inhuman or degrading treatment or punishment" in Weissbrodt and Wolfrum (1998) *op cit* 684.

225 See s 35(4) of the Constitution. Section 35(4) should also apply when the summons or indictment is served on the accused outside the courtroom. Where the accused is represented, communication is effective if the lawyer understands the language of the documents. Where notification is in court, the right to an interpreter in terms of s 35(3)(k) applies. The charge sheet need not be translated into language other than the court language as long as it has been competently interpreted to the accused. It is acceptable if the accused is represented provided that the defence lawyer understands the language in which the document is written. See Steytler *Constitutional criminal procedure* 226. Also see chapter 6 on "The Right to Understand" for a more detailed discussion.

226 See art 14(3)(a).

227 Article 6(3)(a) provides that a person charged with a criminal offence must be informed of the nature and cause of the accusation against him.

228 (1991) 13 EHRR 36.

language that he understands".[229] However, there is compliance with the right if the defence counsel understands the language in which the information is given.[230]

Section 32 provides that everyone has the right of access to any information that is held by the state and another person and that is required for the exercise or protection of any rights. The ratio for section 32 is to produce an open and accountable government. The following case law refers to the interpretation of section 32 of the Constitution:

In *Leech and Others v Farber NO and Others*[231] the question involved the extent to which the examinee at such enquiries was entitled to access to information in the possession of the Commissioner as a creditor. The court found generally it would not be "unfair" to require the witnesses to be examined without first being given access to the information in the possession of the Commissioner or a creditor who intended to participate in the enquiry. The mere fact that the enquiry was under the control of the commissioner did not have the consequence that documents in the possession of a creditor who desired to participate were *ipso facto* held by the creditor as agent on behalf of the commissioner. Such documents were not documents in the state's possession as contemplated by section 32 of the Constitution. Documents to which applicants sought access were the documents of the creditor and were not held by the commissioner. The reliance upon section 32 was therefore found to have been misconceived.[232]

The court held in *Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council*[233] that the respondent had established that the information was confidential. The tenderers and particularly the successful tenderer had a direct and substantial interest in not having the contents of their tender documents revealed to

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229 Steytler *Constitutional criminal procedure* 226.

230 *Id.*

231 1999 (9) BCLR 971(W). Here, enquiries were held in terms of ss 417 and 418 of the Companies Act 61 of 1973.

232 The court held that fairness did not dictate that in general the questioner should disclose to witnesses all information which was already in his possession or any suspicions that may be held in relation to the particular witness as a pre-condition to questioning him. If circumstances arose in which a witness required an opportunity to consider an aspect more fully in order to place himself in a position to provide a meaningful reply, that was a matter which could and should be dealt with by the Commissioner if and when it arose.

233 1999 (9) BCLR 1052 (W). The issue involved an application for access to documents which was sought by an unsuccessful tenderer. The facts were that the applicant relied upon the provisions of s 32 and s 33 read with items 23(2)(a) and 23(2)(b) of Schedule 6 to the Final Constitution and s 217 of the Constitution. Section 32 guarantees to every person the right of access to any information held by the state where such is required for the exercise or protection of any rights. Section 33 guarantees to every person the right to administrative action that is lawful, reasonable and procedurally fair. Section 217 provides that when a state organ contracts for business, it must ensure that the system is fair, equitable, transparent, competitive and cost-effective.

the applicant who was their competitor.[234] The court noted that the framers of the Constitution had clearly not intended to confer a right of unrestricted access. They would have been conscious of the fact that unscrupulous persons would exploit such a position for selfish reasons. A balance had to be struck between the right of access to documents and the right of third parties to privacy.[235] Therefore, the application was dismissed. Similarly, in *Goodman Brothers (Pty) Ltd v Transnet Ltd*[236] the court found that a party seeking access had to show a reasonable basis for believing that a disclosure of documents in the state's possession would assist him to protect or exercise a right. The court found that no *prima facie* basis had been made out for the infringement of a right which the applicant had sought to exercise or protect.

In the case of *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*[237] the court held that the content of the right of access of information should be examined within the context within which it is claimed. The court also held that the purpose of section 32 is, *inter alia*, to provide a framework for a statute guaranteeing freedom of information, and to enable courts to examine whether a denial of information would undermine the notions of fairness, openness and transparency.[238] Similarly, a medical practitioner relied on the constitutional right of access to information, when he sought an order against the Health Professions Council of South Africa, to compel it to grant access to certain hospital records.[239] The professional body was conducting an enquiry into a complaint of negligence laid against the medical practitioner, and it possessed hospital records relating to the complaint. The court held that such relief was not competent against the council because the council was not an organ of the state. The complainant was, however, entitled to access to those documents in the possession of the council emanating directly or indirectly from the hospital records. The respondent was therefore ordered

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234 If each tenderer was able to obtain access to its competitors' confidential information, this would have a chilling effect causing prospective tenderers to withhold important information and possibly even refraining from submitting a tender. The commercial implications of such a state of affairs were obvious.

235 Also see the Canadian case of *R v O'Connor supra* which is also instructive regarding the maintenance of a balance between the accused's right of access to information and the third party's right to privacy.

236 1998 (8) BCLR 1024 (W). Here, an unsuccessful tenderer had sought an order compelling the respondent to furnish reasons for the rejection of the applicant's tender as well as the furnishing of information in the possession of the respondent relating to the evaluation of the tenders, including copies of tenders received. The court found that the applicant was entitled to an order compelling the respondent to furnish reasons for the rejection of the applicant's tender. However, it was not entitled to the relief it sought in respect of access to documents in the respondent's possession.

237 2000 (5) BCLR 534 (C). Here, the applicants had sought an order compelling the first respondent to furnish a wide range of information, including a transcript of all the evidence presented to the first respondent's committee on Human Rights Violations, upon which the findings complained of were investigated.

238 However, the application was dismissed with costs, because the applicants had not made out a case why the information was needed immediately to exercise their right to launch a claim for defamation.

239 See *Korf v Health Professions Council of South Africa* 2000 (3) BCLR 309 (T).

to allow the applicant to inspect and make copies of all such documentation. It has also been held that whilst the information to which access is sought in terms of section 32 does not have to be essential, it certainly has to be more than useful to a party who alleges that he requires the information.[240]

The above discussion demonstrates that the case law does not deal with criminal matters *per se*. However, the principles extracted from these cases clearly apply to the realm of criminal discovery. The above cases illustrate that a witness must be given access to information in the other party's possession according to the dictates of fairness. However, this right of access is not absolute, and a balance must be struck between one party's right of access and the other party's right to withhold such access. This view conforms with the Constitutional Court's finding in *Shababala*.[241]

5.3.5 CURRENT POSITION: PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

The **aim** of the Information Act is to give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights, and to provide for incidental matters.[242] The object of the Information Act is to foster a culture of transparency and accountability in public and private bodies, thus giving effect to the right of access to information. Similarly, it seeks to promote a society in which the people of South Africa have access to information so as to enable them to more fully exercise and protect all of their rights. However, the right of access to any information held by a public or a private body may be limited to the extent that the limitations are reasonable and justifiable in terms of section 36 of the Constitution.

When a court interprets the provision of the Information Act, it must prefer any reasonable interpretation of that provision which is consistent with the objects of the act over any alternative interpretation that is inconsistent with those objects. The Information Act applies to a record of a public body and a record of a private body. However, the Information Act does not apply to records required for criminal or civil proceedings after commencement of proceedings.[243] The Information Act is said to apply despite the provisions of any other legislation.

The information officer (chief executive officer of a public or private body) has a right to refuse a request of access to a record of the body in the following circumstances:

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240 See *Ngubane v Meisch NO* 2001 (1) SA 425 (N).

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

242 See Government Gazette No 20852. Sections of the Promotion of Access to Information Act of 2000, formerly known as the Open Democracy Bill, are modelled on Freedom of Information Acts in Australia, New Zealand, Canada and the US. For a detailed discussion about this Act, see *The Star* "Promotion Of Access to Information Act of 2000" 23 March 2001:16.

243 See s 7(1) of the Act. However, any record obtained in contravention of s 7(1) is admissible as evidence in the criminal or civil proceedings referred to in s 7(1), unless the exclusion of such record by the court in question would be detrimental to the interests of justice.

(1) for the protection of the privacy of a third party who is a natural person (s 34). This means that the information officer must refuse a request for access to the record of the body if its disclosure would invoke the unreasonable disclosure of personal information about a third party including a deceased individual (s 34(1));

(2) . . . . . (s 35);

(3) . . . . . (s 36);

(4) . . . . . (s 37);

(5) . . . . . (s 38);

(6) for the protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings (s 39). This means that the information officer may refuse a request for access to a record if

(a) the record contains methods, techniques, procedures or guidelines for the prevention, detection, suppression or investigation of offences or the prosecution of alleged offenders and the disclosure of those methods, techniques, procedures or guidelines would prejudice the effectiveness of
those methods or lead to the circumvention of the law or facilitate the commission of an offence;

(b) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record would impede that prosecution or result in a miscarriage of justice in that prosecution;

(c) if the disclosure of the record would prejudice the investigation of any possible offence, reveal or enable a person to ascertain the identity of a confidential source of information in respect of a law enforcement matter, resulting in the intimidation or coercion of a witness or endangering the life or physical safety of that witness; resulting in the commission of an offence facilitating escape from lawful detention, depriving a person of a right to a fair trial or an impartial adjudication;

(d) if the disclosure facilitates the commission of a contravention of a law including escape from lawful detention, or prejudices or impairs the fairness of a trial or the impartiality of an adjudication.

(7) for the protection of records privileged from production in legal proceedings (s 40). This means that the information officer must refuse a request for access to record if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.

(8) . . . . . (s 41);

(9) . . . . . (s 42);

(10) . . . . . (s 43).

However, the information officer must grant a request for access to a record if the public interest in the disclosure of the record outweighs the harm (s 46).

It is apparent from the above that sections 34, 39 and 40 have a bearing on criminal discovery practice. The exclusion of the Information Act for records required for criminal and civil proceedings is harsh. This clearly restricts the accused's rights to obtain access to information in police dockets. The Information Act clearly places emphasis on law enforcement which is understandable in the light of the violent times we live in. However, the rights of accused persons should also be protected. It is noteworthy that the Information Act stipulates that any limitation on the right of access must be justified in terms of section 36 of the Constitution. This would certainly ensure that a fair and equitable balance is maintained between the accused's rights of access to information and the law enforcement's right to refuse disclosure. The effect of this justification requirement and section 46 above, is that the Information Act requires the information officer to use great care in exercising his right of refusal. This is indeed commendable. The Information Act is heralded as a milestone for public sector accountability.[244] South Africa was a closed and secretive society before the advent of the Constitution. Therefore, it was impossible for interested parties to obtain access to sensitive information. However, the Constitution brought with it transformation and a welcome shift from the secretive authoritarianism of the past towards a democracy based on openness and transparency.[245]

5.3.6 ACCESS TO INFORMATION IN FOREIGN JURISDICTIONS

The position in international law varies from country to country.[246] In some instances discovery is virtually non-existent, whilst in other countries discovery is generally applied and is very extensive. This comparative study is also relevant in terms of section 39(1) of the Constitution which requires consideration of international law and

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244 See *The Star op cit* 16.

245 The Promotion of Access to Information Act illustrates this transformation. Also see Williams "Access to information in the new South Africa" (1997) *De Rebus* at 563-565.

246 Roger Traynor, former Chief Justice of the Supreme Court of California, made the following appropriate comments regarding the use of comparative law:

> "Such differences do more than elucidate the stuff of comparative law. They also serve to remind us, in any advance upon its dusky area, how apt are the uses of diversity. It is no flat world, this world of law, and we need as many views as are envisaged how much of it still awaits discovery."

See Traynor "Ground lost and found in criminal discovery in England" 39 (1964) *New York University Law Review* 749 at 770.

foreign law.[247] Many foreign jurisdictions have also taken a progressive approach towards the right of access to information as the ensuing discussion will demonstrate.

5.3.6.1 CANADA

There was virtually no discovery in criminal cases in Canada. However, that situation changed as a practice of voluntary disclosure by the prosecution developed. Efforts to make discovery mandatory were initially resisted. An "experiment" in Montreal had revealed that greater discovery led to an increase in guilty pleas.[248] Rules have developed through precedent as courts have been required to balance the interests of the state with the right of an accused under the Canadian Charter to make "full answer and defence". Any rule of evidentiary privilege or non-disclosure which prevents relevant material from coming into the hands of parties or the court "acts as an exception to the truth-finding process".[249] It may conflict with the defendant's right to make full answer and defence, a right described by the Supreme Court in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[250] The court noted that "the principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material".[251] The court in *Stinchcombe* also reaffirmed the principle that "there is a general duty on the crown's part to disclose all material it proposes to use at the trial and especially all evidence which may assist the accused even if the crown does not propose to use it".[252]
However, the obligation to disclose is not absolute and it is subject to the discretion of counsel for the crown (prosecution).[253] The general principle applied is that information ought not to be withheld if there is a reasonable possibility that the

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247 Section 39(1) states that when interpreting the bill of rights, a court, tribunal or forum:

> "(a) .....
> (b) must consider international law; and
> (c) may consider foreign law."

However, care must be adopted when foreign law is taken into consideration. See *inter alia*, *Shabalala v Attorney-General of the Transvaal supra*.

248 *S v Majavu supra* at 63.

249 See *R v Beharreill supra*.

250 See *R v Stinchcombe supra* at 68. The extent of the Crown obligation is to produce the fruits of the police investigation to the accused, including statements made by witnesses and notes of interviews. Thus, the Court of Appeal accepted the principle that an accused is entitled to discovery of documentation in the prosecution's possession.

251 *Ibid* at 74. The court stated that if the system of criminal justice is to be marked by search for truth, then disclosure and discovery of relevant materials rather than suppression must be the starting point.

252 It was so stated in *R v C* (MH) 1988 46 CCC (3 d) 142 at 155.

253 This discretion extends both to the withholding of information in the following instances for example, to protect the identity of informer, to prevent prejudice and harm to an informer and to the timing of disclosure. The discretion of the Crown counsel is reviewable by the trial judge. This view conforms with *Shabalala supra*.

withholding of information will impair the accused's right to make full answer and defence, unless non-disclosure is justified by the law of privilege.[254] The crown's counsel must disclose all relevant information. Initial disclosure should occur before the accused is called upon to choose the mode of trial or to plead. Nevertheless the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.[255] It has also been stated that the crown has a duty to make timely disclosure to the defence of all evidence supporting innocence of the accused or mitigating the offence. However, the obligation is not reciprocal.[256] The Law Reform Commission of Canada has also adopted the view that it would be inconsistent with the principles of the adversarial process to compel the defence to make pre-trial disclosure.[257] However, Maude favours the introduction of reciprocal disclosure in Canada.[258]

The Supreme Court decided in *Stinchcombe* that the test for relevance is one of potential usefulness in making a full answer to the allegations, in terms of assisting the case for the defence or damaging the prosecution. The onus rests on the prosecution to justify non-disclosure of information in its possession. However, relevance is defined differently when the information is in the hands of third parties, who are not in the same position as the crown.[259] According to the Supreme Court, parties may only be ordered to produce material that is likely to be used for evidential purposes, and not merely for strategic or tactical reasons. Thus, the test is one of probative value. The defence may use the material for limited purposes only. To illustrate this, in *Mandeville*, the court directed that "the defence be restricted from reproducing or releasing this material except for the purpose of instructing its expert witnesses" and that the "material should not be disclosed to the accused except for the necessary soliticor-client communications".[260] There will usually be a duty to disclose medical information to the defendant when "the right to make full answer and

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254 See *R v Stinchcombe supra* at 77.

255 This conforms with the finding in *Shabalala*. It should be noted that defence counsel who become aware of any failure by the Crown to comply with the duty to disclose must bring it to the court's attention at the earliest opportunity, in order to avoid a new trial. Any failure to comply with this obligation will be an important factor in determining on appeal whether a new trial should be ordered. See *R v Stinchcombe supra* at 12-13, 68.

256 See *R v Stinchcombe supra*. Also see *R v Stone* [1999] 2 SCR 290.

257 See Law Reform Commission of Canada *Criminal Procedure: Discovery* (Working Paper No 4 1974) 29, para 64. A current proposal is being put forth for reciprocal disclosure of expert evidence in terms of the Criminal Code Amendment Bill 2001. Also see Dawkins "Defence disclosure in criminal cases" (2001) *New Zealand Law Review* 35 at 56-57.

258 See Maude "Reciprocal disclosure in criminal trials: stacking the deck against the accused, or calling defence counsel's bluff?" (1999) *Alberta Law Review* 715, where the writer examines if there is room to incorporate defence disclosure into Canada's criminal trial proceedings. He concludes that the introduction of reciprocal disclosure would be a moderate expansion of already existing notice requirements, and that defence counsel should start to introduce their own guidelines regarding defence disclosure.

259 See *R v O'Connor supra*.

260 See *R v Mandeville* (1993) [1994] NWTR 126 (SC) 21 CR (4th) 272. Also see *R v Ross* (1991) 119 NSR (2d) 177 at 180 (SC AD), where it was determined that any order for production should be "as restrictive as possible".

defence is implicated by information contained in the records".[261] It was determined by the majority in *O'Connor* that "information in the crown's possession which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege which might arise".[262] Compelled disclosure is necessary to satisfy these defence interests only if the information cannot reasonably be obtained by other means.

The crown (state) is only entitled to produce what is in its possession or control. However, the crown is entitled to explain the absence of evidence which has been in its possession, and is no longer available. A satisfactory explanation will lead to the crown discharging its obligation, unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Charter.[263]

The Federal Access to Information Act of 1982 (hereinafter referred to as the "AIA") covers the major agencies for the administration of justice, including the federal police (RCMP), the Department of Solicitor General, and the Department of Justice. However, the law enforcement exemptions are "distressingly broad".[264] To illustrate this, section 16(1)(c) permits withholding of information if disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations".[265] Indications are that the AIA is rarely used in the criminal discovery context. The reason for the lack of impact of the federal and provincial Freedom of Information legislation on criminal discovery practice is that these law exemptions are too broad. This nullifies the practical use of the Federal Access to Information Act by criminal defendants.

In Canadian criminal proceedings, the defendant's information rights are protected by legislation governing criminal procedure and by the inherent powers of courts to ensure fairness in trials. *Stinchcombe* set out the general principle that an accused's ability to access the necessary information to make full answer and defence is now constitutionally protected under section 7 of the Canadian Charter of Rights and Freedoms. The *Stinchcombe* case also "marked the dawn of a new era in disclosure

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261 See *R v O'Connor supra* at 411. Also see Dawson "Compelled production of medical records" 43 (1998) *McGill Law Journal* 25- 65, for a discussion of the form of analysis that a court is likely to adopt in resolving a dispute concerning the compelled production of medical and psychiatric records in legal proceedings, when the defendant seeks access to the records.

262 See *R v O'Connor supra* at 431.

263 See *R v Stinchcombe supra* at 96, where the loss of relevant evidence due to the death of the investigating officer did not require a stay of proceedings. However, in *R v Carosella* (1997) 112 CCC (3d) 289 (SCC) [Ont], a deliberate shredding by a rape crisis centre, of notes compiled during an interview with the complainant required a stay of proceedings.

264 Rankin "The new Access to Information and Privacy Act: a critical annotation" 15 (1983) *Ottawa Law Review* 1. Also see Onyshko "The Federal Court and the *Access to Information Act*" 22 (1993) *Manitoba Law Journal* 73-144 for a more detailed discussion about how the Federal Court of Canada has treated the Federal Access to Information Act in Canada. Onyshko criticises the Federal Court for not treating the Access to Information Act on the same level as the Charter.

265 Taggart "The impact of freedom of information legislation on criminal discovery in comparative common law perspective" (1990) *Vanderbilt Journal of Transnational Law* 235 at 266.

to the defence, by transforming a professional courtesy into a formal obligation".[266] The innovation of *Stinchcombe* is in the creation of an avenue of judicial review in which the crown will have to justify non-disclosure on the basis that the material sought is clearly irrelevant or privileged.[267]

5.3.6.2 UNITED STATES OF AMERICA

In the United States of America, discovery is more limited. The history of discovery illustrates that the common law of England prior to the Revolution made no provision for discovery by a criminal defendant. Indeed, the first effort at discovery occurred after the Revolution, when a motion was made for an order requiring the prosecution to make a report available for inspection by the defendant.[268] However, a different position was taken up by the English courts in 1833, when the prosecution was ordered to allow the defendant to examine a threatening letter allegedly written by him, in order to give his witness an opportunity to study the handwriting.[269] Nowadays, discovery is regulated by federal and state laws of criminal procedure.[270] Many states have recognised that a defendant has a right to discovery in criminal cases.[271] In

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266 See *R v O'Connor supra*. Also see *R v Mills* [1999] 3 SCR 668 at 671-673, where the Supreme Court of Canada stated that the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. On the other hand, the accused will have no right to the records if they contain information that is either irrelevant or distorts the search for truth.

267 However, see Young "Adversarial justice and the Charter of rights: stunting the growth of the 'living tree' Part II" (1997) *Criminal Law Quarterly* 419 at 421. The writer contends that the *Stinchcombe* requirements are being enforced without the creation of any new pre-trial mechanism to give practical effect to its sweeping theoretical principles.

268 The motion was denied as the court found "no principle to warrant it". See *King v Holland* 4 TR 691, 100 Eng Rep 1248 (KB 1792). Also see Perkins and Boyce *Criminal law and procedure: cases and materials* The Foundation Press Inc (1977) at 970-975.

269 See *Rex v Harrie* 6 Car and P 105, 172 Eng Rep 1165 (1833). Similarly, in 1861, a defendant charged with false pretenses was given permission to inspect letters written by him to the alleged victim. See *Regina v Colucci* 3 F and F 103, 176 Eng Rep 46 (1861).

270 Where discovery in a criminal case is recognised it has included not only confessions but such subjects as guns and bullets, reports of scientific analyses, autopsies and photographs of persons and places. See *inter alia*, *State v ex rel Mahoney v Superior Court* 78 Ariz 74, 275 P2d 887 (1954), *State v Thompson* 54 Wash 2d 100, 338 P 2d 319 (1959) and *Norton v Superior Court In and For San Diego County* 173 Cal App 2d 133, 343 P 2d 139 (1959). Also see DelRosso and Ernst "Discovery" (2001) *The Georgetown Law Journal* at 1343-1376 for a detailed discussion about criminal discovery in the United States.

271 In 1927, the Missouri court had recognised that the defendant in a criminal case has a right to discovery when circumstances make this important for the proper preparation of his defence. See *S v Tippet* 317 Mo 319, 296 SW 132 (1927). An Iowa statute had also permitted such discovery, but this was held not to be mandatory. See *S v Howard* 191 Iowa 728, 183 NW 482 (1921). The state of California had also recognised the defendant's right to pre-trial inspection of evidence in the possession of the prosecution. The leading California case is *Powell v Superior Court In and For Los Angeles County* 48 Calif 2d 704, 312 P 2d (698) (1957), where the defendant Powell was granted an order of inspection of his signed statement to the police and a type written script of a tape recording, with the right to make copies as requested. Thus, in *Powell v Superior Court*, the Supreme Court established the basic right of the accused in a criminal case to obtain

federal criminal cases and in some states, the names and pretrial statements of prosecution witnesses are not disclosed prior to trial. In other states, felony prosecutors disclose everything in their files unless justification for a protective order for certain items is made. However, a court has a discretion to assist an accused who makes out a case for the discovery of particular documents. The basis for requiring the production of such material is the accused's right to a fair trial.[272] Although most of the rules regarding defence discovery of prosecution evidence are based on statutes and procedural rules, some disclosures to the defence are constitutionally required.

Due process requires the prosecution to turn over exculpatory[273] or other pro-defence evidence in its possession whenever such evidence is "material" to either the determination of guilt or to sentencing.[274] Thus, a prosecutor's suppression of material evidence favourable to the defendant, following a defendant's request, violates due process.[275] This applies "irrespective of the good faith or bad faith of the

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discovery before trial as well as during the trial itself.

272 See *S v Majavu supra* at 67. Also see *Cash v Superior Court* 53 Calif 2d 72, 75, 346 P 2d 407, 408 (1959), where the court stated that "the basis for requiring pre-trial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." Also see Brennan "The criminal prosecution: sporting event or quest for truth? A progress report" 68 (1990) *Washington University Law Quarterly* 1, where the writer discusses the advances in criminal discovery in the United States over the last quarter-century. The writer concludes (at 18) that considerable more discovery to the defence is required than is now permitted if one wants to ensure the fairness of criminal trials. However, see Dennis "The discovery process in criminal prosecutions: towards fair trials and just verdicts" 68 (1990) *Washington University Law Quarterly* 63, which is a critical response to Justice Brennan's arguments. Dennis contends that not only is broader discovery not needed, but it might diminish fairness in criminal trials, by promoting and facilitating the defendants' attempts to subvert justice.

273 The term "exculpatory" comes from the word "exculpate", which means to free from blame or to prove guiltless. Thus, exculpatory evidence may include such evidence that will prove the accused's innocence or would create such doubt as to prevent the prosecution from establishing the guilt of the accused beyond a reasonable doubt. See Webster's *New World Dictionary* World Publication (1971) at 262. Also see Balbastro "Due process right of the accused to be informed before trial of exculpatory evidence: proceedings of symposium on the rights of the accused" 11 (1996) *Institute of Human Rights University of Phillipines Law Centre* 311, for a discussion about the relevant American jurisprudence.

274 See Frase "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 43. Also see *Brady v Maryland supra*, which held that due process of law required that the Government disclose, upon request "evidence favourable to an accused which is material either to guilt or to punishment". This is known as the *Brady* rule. According to Robert Clinton, *Brady* provides a broad constitutional right of the accused to discover upon request any evidence in the prosecution's possession useful to the accused's prosecution of a defence. Another important issue which arises under *Brady* is the timing of the required disclosure of evidence favourable to the accused. Once the courts recognise that the *Brady* decision rests not on an effort to prevent "suppression" of favourable evidence, as its language suggests, but on the right to present a defence, it is clear that disclosure must be made sufficiently early to facilitate effective defence use of the favourable material. See Clinton "The right to present a defence: an emergent constitutional guarantee in criminal trials" (1976) *Indiana Law Review* 713 at 842-843.

275 See *Brady v Maryland supra* at 87.

prosecution".[276] The government obligation has been extended to include a duty to seek out evidence favourable to the accused not in government possession or control.[277] In the post- conviction context, evidence is "material" if there is a "reasonable probability" that the result as to guilt or sentencing would have been different had the evidence been disclosed.[278]

The government is required to preserve evidence only in certain circumstances.[279] Courts have held that the failure to produce evidence requires dismissal of the prosecution in order to protect the accused's right to defend.[280] "Lost evidence" cases involve situations in which the government has been in possession of physical evidence such as bullets, weapons, drugs, blood samples or written statements which are material to the defence, and is unable or unwilling to produce the evidence at trial.[281] When alleged exculpatory evidence is lost or destroyed by the prosecution and is therefore not available for assessment and use at trial or retrial, the defendants must show that comparable evidence is not reasonably available and that the evidence was lost or destroyed in bad faith.[282] Unless the defendant can show bad faith on the police's part, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.[283]

At the Federal level, Rule 16 of the Federal Rules of Criminal Procedure provides for pre-trial discovery of certain information and material in the prosecution's possession. Thus, the inherent power of the trial court to allow discovery in criminal cases in the interests of justice may be exercised with regard to matters not explicitly authorised under the limited discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure or state counterpart.[284] This rule allows the accused to inspect and copy

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276 *Id*. Also see *United States v Bagley supra* at 682, where it was held that the suppression of material evidence is a constitutional violation regardless of whether there has been a specific or general request, or no request at all.

277 See *Kyles v Whitley supra* at 434.

278 See *US v Bagley supra* at 682.

279 See *California v Trombetta* 467 US 479, 488-489 (1984).

280 See *US v Perry* 471 F 2d 1057, 1063 (DC Cir 1972). Also see Clinton *op cit* 847.

281 This problem has often arisen in connection with statements required to be produced under the Jencks Act. Courts have also dismissed prosecutions or reversed convictions because of the prosecution's failure or inability to supply exculpatory evidence previously in its possession. See, *inter alia*, *Johnson v State* 249 So 2d 470 (Fla Ct App 197), 280 So 2d 673 (Fla 1973). These cases demonstrate that the courts are safeguarding the accused's right to defend by presuming that the lost or destroyed evidence would be exculpatory and therefore vital to the accused. Therefore, the government cannot constitutionally act in such a way as to physically deprive the accused of evidence which is material to the defence case. See Clinton *op cit* 848.

282 See *California v Trombetta supra*.

283 See *Arizona v Youngblood* 488 US 51, 58 (1988).

284 The following is open to discovery and inspection in terms of Rule 16:

"(i) Any statement by defendant whether oral or in writing

any statement made by himself, but it does not require the prosecution to disclose the names and addresses of any prosecution witnesses, nor does it oblige the prosecutor to furnish the accused with copies of statements made by prospective witnesses.[285] The defendant is thus given access to material which the government has in its possession, but which is not available to him. Nevertheless, the defendant is given a substantial right of pre-trial discovery under Rule 16. An important aspect of Rule 16 discovery is the continuing duty to disclose.[286] Most of a defendant's reciprocal discovery obligations under Rule 16 arise only after the government has complied with defence requests for disclosure.[287] The fifth amendment is also not an absolute bar to criminal discovery in favour of the prosecution.[288] It has been assumed that the prosecution would have no right to pre-trial discovery in a criminal case. However, a Californian court has held that where important, it is entitled to such discovery as will violate neither the defendant's privilege against self-incrimination nor the attorney-

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(ii) Documents and tangible objects
(iii) Reports of examination and tests such as results or reports of physical or mental examinations and of scientific tests or experiments or copies thereof
(iv) However, statements by other state witnesses and evidence before a Grand jury are excluded except evidence of the defendant himself."

See Rule 16 of the Federal Rules of Criminal Procedure. Also *S v Majavu supra* at 67.

285 See Taggart *op cit* 238.

286 See Rule 16(c) which provides that the Government must "promptly notify" the defendant of additional discoverable material which has been the subject of a previous discovery request, upon receiving knowledge of the existence of the material. See *US v James* 495 F 2d 434 (5th Cir) 419 US 899 (1974).

287 See Rule 16(b)(1)(A)-(B) of the Federal Rules of Criminal Procedure. Rule 16(b)(1) allows reciprocal discovery by the government of documents, tangible objects, and results or reports of examinations and tests within the possession of the defence, if the government has already complied with a defence request for discovery of similar items under R 16, or the defence intends to present the requested material as evidence, or the defence witnesses who prepared a report will testify regarding its contents. The only exception is Rule 16(b)(1)(c) which requires a defendant to disclose a summary of expert testimony where he has filed a notice under Rule 12(2)(b) of intent to present expert testimony regarding his mental condition. See Jordan, Kehoe and Schechter "The Freedom of Information Act – a potential alternative to conventional criminal discovery" 14 (1976) *The American Criminal Law Review* 73 at 92-96 for a detailed discussion about Rule 16 discovery.

288 See *Williams v Florida* 399 US 78, 85 (1970) where it was stated that "Nothing in the Fifth amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defence." Here, the Supreme Court upheld the requirement under Federal Rule of Criminal Procedure 12.1 that the defendant give notice of an alibi defence. This decision is said to be the turning point in the development of compulsory defence disclosure in the United States. Also see Beckler *et al* "Protecting defence evidence from prosecutorial discovery" 68 (1990) *Washington University Law Quarterly* 71. Also see Williams "Sidestepping *Scott*: modifying criminal discovery in Alaska" (1998) *Alaska Law Review* 33, where the writer examines the possibility of instituting reciprocal criminal discovery in Alaska. The writer makes out a case for reciprocal discovery, by contending (at 34) that without reciprocal discovery, the defence has access to more information than does the prosecution from putting on a strong case as possible. Reciprocal discovery systems thus aim to rectify this imbalance by providing the prosecution with greater discovery access to the defendant's information.

client privilege.[289]

The leading case of *Jencks v United States*[290] established the defendant's right in a criminal case to inspect written reports such as FBI records, after the witness has testified in court, to aid in cross-examination. This led to the advent of the so-called Jencks Act, 18 USCA s 3500, which relates to the production of statements and reports of witnesses.[291] The Jencks Act narrowly defined which statements were discoverable and prohibited courts from ordering disclosure before the witness testified at trial.[292] If the government does not turn over the requested documents, the testimony of the witness will be stricken and the trial will continue, unless the court determines that the interests of justice call for a mistrial.[293]

Criminal discovery at the federal level falls far short of the American Bar Association Standards for Criminal Procedure which require the prosecution to provide, upon request, names and addresses of witnesses together with any relevant witness statements.[294] The experience at the state level varies a great deal. Defence counsel are using the federal Freedom of Information Act (hereinafter referred to as the "FOIA") and state open record laws as substitutes for, or aids to criminal discovery, due to the restrictiveness and complexity of federal criminal regime and the diversity of state criminal discovery practice.[295] Indeed, FOIA access has a number of advantages over conventional criminal discovery.[296]

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289 See *Jones v Superior Court of Nevada County* 58 Cal 2d 56, 22 Cal Rptr 879, 372 P 2d 919 (1962).

290 353 US 657, 77 S Ct 1007, 1 L ed 2d 1103 (1957).

291 The Jencks Act provides that : "In any criminal prosecution ... no statement or report ... made by a Government witness or prospective Government witness (other than the defendant) ... shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case." Thus, the Jencks Act provides for defence access to statements made by a Government witness which relate to the subject matter of his testimony at trial.

292 See Douglass "Balancing hearsay and criminal discovery" 68 (2000) *Fordham Law Review* 2097 at 2135. This article discusses how the process of criminal discovery can and should adapt to correct the hearsay-discovery balance when the government relies on hearsay.

293 See 18 USC s 3500(d).

294 See Taggart *op cit* 239.

295 Three general types of countervailing interests are said to be recognised in the FOIA, namely:

(1) the nation's interest in self-preservation;
(2) the agency's interest in maintaining the secrecy of its decisional processes and information sources; and
(3) the individual's interest in remaining secure from invasions of privacy.

See Jordan *et al op cit* 75.

296 These include the following: although a potential defendant can't seek discovery before charges are laid or after the time provided for by the court rule, the defendant can make the FOIA request before charges are brought, during conventional discovery period or after the period expires; some records that would not be discoverable under the rules or that would be the subject of

The courts in the United States have generally resisted attempts by criminal defendants to gain access to a wider range of material under the FOIA than is available by conventional discovery. However, some judges have indicated their willingness to use the FOIA as a criminal discovery tool.[297] Nevertheless, the FOIA has had little impact on federal criminal discovery practice. The major factor is that most judges are unwilling or reluctant to allow the FOIA to supplement and amend the partial code of pre-trial discovery in the Federal Rules of Criminal Procedure.[298] In those courts that have taken a restrictive approach, the FOIA remains available as an alternative to conventional discovery as long as FOIA disclosure would not exceed the provisions in the Federal Rules.[299]

The above discussion demonstrates that the Federal Rule of Criminal Procedure 16, the Jencks Act and the *Brady* rule govern discovery in criminal proceedings in the United States. The general trend over the past two decades is to expand the scope of pre-trial discovery permitted to defendants. Thus in American Law, the accused not only has the right to interview all witnesses, even those held in custody by the state, but also the right through the discovery process, of gaining access to all the material available to the prosecutor, which would include statements made by witnesses, exhibits, forensic reports and the like. The American experience illustrates that the accused is not entitled to discovery as of right but the court has a discretion to come to his assistance on application by him to the extent that the court is satisfied that he has made out a case for discovery of certain documents.[300]

5.3.6.3 UNITED KINGDOM

In the **United Kingdom**, the disclosure of evidence against the accused is a major

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privilege are available under the FOIA such as witness lists, prosecution guidelines and instructions to prosecutors; FOIA also requires no showing of reasonableness or relevance unlike the discovery motion. See Taggart *op cit* 239-240. Jordan *et al* also describe the advantages of FOIA discovery to be the absence of any timing or standing requirements in an FOIA action, and the fact that the Government rather than the FOIA plaintiff carries the burden of proof regarding the applicability of a disclosure exemption. See Jordan *et al op cit* 131-134 for a detailed discussion.

297 In the case of *United States v Wahlin* 384 F Supp (WD Wis) (1974) 43, the accused who was charged with excise tax evasion filed a discovery motion under Rule 16, seeking access to Internal Revenue Service private letter rulings which were necessary for the preparation for his defence. The court found that the Government's contention that the defendant can't rely on the FOIA to obtain discovery in a criminal action is "preposterous".

298 The FOIA also has disadvantages. Jordan *et al* set out the disadvantages of using the FOIA such as delay, expense and inadequate remedies. See Jordan *et al op cit* 134-138.

299 See Taggart *op cit* 242. Also see Jordan *et al op cit* 91, where the writer examines ways that the FOIA can assist the criminal lawyer during pre-trial discovery.

300 Also see Louisell "Criminal discovery: dilemma real or apparent?" (1961) *California Law Review* 56-103, for a detailed discussion about criminal discovery in the United States. The writer concludes that when criminal discovery genuinely promotes the ascertainment of facts, it cannot arbitrarily be withheld in the name of protecting the balance between the state and the accused. He also states that the long-term path for discovery is one of development, that focusses on the difficulties that inhibit growth such as tackling organised, professional or conspirational crime and their intelligent resolution. Also see *Powell v Supreme Court supra*.

element of a fair hearing. Article 6(3)(a) of the European Convention on Human Rights requires that a person charged with a criminal offence be informed of the nature and cause of the accusation against him.[301] The need for the accused to have access to information necessary for the proper preparation of the defence arose as a result of several cases in England involving miscarriages of justice.[302] This led to changes to prosecution disclosure by precedent and statute.

5.3.6.3.1 THE POSITION BEFORE 1996

It was suggested in *Marks v Beyfus*[303] that material which assists the defence should always be disclosed. However, in *R v Keane*,[304] the Court of Appeal favoured a balancing exercise between public interest in the non-disclosure of the documents and the public interest in the proper administration of justice. Disclosure should always be ordered if the withholding of the information "may prove the defendant's innocence or avoid a miscarriage of justice".[305]

Prior to the Criminal Procedure and Investigations Act 1996 (hereinafter referred to as the "CPIA"), the matter was governed by guidelines issued by the Attorney-General in 1981 supplemented by court cases.[306] These guidelines demonstrate that an accused who is tried in the English High Court is given access well before the trial. The information made available to the accused by means of the procedures set out in the Attorney-General's guidelines is additional to the information the accused receives in the form of the "committal bundle", the indictment and further particulars. The accused's access to the prosecution's statements is curtailed only in special circumstances for which there are detailed guidelines to ensure that there is no abuse of the access given.[307]

A prosecutor is obliged to inform an accused of his rights to request advance information.[308] If the prosecutor receives such a request, he must furnish the accused with a copy of those written statements which he proposes to use in the proceedings, or a summary of the evidence of which he proposes to use in the proceedings.

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301 The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law.

302 Cheney D *et al Criminal justice and Human Rights Act 1998* Jordans (1999) at 91.

303 (1890) 25 QBD 494, 488. Also see *R v Governor of Brixton Prison, ex p Osman* [1991] 1 WLR 281, 290.

304 [1994] 1 WLR 746.

305 See *R v Turner* (Paul) [1995] 1 WLR 264.

306 In practice the most extensive access to information is given to an accused charged in the High Court on an indictment, in terms of guidelines laid down by the Attorney-General.

307 *S v Sefadi supra* at 29-33.

308 *Halsbury's Laws of England* Vol 11(2) 1990 at 692. Also see *S v Majavu supra* at 69.

However, if the prosecutor believes that the disclosure of any evidence might lead to a witness being intimidated or the course of justice being interfered with, he is not obliged to comply with the request. The prosecution must however indicate in writing that he refuses to give such advance information. However, the court can compel the prosecutor to provide such information.[309] The prosecutor's failure to disclose to the defence statements of witnesses which might help the defence case amounts to a denial of natural justice, and any conviction obtained in such circumstances is liable to be squashed by the Divisional Court.[310] This principle also applies to the disclosure of witness statements when a material discrepancy exists between evidence given on oath and the contents of written statements in a trial of a summary offence.

The prosecution thus owes a duty to the courts to ensure that all relevant evidence which assists an accused is either led by them or made available to the defence.[311] This right is said to be part of the general right to a fair trial.[312] If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness requires that the rules of natural justice must be observed. Under the common law, the prosecution was obliged to provide material which had or might have some bearing on the offences charged. This meant that all "material" evidence was discloseable.[313] There was a duty to provide all statements which have been taken, whether or not the witnesses were apparently credible.[314] This includes material relevant to the credibility of prosecution witnesses, but not material which relates only to the credibility of defence witnesses.[315]

Therefore, the position prevailing before 1996 was that full disclosure of prosecution material before trial was regarded as an essential element of a fair trial. The position regarding trials on indictment was that the defendant is entitled to advance disclosure not only of the evidence on which the prosecution is intending to rely but also of "unused material".[316] The position prevailing in the magistrate's courts was that there was no obligation on the prosecution to disclose evidence regarding summary offences. However, there is a statutory obligation in the magistrate's court regarding

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309 These rules originate from the Magistrates' Courts (Advance Information) Rules of 1985.

310 See *R v Leyland Justices ex parte Hawthorne* (1979) 1 QE 2(3).

311 See *R v Ward* (Judith) [1993] 1 WLR 619, 645;[1993] 2 All ER 577.

312 See *R v Brown* (Winston) [1998] AC 367, 374 F, where the learned judge Lord Hope stated that "the rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial."

313 See *R v Keane supra* at 746.

314 See *R v Mills* [1998] AC 382.

315 See *Wilson v Police* [1992] 2 NZLR 533.

316 In *R v Maguire* [1992] 94 Cr App R 133 and *R v Ward supra*, the courts ruled that "unused material" applied to almost all material collected during the prosecution. The prosecution also had to disclose any matters which might be used against prosecution witnesses for example, that the witness had been subject to police disciplinary hearings.

triable-either-way offences which are being tried summarily.[317] In *R v Liverpool Crown Court ex p Robinson,*[318] it was held that a general duty rests on the court to ensure a fair trial which would require the prosecution to produce all the material evidence.[319] The prosecution had to determine what was relevant, though the defence could ask the court to rule on this if there was a dispute. The police and prosecution resented these developments because they were now faced with the dilemma of either having to disclose sensitive and confidential material, especially in relation to informants, or having to discontinue prosecution.[320]

There was no common-law obligation on the defence to disclose the nature of the defence before 1996. However, it was introduced by statute in the following circumstances: for alibi defences under the Criminal Justice Act 1967; for expert evidence in terms of section 81 of the PACE 1984 and for preparatory hearings in serious fraud cases in terms of section 9 of the Criminal Justice Act 1987.[321] This was done to facilitate the jury's function to arrive at the truth.

The prosecutor may also seek immunity from disclosure on the grounds of public interest immunity because the information would reveal the identity of informants or details of police operational practices. If the prosecutor believes that the disclosure would not be in the public interest he can apply to the court for an order to that effect.[322] If after a conviction, it becomes clear that the material does exist which, if disclosed, would have influenced the way in which the defence was conducted, then the non-disclosure by the prosecution amounts to a material irregularity which entitles an appeal against conviction to succeed. Usually the defence would be aware of an application to decide on a public interest immunity claim and could make representations in court. However, the courts have now approved an *ex parte* procedure whereby the prosecution can approach the court for an order for immunity from disclosure without informing the defence at all.[323] These procedures limit the

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317 See s 48 of the Criminal Law Act 1977 and Magistrates' Courts (Advance Information) Rules 1985, SI 1985/601.

318 [1986] Crim LR 622.

319 The following definition of "material" has been made by the judges:

(a) anything which was possibly relevant to an issue in the case
(b) anything which possibly raised a new issue not already apparent and
(c) anything which held out a real prospect of providing a lead on evidence concerning the material in (a) or (b).

See *R v Liverpool Crown Court ex p Robinson supra*.

320 See Cheney *et al op cit* 91.

321 *Ibid* at 92.

322 The court will consider the issue by balancing the public interest in non-disclosure against the interests of justice as far as the defendant is concerned. After making an order of non-disclosure, the court must consider under review, whether it remains contrary to the public interest to disclose the material. *Ibid* at 93.

323 It was so held in *R v Keane supra* and *R v Davis* [1993] 2 All ER 643.

access of the defence to sensitive material.

5.3.6.3.2 POSITION IN TERMS OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 ("CPIA")

The position in the United Kingdom has been modified by the Criminal Procedure and Investigations Act 1996 (the "CPIA") and the Code of Practice issued under it. These replace the common law rules regarding prosecution disclosure.[324] The CPIA has had a major impact on the procedure for disclosure.[325] The 1996 Act involves a three-stage process namely, primary disclosure by the prosecution which is automatic, submission of a statement by the defence and secondary disclosure by the prosecution. The prosecution is required to disclose to the defence any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused ("primary disclosure").[326] The prosecution is obliged to furnish the defence with copies of all relevant material to the offence, details about the offender and the circumstances of the case, as well as evidence of expert scientific witnesses. The second stage involves a statement by the defence setting out the material basis of its case. The defence must give a "defence statement" to both the court and the prosecutor setting out in general terms the nature of the accused's defence and indicating why he disagrees with the prosecution.[327] Flaws in the defence statement may lead to adverse consequences for the accused as the jury may draw adverse inferences.[328] According to Sharpe, this reciprocal disclosure provision weakens the privilege against self-incrimination, and may be challenged under article 6(2) as infringing the presumption of innocence.[329]

The prosecutor must respond to the defence statement and disclose to the defence any prosecution material which has not previously been disclosed and which might be

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324 See s 21(1) of the CPIA.

325 See Sharpe "Disclosure, immunity and fair trials" 63 (1999) *The Journal of Criminal Law* 67-82, for a detailed discussion about the Criminal Procedure and Investigations Act 1996. Also see Sprack "The Criminal Procedure and Investigations Act 1996: (1) The duty of disclosure" (1997) *The Criminal Law Review* 308.

326 See s 3(1) of the CPIA.

327 See s 5 of the CPIA. It should be noted that Scotland also has a scheme of defence disclosure. The defence is entitled to disclose any pleas of special defence such as insanity or alibi 10 days before the trial. The defence is also entitled to furnish the prosecution with a list of their witnesses before the trial. A quasi-inquisitorial procedure is also held in advance of the trial, whereby the defendant is examined regarding the nature and particulars of his defence. For a more detailed discussion about the Scottish scheme, see Dawkins *op cit* 58.

328 According to Sharpe, s 11 of the CPIA imposes a penalty by allowing the court to draw adverse inferences at trial for "faults in disclosure" by the accused, but a failure by the police or prosecutors to divulge information required under the act is not penalised. This clearly demonstrates inequalities of structure and treatment. See Sharpe *The Journal of Criminal Law op cit* 71.

329 See Sharpe "Article 6 and the disclosure of evidence in criminal trials" (1999) *The Criminal Law Review* 273 at 277.

reasonably expected to assist the accused's defence ("secondary disclosure").[330] Thereafter the prosecutor must consider whether at any time there is prosecution material which ought to be disclosed. Where the accused has given a statement to the prosecution, the prosecutor is obliged to make any additional disclosures that may be necessary. Where the prosecution comes across material which might undermine the prosecution case and which has not been disclosed to the accused, such material should be disclosed to the accused as soon as possible.[331] The duty to disclose under article 6, extends to any material for and against the accused. This includes material which may undermine the credibility of defence witnesses, as well as those appearing for the prosecution.[332] The disclosure provisions do not apply until after committal.[333] It is envisaged that some disclosure may be required before then, although this would not normally exceed primary disclosure.[334] The aim of these new rules is to make prosecutions more efficient but to maintain fairness.

The Criminal Procedure and Investigation Act of 1996 has not changed the procedures regarding disclosure on public interest immunity much. Section 8 of the Act requires the prosecutor on application to the trial court, not to disclose information where it would not be in the public interest to do so. Where material has not been disclosed on the grounds of public interest immunity, an accused person can apply to court for a review of this decision during the trial.[335] The common law rules regarding

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330 See s 7 of the CPIA. The prosecutor is said to be under a continuing duty to review questions of disclosure. See s 9 of the CPIA. The prosecutor's continuing duty to disclose conforms with the viewpoints in *Shabalala* and *Stinchcombe supra*.

331 The CPIA 1996 now requires the prosecutor to share with the defence the evidence that he does not intend to use, that is, "unused material". This not only applies to proceedings on indictment but also to all forms of summary trial. See Spencer "Procedural anomalies" (2000) *Cambridge Law Journal* 51.

332 In *R v Brown* [1997] 3 All ER 780, the prosecution did not disclose statements by a potential defence witness which the prosecution did not consider credible. The Court of Appeal held that informing the defence of the name and address of the witness was sufficient. However, the House of Lords concluded that the non-disclosure was a material irregularity. Although the failure to disclose material to the defence is a breach under art 6, the Commission has accepted that the late introduction of previously undisclosed evidence by the prosecution under the *ex improviso* rules does not infringe the Convention.

333 See Azzopardi "Disclosure at the police station, the right to silence and *DPP v Ara*" (2002) *Criminal Law Review* 295-300, where he states that the guidelines contemplate that disclosure should sometimes occur before the duty arises under the CPIA. For example, when disclosure is given prior to a bail decision or before committal proceedings.

334 See *R v Director of Public Prosecutions*, *ex p Lee* [1999] 2 All ER 737.

335 However, a different view is taken of police disclosure of information obtained at interviews. See *Woolgar Chief Constable of Sussex* [1999] 3 All ER 604, where the appeal court stated that information obtained from the police from interviews with suspects is *prima facie* confidential and is normally to be used in the course of ensuing criminal proceedings. However, when a regulatory body in the course of its statutory duty is holding an inquiry, the police are entitled to release information in their possession to it for the purpose of that inquiry (but for no other purpose), whether or not the person affected consents and whether or not the information has been requested by the regulatory body.

whether disclosure is in the public interest will still apply.[336]

The obligation to make pre-trial disclosure does not apply to trials in the magistrate's court. The absence of such disclosure does not affect the fairness of any trial. However, justices must grant reasonable adjournments to enable the defendant to deal with the evidence.[337] Such disclosure ought to be given if requested unless there are good reasons for the refusal, such as protection of a witness.[338] However, the provisions of the CPIA do not affect the disclosure position.[339] This approach is said to be consistent with article 6 of the Convention.[340]

According to Sharpe, the CPIA has restricted the availability of information to the defence, placed new disclosure obligations on an accused prior to trial and has, through the Code expanded the scope of public interest immunity.[341] It has also been suggested that the provisions of the CPIA may be in breach of article 6 of the Convention.[342] Thus, the CPIA has been subjected to criticism. Indeed, the statutory disclosure regime imposed by the CPIA is said to increase the structural imbalance that exists between the

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336 See s 21(2) of the CPIA. A number of categories of documents fall under public interest, namely documents which would tend to disclose the identity of informers (see *Savage v Chief Constable of Hampshire* [1997], WLR 1061); documents which might reveal the location of police observation posts (for example, *R v Rankine* [1986] QB 861); police reports (see *Taylor v Anderton* (Police Complaints Authority Intervening) [1995] 1 WLR 447 or manuals. Regarding third party disclosure in England and Wales, see Temkin "Digging the dirt: disclosure of records in sexual assault cases" (2002) *The Cambridge Law Journal* 126, where the writer calls for amendments to the present law. It should be noted that the existing regime under the Criminal Procedure (Attendance of Witnesses) Act 1965 as amended by s 66 of the CPIA, has a two-stage process requiring the defence first to demonstrate materiality and the court to perform a balancing act required by public interest immunity.

337 See *R v Kingston-upon-Hull Justices*, *ex p McCann* (1991) 155 JP 569.

338 See *R v Kingston supra* at 573E-574B; *R v Stratford Justices*, *ex p Imbert* (1999) 2 Cr App R 276.

339 See *R v Stratford Justices exp Imbert supra* at 376.

340 *Ibid*. Also see Clayton and Tomlinson *The law of human rights* Oxford University Press (2000) 592-595.

341 See Sharpe *The Journal of Criminal Law op cit* 67.

342 This is because there is no independent assessment of the relevance of material; disclosure is "conditional" on the services of a "defence statement"; there is no obligation to disclose material obtained in other investigations or held by other people, and there is no obligation to provide disclosure in the case of summary trials. For a more detailed discussion see Clayton and Tomlinson *op cit* 707-709. Also see Sharpe *The Criminal Law Review op cit* 273, where the writer examines the possible impact of the Human Rights Act 1998 on the law relating to the disclosure of unused material in criminal cases. The writer concludes that despite a reduction in the prosecution obligation of disclosure in terms of the CPIA, it is unlikely that the Act, as a whole, will be impugned by the direct application of art 6.

state and the defence.[343] According to Sprack, the courts should interpret the CPIA in such a way as to ensure that material relevant to the question of the accused's guilt is made available.[344] Therefore, UK courts must ensure that the use which is made of the defence statement, does not infringe the principle enshrined in article 6(2) of the European Convention.[345]

Therefore, in the United Kingdom, the accused is given relatively extensive rights of access to information in order to prepare his defence properly. This is in line with Convention case-law which suggests a broader obligation to disclose any material which may "assist the accused in exonerating himself" to ensure "equality of arms".[346]

5.3.6.4 GERMANY

German Law recognises the right of an accused to have access to the contents of the prosecution's documents. Article 147 of the German Criminal Procedure Act (better known as "StPO") provides that the defendant or his legal representative can see all the documents from the outset.[347] The defence lawyer has the right to examine all the files
and evidence of the prosecution and to make photocopies of them.[348] This right to examine the files represents a necessary element of the "equality of arms" principle derived from the principle of a fair trial. However, the accused's right of access is not unlimited, and it may be curtailed in cases where the investigation has not been completed and access to the documents may prejudice the investigation.[349] Thus, the prosecution may deny defence counsel an inspection before the conclusion of

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343 Sharpe *The Journal of Criminal Law op cit* 80-82, where the writer concludes that the crown has been given greater control of information and greater scope to seek immunity from disclosure of matters that may be relevant to the defence case. She advocates a random review by an independent disclosure Commissioner to discourage investigators and prosecutors from non-compliance with the minimum criteria of the Act.

344 This trend will conform with the UK's obligations under art 6 of the European Convention on Human Rights which deals with the right to a fair trial. See Sprack *op cit* 319.

345 Article 6(2) of the European Convention states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law". *Ibid* at 320.

346 See Cheney *et al op cit* 94. However, Sharpe maintains that it would be naïve to assume that the incorporation of the European Convention on Human Rights will necessarily lead to a "declaration of incompatibility" in respect of the CPIA statute. See Sharpe *The Journal of Criminal Law op cit* 80. According to Azzopardi, the issue of inequality of arms need to be addressed. In *DPP v Ara* [2001] 4 All ER 559, common sense and good practice dictated that disclosure should have been forthcoming from the outset. This will assist both sides to come to a fuller understanding of all documents at an early stage and possibly obviate a costly trial and avoid the emotional and financial losses to the accused and his family. See Azzopardi *op cit* 295-300.

347 In Germany, the accused also has the right of access to read all the files of the state attorney and the court, including the recordings of the interrogations of the police and state attorney. This amounts to full pre-trial discovery. See s 147 of the German Criminal Procedural Code or StPO. Also see Foster *German legal systems and laws* Blackstone Press Ltd (1996) 220.

348 In the German Federal CCP, only the defence lawyer, and not the accused, is given the opportunity to inspect the files.

349 See s 147 II of StPO.

investigations, if the inspection will endanger the purpose of the investigation.[350]

Therefore, if the prosecutor refuses to allow the defence to examine the files, his decision can't be appealed against.[351] No violation of the fair trial principle in this regulation was found by the Federal Constitutional Court, because the restriction only applies as long as the prosecutor is still investigating.[352] When the investigation phase is concluded, the right of access to the documents is revived and the defence counsel has unrestricted sight of the documents and an unlimited right to inspect the files.[353] The right to examination of files explicitly extends not over all files brought before the court but does only exist in so far as the accused needs the information they contain.

Thus, the experience in Germany illustrates that an accused is allowed extensive albeit controlled rights of access to information in the police files.

5.3.6.5 THE DECISIONS OF INTERNATIONAL INSTRUMENTS

In criminal cases, every party to the proceedings must have a reasonable opportunity of presenting his case to court under conditions which do not place him at substantial disadvantage *vis-á-vis* his opponent.[354] The right to "equality of arms" means that all parties must have access to records and documents which are relied on by the court.[355] The parties should have the opportunity to make copies of the relevant documents from the court file. The prosecution is obliged to disclose to the defence

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350 However, this does not apply to the following inspections, namely, the records of the investigation of the accused, examination hearings before the judge for which the defence lawyer was granted the right to be present or should have been granted such a right, or of expert witnesses' testimonies. In such cases, the defence lawyer may not be fully denied access to documents at any stage in the proceedings. See Eser "The acceleration of criminal proceedings and the rights of the accused: comparative observations as to reform of criminal procedure in Europe" 3 (1996) *Maastricht Journal of European and Comparative Law* 341 at 360.

351 See Samson "The right to a fair criminal trial in German criminal proceedings law" in Weissbrodt and Wolfrum (1998) *op cit* 530.

352 The Federal Constitutional Court had to make a finding in a decided case whether the denial of the right to examination of files violates the right to a fair trial. The Court held that the prosecution's advantage in having the information during the investigation is constitutional. It also declared that an oral notification of the incriminating circumstances is sufficient in "normal cases". The Court held:

> "From the right of an accused to a fair trial complying with the law and order, follows the right of an accused in custody to have his defence lawyer examine the file, if and as far as he needs the information in them in order to effectively influence the judicial custody decision and if an oral notification of the facts and evidence that the court plans to base its decision on is not sufficient."

Ibid at 531.

353 See *S v Sefadi supra* at 34-35. Also see Eser *op cit* 360.

354 See *De Hals and Gijsels v Belgium* (1997) 25 EHRR para 53.

355 See *Lobo Machado v Portugal* (1996) 23 EHRR 79 para 31.

all the material evidence for and against the accused.[356] The European Commission and court have also considered complaints regarding the non-disclosure of evidence to defendants in criminal trials. In *Edwards v UK* [357] the applicant complained that evidence which had not been disclosed by the prosecution in the course of his trial rendered the trial unfair. The court said that its task is to ascertain whether the proceedings in their entirety were fair. It held that the defects of the original trial were remedied by the subsequent procedure before the court of appeal and that, as a result, there had been no breach of article 6.

The Commission has found breaches in the following circumstances.[358] The Commission has held that the prosecution must disclose any material in their possession which "may assist the accused in exonerating himself or obtaining a reduction in sentence".[359] Where it is claimed that the material which is not disclosed is subject to "public interest immunity", the prosecution must make an application to the trial judge, if necessary, without notice. In *Jasper v UK*[360] the court accepted that, in some cases, it might be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Only such measures restricting the rights of defence that were strictly necessary were permissible. The court held that where the defence had been informed about the application for non-disclosure and had been able to outline its position, there was no breach of article 6(1). However, in *Rowe and Davis v UK*[361] the court held that the prosecution's failure to make an application to the trial judge to withhold material was a breach of article 6. The fact that the material had been subsequently reviewed by the court of appeal, was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld material by the trial judge. Occasionally, the courts may approve the non-disclosure of evidence to the defence, for example, an application by the prosecution authorities to protect informers or security interests. The extent to which *ex parte* review of the material by the trial judge or court of appeal provides sufficient procedural guarantees of fairness, and lack of arbitrariness is under examination in cases pending before the Commission.[362]

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356 See *Jespers v Belgium* 8403/78 (Rep), Dec 14, 1981, 27 DR 61.

357 See *Edwards v UK supra* at 417.

358 Where the applicant was not given the opportunity to comment on a medical report. See *Feldbrugge v The Netherlands* (1986) 8 EHRR 425.

359 See *Edwards v UK supra*. However, see *Bendenoun v France* (1994) 18 EHRR 54, where there was no breach as a result of a failure to disclose a bulky file whose contents the applicant was aware of and which was not relied on by the court.

360 2000/30 EHRR 1, Application No 27052/95.

361 28901/95, *The Times*, 1 March 2000. Also see *Atlan v United Kingdom* (2002) 34 EHRR 33, where the European Court held that the prosecutor's failure to place evidence before the trial judge and allow him to rule on the question of disclosure deprived the applicants of a fair trial. Therefore, a violation of art 6(1) was found.

362 See *inter alia*, *Rowe v Davis v UK supra* at 28901/95.

A procedure is said to be not truly adversarial if it fails to ensure "equality of arms".[363] In *Adams v Jamaica*[364] a witness statement that incriminated the accused in a murder trial had not been disclosed to the defence, nor presented at the preliminary inquiry. However, it was admitted as evidence at the trial notwithstanding defence counsel's objection. The United Nations HRC held that even though his counsel had objected to the production of this evidence, as he did not request a postponement, "or even ask for a copy of the statement," no violation of the Covenant had been committed in this respect.[365] However, a state cannot withhold evidence that indicates another person committed the crime.[366] The Committee has held that the failure to make a statement implicating another person in *Peart* "seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants," and violating article 14(3)(e).[367]

Therefore, both the European Court and the HRC have found disclosure to be necessary for purposes of a fair trial and to ensure "equality of arms".

5.3.6.6 NEW ZEALAND

In New Zealand, formal pre-trial disclosure in criminal cases is said to be quite a recent development. The accused is not entitled to discovery as of right, but the court

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363 See *Larry v Belgium* (1989) 11 EHRR 529, where Mr Larry had sought inspection of the investigative case file. The court held that it was essential to inspect the documents in question to challenge the lawfulness of the arrest warrant effectively. Whereas crown counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity to challenge appropriately the reasons relied upon to justify a remand in custody. The failure to ensure equality of arms led to the procedure not being truly adversarial, and therefore it was a breach of art 5(4).

364 Communications No 607/1994 UN Doc CCPR/C/58/D/607/1994 (1996).The accused contended that his opportunity to cross-examine witnesses on the same terms as the prosecution had been denied, as well as his right to benefit from adequate facilities to prepare his defence.

365 The Committee also expressed concern that there is no obligation on the prosecution in Japan to disclose evidence that it may have gathered during the course of the investigation other than that which it intended to produce at trial, and also that the defence has no right to ask for the disclosure of that material at any stage of the proceedings. See the concluding observations of the Human Rights Committee: Japan CCPR/C/79/Add 102 (1998). Therefore, the Committee recommended that Japan revise its law and practice to enable the defence to have access to all relevant material in terms of art 14(3). See Weissbrodt *The right to a fair trial* Martin Nijhoff Publishers (2001) 136-137.

366 See the case of *Garfield and Andrew Peart v Jamaica* Communications Nos 464/1991 and 482/1991 UN Doc CCPR/C/54/D/464/1991 (1995), which concerned a murder case where the main witness for the prosecution had identified the accused as the murderer, leading to his conviction and sentence. However, during cross-examination, the witness admitted to having made a written statement to the police implicating another person on the night of the incident. The prosecution refused defence counsel's request for production of the statement in *Peart*, and the trial judge found that counsel had failed to put forward any reason why the statement should be provided. The defence counsel only saw the statement after the rejection of the appeal and the submission of his petition for special leave to appeal to the Judicial Committee of the Privy Council, named another man as the murderer.

367 See *Garfield and Andrew Peart v Jamaica supra*. This case illustrates the link between the right to information and the right to present one's case.

has a discretion to come to his assistance when he applies for discovery. However, the court must be satisfied that he has made out a case for discovery of certain documents before granting his request. The Official Information Act of 1982 (hereinafter referred to as the "OIA") has impacted on the practice of discovery.[368] The OIA gives citizens the right to personal information but permits the government to refuse to disclose if disclosure would prejudice, *inter alia,* the maintenance of the law.[369] Therefore, the prosecution's obligations of disclosure have expanded significantly, both at common law and as a result of legislative intervention, especially with the advent of the Official Information Act.[370]

The provisions of the OIA were interpreted by the New Zealand Appeal Court in the case of *Commissioner of Police v Ombudsman*,[371] where the issue concerned a request by the defence for copies of statements in the police docket. The police refused to disclose these statements on the basis that the information was exempt from disclosure in terms of section 6(c) of the OIA.[372] The majority held that before criminal charges are laid, investigations by the police will be protected from disclosure by section 6(c). However, once criminal proceedings have commenced, the balance aimed at by section 6(c), will shift in favour of disclosure. The court held therefore, that the decision of the Commissioner of Police to withhold access to the police briefs was incorrect. The court also found that to allow the defendant access to the police briefs would not jeopardise the administration of the law. Therefore, the defendant's right to a fair trial was found to prevail over the interest in investigative secrecy. The disclosure of such documents was viewed as being essential to a fair trial. This decision demonstrates that prosecution disclosure is linked to the duty of fairness and the defendant's right to a fair trial.[373] The case also illustrates the innovative and bold approach of the New Zealand courts.

However, defence disclosure obligations have not changed much in New Zealand. The only formal obligation on the defence is to disclose intended reliance on evidence

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368 The Official Information Act of 1982 governs pre-trial discovery in New Zealand. Discovery under the OIA is available as of right under the statute. See Doyle and Hodge *op cit* 118.

369 It has been held that "maintenance of the law" includes the public's interest in the fairness and finality of a criminal trial, and that "personal information" includes information held by the police which is relevant to an offence charged against the person. See Taggart *op cit* 288.

370 See Dawkins *op cit* 36. This article reviews the main arguments for and against increased defence disclosure.

371 (1988) 1 NZLR 385. These statements were made by two witnesses who were policemen. The accused had been charged with driving with excess blood alcohol, refusing to accompany a police officer and driving without a licence.

372 The exemption provides that the official information may be withheld if such information would prejudice the maintenance of law including the prevention, investigation and detection of offences and the right to a fair trial. See Taggart *op cit* 288.

373 The *Commissioner of Police v Ombudsman* decision illustrates the transformation of the Official Information Act 1982 into an engine of criminal discovery. This case is said to regulate the duty of fairness at common law.

of alibi in trials on indictment.[374] Dawkin disagrees with the argument that reciprocal pre-trial disclosure regimes promote the pursuit of truth and the more efficient conduct of criminal trials.[375] Rather, he suggests that instead of compelling the defence to reveal all, a greater degree of voluntary pre-trial disclosure could be encouraged by the introduction of a comprehensive code on prosecution disclosure.[376] Prosecution disclosure is also implicitly required by section 24(d) and section 25(a) of the New Zealand Bill of Rights Act 1990 respectively.[377]

Thus in New Zealand, the disclosure of prosecution documents is seen as an integral part of the accused's right to a fair trial.

5.3.6.7 AUSTRALIA

In Australia, the rights of discovery are virtually non-existent. Indeed, it has been said that there is no right to discovery in the criminal law.[378] Academic writers have criticised as "archaic" the rationales underlying "the maintenance of an adversarial system without modification".[379] Committal proceedings, names of prosecution witnesses and copies of statements are the usual scope of discovery. Generally, the magistrate has a discretion to grant the defendant access to statements of prosecution witnesses where the defendant has sought their production.[380] There are provisions in all jurisdictions, except Tasmania, for the committal proceedings to take place by the tendering of the statements of witnesses, either with or without oral evidence, provided that the statements are in the necessary form.[381] The prosecution is obliged to serve copies of exhibits on the defendant prior to a hearing.[382] The defendant is obliged to indicate whether he objects to the statements being tendered or wishes any of the witnesses to attend for cross-examination.[383]

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374 See Dawkins *op cit* 36.

375 He states that in principle, mandatory defence disclosure is also difficult to reconcile with the nature of the adversarial process and a defendant's right not to be coerced into assisting the prosecution. *Ibid* at 38.

376 *Ibid* at 60-64.

377 Section 24(d) relates to the right to adequate time and facilities to prepare a defence, whilst s 25(a) refers to the right to a fair hearing. Also see *Allen v Police* [1999] 1 NZLR 356, 359-363; *Police v Keogh* [2000] 1 NZLR 736-749.

378 See, *inter alia*, *Sobh v Police Force of Victoria* [1994] 1 VR 41.

379 See *S v Majavu supra* at 68.

380 See, for example, *Cheng Kui v Quinn* (1984) 11 FCR 217, 21 A Crim R 447.

381 See, for example, s 90AA of the Magistrates' Court Act 1930 (ACT); s 105B of the Justices Act 1928 (NT).

382 See, for example, s 90 of the Magistrates' Court Act 1930 (ACT).

383 See, for example, s 90AA(3) of the Magistrates' Court Act 1930 (ACT); s 105B(3) of the Justices Act 1928 (NT).

However, the Australian courts are reluctant to disclose prosecution evidence to the defence.[384] There are limited statutory requirements imposed on the prosecution regarding the disclosure of material collated by the state to the defence in criminal proceedings.[385] The prosecution's duty to disclose is mostly governed by the common law. However, steps have recently been taken in Victoria and been proposed in New South Wales, to improve the efficiency of the criminal justice system. These steps provide the criminal courts with greater powers to control pre-trial processes.[386]

Victoria is presently the only Australian jurisdiction to have implemented the statutory reciprocal disclosure scheme. Recent legislative changes in Victoria have imposed disclosure obligations on accused persons in criminal trials, whereby they are now required to actively participate in narrowing the issues in the case and to disclose the nature of their defence before trial.[387] These changes have been attacked on the basis that they abrogate the presumption of innocence and reverse the onus of proof. However, Flatman and Bagaric contend that accused disclosure does not violate any criminal law objectives, but will result in many distinct advantages including considerable cost savings to the community and a greater emphasis on pursuit of the truth.[388] The Victorian scheme is said to be more flexible than its English counterpart in the CPIA .[389]

Freedom of Information Acts (the Freedom of Information Act is hereinafter referred to as the "FOIA") exist in most Australian jurisdictions to confer a public right of

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384 In *National Company and Securities Commission v News Corporation* 52 ALR (1984) 417, the court held that if an investigator were to disclose his hand prematurely it will not only alert the suspect to the progress of the investigation, but would also close off other sources of inquiry. The court also reaffirmed the principle that an accused should not be entitled to discovery as against the prosecution.

385 See *inter alia*, s 104 of the Summary Procedure Act 1921 (SA); s 8 of the Crimes (Criminals Trials) Act 1993 (Vic). Also see Hinton "Unused material and the prosecutor's duty of disclosure" (2001) *Criminal Law Journal* 121 at 122.

386 See the Crimes (Criminal Trials) Act 1999 (Vic) and the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW). This has included powers relating to both the prosecution and the defence.

387 See the disclosure requirements imposed on accused pursuant to the Crimes (Criminal Trials) Act 1999 (Vic). Also see the statutory scheme requiring reciprocal disclosure in New South Wales, the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW) *supra*. For a more detailed discussion about this statute, see Dawkins *op cit* 51-55.

388 See Flatman and Bagaric "Accused disclosure – measured response or abrogation of the presumption of innocence?" (1999) *Criminal Law Journal* 327. The writers argue that imposing disclosure obligations on an accused does not abrogate any fundamental tenets of the criminal justice process. Rather, it represents a measured and justifiable response to curtailing the ever increasing length and expense of criminal trials. Also see pages 333-334 for a list of the advantages and benefits flowing from accused disclosure provisions.

389 This is because it allows optional disclosure procedures, prosecution disclosure is not dependent on defence disclosure, and the sanctions for non-compliance apply as much to the prosecution as to the defence. See Dawkins *op cit* 48-51, for a more detailed discussion about the Victorian scheme of reciprocal defence disclosure.

access to government documents.[390] However, the Northern Territory is the only jurisdiction that has not enacted a FOIA. The pertinent features of the scheme in the FOIA, are that there is no standing requirement, in other words, to obtain access, a person does not have to explain or justify why they need a document; the government's right to withhold documents from disclosure is circumscribed by exemptions in the legislation, and a refusal of access can be questioned before an independent court or tribunal, in which the government bears the onus of establishing the correctness of the decision under review.[391]

Although the language of Australia's federal and state freedom of information acts allows scope for criminal discovery-motivated requests by criminal defendants, the courts have also rejected discovery-motivated FOIA access. The courts and administrative tribunals have been hostile to freedom of information requests in aid of criminal discovery. Exemptions in the FOIA may also frustrate attempts to use it as a criminal discovery tool. The protection of documents subject to legal professional privilege in section 42 of the Act may also serve as a barrier to criminal discovery-motivated FOIA requests.[392] In *Austin v Deputy Secretary, Attorney-General's Department*[393] the Government Solicitor withheld several documents on the ground of legal professional privilege and the Administrative Appeals Tribunal (AAT) upheld the decision. Upon further appeal the Federal Court found no error of law on the Tribunal's part. Similarly, the AAT upheld a claim for exemption in terms of section 42, thus protecting from disclosure, statements of potential witnesses. These were taken by police officers in the course of a criminal investigation and were obtained for the sole purpose of obtaining legal advice.[394] In *Stewart and Victoria Police*[395] the applicants had sought access to evidence gathered in the course of an internal investigation into complaints alleging assault against the police officers. The police refused to disclose this information on several grounds and the AAT upheld the appeal.[396] The AAT also stated that "the whole area of 'criminal discovery' should, as a matter of policy remain with the criminal courts". This statement led to the

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390 See for example, Freedom of Information Act 1982 (Cth) and Archives Act 1983 (Cth).

391 See Kinley *Human rights in Australian law* Federation Press (1998) 68. For a more detailed discussion about freedom of information laws in Australia, see Bayne "Freedom of information in Australia" (1993) *Acta Juridica* 197 at 200, where it is stated that the object of the federal FOIA law is "to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government". It should be noted that this article focusses on the realm of administrative law reform.

392 See Taggart *op cit* 278.

393 67 ALR 585 (Federal Court 1986). Austin was charged with sending an explosive substance through the mail which was contrary to postal legislation. He sought access to the file of the Australian Government Solicitor under the FOIA.

394 *John and Secretary, Attorney-General's Department* 4 Freedom Information Review 54 (Admin Appeals Tribunal) (1986). Also see Taggart *op cit* 279.

395 15 Freedom Information Review 27 (Victoria Admin Appeal Tribunal) (1988).

396 Factors which influenced the AAT's decision were the confidentiality of the information and the possibility of harassment of civilian witnesses.

implication that it was contrary to public interest to apply the FOIA according to its terms. However, this view was rejected by the Deputy President of the Commonwealth ATT as being contrary to the spirit and amendment of the FOIA Act.[397]

The Australian experience illustrates its conservative approach. This can be compared to the *Steyn* era where the common-law privilege to refuse disclosure was jealously enforced by the prosecution.[398] Not surprisingly, a call for reform on prosecution disclosure in Australia has been made on the basis of the "equality of arms" principle.[399]

5.3.6.8 ISLAMIC LAW

Islamic Criminal Procedure attempts to strike a balance between the interests of the accused and those of society. The Qur'an states:

> "Nor would we visit our wrath until we had sent an apostle to give warning."[400]

This has been interpreted to mean that individuals should be informed of the law before they may be prosecuted or punished. The accused and his attorney are informed of the charges and the supporting evidence. They are also informed of any evidence in the prosecution's possession that indicates the defendant's innocence.[401] In order for a case to be acceptable, it must fulfill some conditions called conditions of validity. If these conditions are incomplete, the judge cannot commence the trial until they are fulfilled.[402] The defendant is entitled to obtain a copy of the case against him and to ask the judge for a period of time to study it and prepare his defence. The defendant can also obtain
copies of documentary evidence tendered by the plaintiff besides witness statements which are necessary to prepare his defence.[403]

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397 See Taggart *op cit* 284.

398 However, the state of Victoria is to be commended for its statutory reciprocal disclosure scheme, which has been described as being more flexible than its English counterpart in the CPIA.

399 See Hinton *op cit* 139, where he opines that the Director of Public Prosecutions should adopt and implement the principle of "equality of arms" as the basis upon which requests by the defence for disclosure of unused material by the prosecution will be considered. This approach together with the greater involvement by the judiciary in pre-trial disclosure, will ensure that all the relevant material is placed before the jury, thereby minimising the risk of a false conviction and contributing to justice.

400 See Qur'an, XVII: 15. Also see Mahmood "Criminal procedure" in Mahmood *et al Criminal law in Islam and the Muslim world* Qazi Publishers (1996) at 298.

401 *Ibid* at 300.

402 The procedure is that the judge listens to the plaintiff in the defendant's presence. The defendant (accused) is then questioned. See Attia "The rights to a fair trial in Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 351.

403 *Id*.

Therefore, Islamic law also makes some provision for disclosure of evidence to the defence. The discussion on foreign jurisdictions reveals that for the most part, an accused is entitled to disclosure of evidence by the prosecution on the basis of his right to a fair trial.

5.4 THE ACCUSED'S RIGHT TO BE INFORMED OF THE REASON FOR DETENTION

The two relevant provisions are section 25(1)(a) of the Interim Constitution and section 35(2)(a) of the Final Constitution respectively. Section 25(1)(a) provides that every detained prisoner has the right "to be informed promptly in a language which he or she understands of the reason for his or her detention". The provisions of section 35(2)(a) are similar. Section 35(2)(a) provides that:

> "everyone who is detained, including every sentenced prisoner, has the right-
>
> (a) to be informed promptly of the reason for being detained;"

The right to be informed of the reason for detention is long established in South Africa.[404] A person needs to know the reason why he is deprived of his freedom in order to decide whether or not to resist the arrest and to take reasonable steps to regain it. Therefore, the requirement of prompt notification enables the individual to decide whether to remain silent or to obtain legal representation. It is a trite fact that when a person is arrested, not only is he informed of the right to silence in terms of section 35(1)(a), but he is also informed of the reason for the arrest and the right to a lawyer in terms of section 35(2)(b). The objectives of section 35(2)(a) will be defeated if the police arrest an accused on the pretext of one charge, but detain him on a serious charge.[405] The accused cannot exercise an informed choice about remaining silent or engaging a lawyer if he does not know that the detention is based on a more serious charge. However, in *R v Evans*[406] the Supreme Court of Canada accepted that the requirements of section 10(b) of the Charter were met even where the accused was arrested on the pretext of one charge and the subsequent questioning indicated that he was held on a more serious charge.

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404 See s 39(2) of the Act. Also refer to the discussion in 5.2.4 above.

405 Section 35(2)(a) provides than an accused must be informed of the true purpose of arrest. The wording of s 35(2)(a) is similar to art 5(2) of the ECHR and s 10 of the Canadian Charter. Article 5(2) of the ECHR provides that "everyone who is arrested shall be informed promptly in a language which he understands of the reasons for his arrest and of any charges against him", whilst s 10 of the Charter provides that "everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore". Section 9(2) of the ICCPR provides that "anyone who is arrested shall be informed at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Therefore, the reason for the arrest should be given "at the time of the arrest". The Criminal Procedure Act also provides that the arrestor should notify the arrestee "at the time of effecting an arrest or immediately after effecting the arrest" in terms of s 39(2). Thus, the Act contains more explicit provisions.

406 (1991) 63 CCC (3d) 289 (SCC) 303. It should be noted that s 10(b) of the Canadian Charter states that "Everyone has the right on arrest or detention ...

> (b) to retain and instruct counsel without delay and to be informed of that right ..."

The detainee needs to know the reason for his arrest, and this information will also enable the detainee to exercise his right to *habeas corpus*.[407] In *Fox, Campbell and Hartley v UK*[408] the defence contended that the concept of "terrorist" was vague in that the accused were not given adequate and understandable information when they were arrested. The court held that merely being informed by the arresting officer of the legal basis for the arrest in terms of section 11(1) was insufficient for the purposes of section 5(2). However, the court regarded the interrogation on specific criminal acts that followed within 5 hours of the arrest, as being sufficient to enable the applicants to understand why they had been arrested.[409] The accused also has a right "to be informed of the reason for the detention to continue". Two reasons have been advanced for this namely, that an accused should be informed of the immediate reason why it was necessary to remand the case, thus necessitating the bail decision and the reason why the bail has been denied.[410]

The requirement that the detainee must "be informed promptly in a language which he or she understands" is incorporated in section 35(4) of the Constitution.[411] Similar provisions are contained in foreign systems.[412] The reason for detention should be given to the detainee explicitly and unambiguously. The detainee should not have to deduce from the arrestor's conduct what the possible reason could be.[413] Steytler submits that a person who is fully conversant with the official language is not entitled to be addressed in a specific minority language of a country. However, special arrangements may have to be made in the case of foreigners to ensure adequate

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407 *Habeas corpus* is defined as a writ issued to produce a prisoner in court. The purpose of the right is to inform a detainee about what is happening to him. See Steytler *Constitutional criminal procedure* 150.

408 30 Aug 1990 Series A no 182 and 40. In this case, the applicants were arrested in terms of s 11(1) of the Northern Ireland Emergency Provisions Act of 1978. This Act provided for the arrest of any person "suspected of being a terrorist".

409 The court's decision has been criticised by many academic commentators. The effect of the court's decision means that the person is left to deduce from the interrogation the reason for his arrest. This negates the notification requirement. Similarly, the fact that the interrogation followed 5 hours after the arrest is not "prompt". See Steytler *Constitutional criminal procedure* 150.

410 *Ibid* at 129-130. Also see *Minister of Law and Order v Kader supra* at 501-511J, where the then AD remarked that justice requires that the accused should be informed of the reason for remanding a case. The accused should also be informed about the reason why the bail has been denied.

411 Section 35(4) provides that "information must be given to a person in a language that the person understands". Thus, the right to information is linked to the right to understand. The chapter on "The right to understand" (chapter 6) will elaborate on the language requirement.

412 See art 5(2) of the ECHR and art 9(2) of the ICCPR in this regard.

413 See *Fox*, *Campbell and Hartley v UK supra* .

communication.[414] In *Naidenhov v Minister of Home Affairs*[415] the court had to consider the position of a Bulgarian immigrant detained as an illegal immigrant. The court held that section 25(1)(a) of the Interim Constitution did not require that a detainee should be informed in his native language but it should be a language which he understood. Although the detainee's knowledge of English was limited, he understood enough to communicate in it. Therefore, *Naidenhov* confirmed the principle that an arrestee has a right to be informed promptly in a language that he understands of the reasons for his detention.

The European Court has interpreted "promptly" as not imposing a duty to inform at the moment of the arrest and periods of longer than five hours after arrest have been accepted.[416] On the other hand, the Supreme Court of Canada requires notification to occur at the moment of arrest.[417] This is due to the fact that a person is not obliged to submit to an arrest if he does not know the reason for the arrest and cannot exercise the right to counsel meaningfully.[418] Steytler submits that the latter approach is correct as it conforms with the common law in terms of section 39(2) of the Act.[419] A detainee should be informed of the reason for arrest at the moment of the arrest. If notification is impossible at the time of arrest, the duty should be discharged as soon as it is practically feasible in terms of section 39(2) of the Act.

The above discussion demonstrates that a detainee has a right to be informed of the reasons for his detention in a language that he understands at the time of the arrest or soon thereafter.

5.5 THE ACCUSED'S RIGHT TO BE INFORMED OF THE RIGHT TO LEGAL REPRESENTATION

The detainee has a right to be informed of a right to a lawyer in terms of section 35(2)(b). He has a right to be informed of the right to choose and to consult with a

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414 Steytler *Constitutional criminal procedure* 151.

415 1995 (7) BCLR 891 (T). The facts were that a Bulgarian arrestee was informed in English of the reasons for his detention. The arrestee had some knowledge of English, albeit with some difficulty, and he did not indicate a failure to understand the information given to him. He also did not request the assistance of an interpreter. The court held that in the circumstances, the requirements of the provision had been satisfied.

416 See *Fox*, *Campbell and Hartley v UK supra*. Also see *Murray v United Kingdom* (1996) 22 EHRR 297, where it was held that it would be sufficient for purposes of art 5(2) if the alleged offence for the detention "must have been apparent" to the detainee in the course of her questioning. Here, the interview which was held 1 hour and 20 minutes after the initial arrest satisfied the requirement of "promptness" in terms of art 5 (2).

417 See *R v Evans supra*.

418 *Id*.

419 Steytler *Constitutional criminal procedure* 154.

legal practitioner and to be informed of this right promptly.[420] The information should be conveyed in such a manner that a detainee will be able to understand the right and know how to exercise it.[421] The information need not be given in an official language of a detainee's choice, only in a language which he understands in terms of section 35(4), albeit imperfectly.[422] The **Canadian** courts have also held that an accused is entitled to be informed of his rights in a language, and in a manner that he understands in a meaningful way.[423] The usual way of expressing the right is to use the words in the Charter, and the practical risks of not conforming to this standard are that the police will convey incomplete information.[424] When a police officer is aware that a detainee's ability to understand the terms used to explain his rights is compromised by an inadequate knowledge of the language, then he is required to make a particular effort to ensure that the detainees' constitutional guarantees are respected.[425] In these circumstances, the
accused has the right to be informed of his rights in his own language by means of a card, through an interpreter, or with the assistance of a bilingual officer.[426]

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420 Section 73(2A) of the Criminal Procedure Act now provides that every accused "shall (a) at the time of his arrest be informed of his right to be represented at his own expense by a legal adviser of his own choice." Thus, the accused should be informed by the police that he has the right to consult with a lawyer of his choice. It should also be conveyed to the accused that he has a reasonable opportunity to contact a lawyer. See s 73(2B) in this regard. This was inserted by s 2 of the Act 86 of 1996. Also see *S v Gumede* 1998 (5) BCLR 530 (D) and *S v Mfene and Another* 1998 (9) BCLR 1157 (N). Similarly, in **Germany** the detainee must be informed of the right to a lawyer and the right not to speak. See ss 136-137 of the German Criminal Procedural Code.

421 *S v Melani* 1996 (2) BCLR 174 (E) at 189E. The court also remarked that where it is clear that the detainee has difficulty in understanding the right, the police should take additional steps to ensure that the right is adequately communicated. This may often be the case with juveniles. The court also stated that the right to consult with a legal practitioner during the pre-trial procedure and the right to be informed of that right is closely connected to the presumption of innocence, the right to silence and the proscription of compelled confessions and admissions. Thus, the failure to recognise the importance of informing an accused of his right to consult with a legal adviser had the effect of depriving many persons of the protection of their right to remain silent and not to incriminate themselves. The court also noted that s 25(1)(c) provides no absolute prohibition on questioning an accused or obtaining a statement from him in the absence of legal representation. This is only done when it is clear that the accused has waived his right to consult with counsel. However, the right could only be validly waived if the person abandoning it knew and understood what was being abandoned. Therefore, the right to be informed of the right to legal representation is linked to the right to understand.

422 See *Naidenhov v Minister of Home Affairs supra* at 898 J.

423 *R v Stagg* (1987) 7 MVP (2d) 283.

424 *R v Marshall* (1987) 50 MVR 278. It is also noteworthy that Scullin J remarked in *R v Nelson* (1982) 3 CCC (3d) 147 at 152, that: "if the unsophisticated accused is to be confused, it is better that he be confused about what the constitution states, rather than confused about what the police say the constitution states".

425 Gautier "The Charter, the right to counsel and the breathalyzer" (1990) *Revue du Barreau* 163-210 at 190.

426 *R v Vanstaceghem* (1987) 58 CR (3d) 121. This case illustrated the necessity of observing precautions. The failure of a police officer to inform an accused of his right to counsel in French was held to constitute a "regrettable disregard" for the respondent's constitutional rights.

Both section 10(b) of the Canadian Charter of Rights and Freedoms and section 23(1)(b) of the New Zealand Bill of Rights 1990 guarantee to an arrestee or detainee *inter alia*, the right to be informed of the right to counsel.[427] According to Butler, the purpose of the right to be informed is to secure in the detainee an understanding of the existence of the right to counsel.[428] The Canadian courts have consistently held that a mere recitation of the Charter formula will not satisfy the requirements of the section.[429] The courts have also held that, notwithstanding advice by a law-enforcement officer regarding the existence of the right to counsel, detainees have not been "informed" of the right to counsel within the meaning of section 10(b), where the existence of certain disabilities hindered or impeded the ability of the detainee to understand and act upon information communicated by the law enforcement official.[430] The leading New Zealand case on the accused's right to be informed of his right to a lawyer is *R v Mallinson*.[431] The *Mallinson* decision demonstrates a purposive interpretation of the right to be informed of the right to counsel, in that the police advice regarding the right to counsel must indicate to the detainee that he has that right. Thus, the detainee must understand the substance of the right which exists in his favour. The case also established a link between waiver and informed, in that an arrested person who understands the position would be able to make an informed choice regarding the waiver of the guaranteed right.[432]

Therefore, the court held that the admission of the results of the breathalyser tests would tend to bring the administration of justice into disrepute. This case differs from *R v Beauparlant* (1988) 5 MVR (2d) 161 where the correct procedure was followed by the police. When the arresting officer noticed that the accused was not fluent in English, he informed the latter that a French speaking officer would be available at the police station. He also informed the accused of his rights in French and repeated the breathalyser demand in French. The Ontario Court of Appeal concluded that all reasonable steps had been taken to ensure that the accused's Charter rights have been respected.

427 Section 10(b) provides that "everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 provides that "everyone who is arrested or detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right."

428 See Butler "An objective or subjective approach to the right to be informed of the right to counsel? A New Zealand perspective" (1994) *Criminal Law Quarterly* 317. Butler concludes (at 330) that the proper test for the concept of "informed" under s 10(b) of the Charter is one based on the subjective understanding of the information conveyed to the accused by the law-enforcement officer.

429 See *inter alia*, *R v Evans supra* at 289, *R v Vanstaceghem supra* at 121. It has also been held that it is not a breach of s 10(b) to question a detainee who fails to take advantage of an opportunity to contact a lawyer, provided that the detainee is fit to choose his course of conduct. See *Smith v The Queen* [1989] 2 SCR 368, 61 DLR (4th) 462. On the other hand, where a detainee submitted to questioning whilst intoxicated, brushing aside the advice of a relative not to answer questions until she had a lawyer present, the court held that s 10(b) was breached and the resultant confession inadmissible. See *Clarkson v The Queen* [1986] 1 SCR 383.

430 Examples of such disabilities include subnormal intelligence (see *R v Evans supra*), intoxication (see *R v Cotter* (1991) 62 CCC (3d) 423) and inability to speak the language in which the advice was communicated (see *R v Vanstaceghem supra*). Also see Butler *op cit* 319.

431 [1993] 1 NZLR 528.

432 Butler *op cit* 326.

Section 35(2)(c) provides that the detainee must be "informed of the right to counsel promptly". This means that the detainee must be informed of this right immediately on arrest. The reason advanced is that the detainee requires immediate need of legal advice because incriminating questioning will commence.[433] The police is obliged to inform the accused of his right to legal representation again when they take any steps to obtain information from him.[434] However, the existence of such an obligation will depend on the circumstances of each case.[435] The question has also arisen in Canadian law regarding the precise moment that the police are required to inform the accused of his right to counsel. The wording of section 10(b) is said to create some ambiguity as to whether the words "without delay" also qualify the right to be informed. In *R v Kelley*[436] the Ontario Court of Appeal interpreted section 10(b) to mean "without delay". However, it has recently been stated unequivocally that the right to be informed of the right to counsel is triggered immediately on arrest.[437] The question also arises whether the duty to inform applies again if the reason for detention shifts to a different offence or more serious offence. The Canadian courts have held that the duty to inform applies again.[438] The reason advanced is that a different charge or more serious charge may lead the accused to reconsider his initial waiver.

Section 35(2)(c) provides that the detainee must be informed of the right to have a legal practitioner assigned to him by the state and at state expense, if substantial injustice would otherwise occur. This section may be interpreted to mean that the

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433 *R v Brydges* (1990) 53 CCC (3d) 330 (SCC) 343.

434 These steps include, for example, pointing out incriminating evidence, making a statement to the police officer, participating in an identification parade or making a confession to a magistrate. See *S v Mathebula and Another* 1997 (1) BCLR 123 (W) 132 E-F.

435 See *S v Shaba and Another* 1998 (1) SACR 16 (T). The court in *Shaba* found that *S v Mathebula supra* was wrongly decided in so far as it held that the necessary warning and informing of constitutional rights was to be repeated to an accused at every pre-trial stage, and that failure to do so would render evidence obtained thereby inadmissible. *Shaba* was approved and followed in *S v Ngwenya and Others* 1999 (3) BCLR 308 (W), where the court held that the state is under no obligation to repeat the warning if some investigatory step occurs at the pre-trial stage involving the presence or the co-operation of the arrested person. Evidence obtained at the time of that investigatory step (identification parade in the particular case), will not be rendered inadmissible merely because it had not been preceded by a warning informing the arrested person of his right to assistance by a legal practitioner.

436 (1985) 44 CR (3d) 17. The court remarked that "while it is true that 'without delay' is not explicitly made applicable to the right to be informed, it is implicitly applicable in that the right to retain counsel on arrest without delay would be ineffective unless this implication is made".

437 See Gautier *op cit* 189.

438 See *R v Black* (1989) 50 CCC (3d) 1 (SCC) 12 and *R v Evans supra* at 306-307. In *R v Black*, the Supreme Court held that a person who is arrested on an initial charge and is informed of his right to counsel in relation to that charge, is entitled to be reinformed of the right to counsel if the charge changes and becomes more serious. Also see Gautier *op cit* 195.

detainee must be informed of the right to legal aid.[439] The police should inform the detainee not only of the existence of the right to legal aid, but how it can be accessed.[440] However, the duty of the police is merely to convey the necessary information about legal aid services and not to make any determination of who would be entitled to such assistance.[441] Thus, the emphasis should be on the accused understanding the right and how the state legal system can be readily accessed.[442]

Section 35(3)(f) also provides that an accused has the right to be informed promptly that he has the right to legal representation. Section 35(3)(f) requires that the presiding officer should inform an accused at his first court appearance of the right to legal representation.[443] The court considered the question whether the accused was informed of his right to legal representation in *S v Gasa*.[444] The court held that as a

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439 Section 35(3)(g) which refers to the accused, has similar wording. However, the court's duty to inform the accused about the existence of legal aid was recognised by the South African courts long before the inception of the Constitution. See *S v Radebe*; *S v Mbonani supra* at 191, where it was held that a duty rests upon judicial officers to inform an unrepresented accused of their legal rights, including the right to legal representation, and the right to apply for legal aid in appropriate cases. Therefore, s 35(2)(c) and s 35(3)(g) now constitutionalises this duty which is also reflected in s 73(2A) of the Act. Also see *Hlantlalala v Dyantyi NO* 1999 (2) SACR 541 (SCA), where it was held that an unrepresented accused should be told in appropriate cases that he is entitled to apply to the legal aid board for assistance.

440 See *R v Bartle* (1994) 118 DLR (4th) 83 (SCC) 102, where it was held that if there is toll-free legal advice service available on a 24-hour basis, detainees should be appraised of it and informed how to utilise the service. Also see s 73(2A) of the Act which provides that: "every accused shall (a) at the time of his arrest be informed ... if he cannot afford legal aid that he may apply for legal representation and of institutions which he may apply for legal assistance."

441 See Steytler *Constitutional criminal procedure* 170.

442 *Ibid* at 313.

443 Section 35(3)(f) reflects international standards and constitutionalises the common law rule which requires that the presiding officer should inform an accused at the first court appearance of the right to legal representation. See *R v Rudman supra* at 381 C; *S v Mthwana* 1992 (1) SA 343 (A); *S v Radebe; S v Mbonani supra* at 191 (T). Also see s 73(2A) of the Act which provides that at the time of arrest, the service of an indictment or summons, the handing of a written notice or at the first court appearance, an accused must be informed of the right to legal representation, and the right to apply for legal aid. Also see Bekker "The undefended accused/defendant: a brief overview of the development of the American, American Indian and South African positions" (1991) *The Comparative and International Law Journal of Southern Africa* 151 at 178-185, for a discussion about the duty to inform the accused of the right to legal representation, and the consequences of such failure. The writer states at 179, that the preferred view is that an undefended accused should always be informed that he is entitled to employ legal representation. The accused should also be informed of his right to apply for legal aid. See *S v Mthwana* 1989 (4) SA 361 (N) at 371C-E. According to the Appellate Division in *S v Mabaso* 1990 (3) SA 185 (A) at 204 C-D, the failure to inform an accused of his right to legal representation would amount to an irregularity only if he is shown to have been ignorant of that right. This gives rise to the inference that an accused can expressly or tacitly waive his right to legal representation.

444 1998 (1) SACR 446 (D). The accused was merely informed that if he was represented by an attorney, he could request that attorney to be present. This was immediately prior to a pointing-out exercise. The investigating officers also conceded that the accused had never been informed of his right to be provided with the services of a legal practitioner at state expense.

result of the investigating officers' failure to inform the accused of his right to legal representation, the accused had been denied his fundamental rights in the Constitution.[445] Similarly, in *S v Moos* [446] the court had to consider the question whether the accused had been properly informed of his right to legal representation. The court stressed the importance of advising the accused of their rights, and held that the fact that the accused's rights had been explained must appear from the record in such a manner and with sufficient particularity as to enable a judgment to be made regarding the adequacy of the explanation. The court found that the cursory manner in which the question of the advice of the right to legal representation had been recorded, did not clearly spell out that the accused had been advised of all his rights. Therefore, the accused should be given the benefit of the doubt.[447]

If the accused has not acted upon the advice given by the police officer, the court is obliged to reiterate the information at the first court appearance.[448] The presiding officer should execute this duty properly in each and every case.[449] However, failure to comply with this duty should not *per se* lead to the setting aside of the proceedings.[450] Where the accused proceeds without a lawyer in the mistaken belief that they had no such right, the setting aside of such proceedings is necessary as a

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445 It should be noted that the court looked at the contents of s 25(1)(c) of the Interim Constitution (200/1993), which is similar to s 35(3)(f) of the Constitution. Section 25(1)(c) conferred upon the accused the right to be provided with the services of a legal practitioner by the state in situations where substantial injustice would otherwise result. This includes the right to be informed of this right. Steytler also raises the question whether the right of access to care givers such as the spouse, partner and next of kin, contains an obligation to inform the accused of that right. He contends that the duty to inform should be discharged promptly when it becomes practicably possible to do so after arrest with the kind of the care giver and the surrounding circumstances determining the urgency of compliance. See Steytler *Constitutional criminal procedure* 203.

446 1998 (1) SACR 372 (C). The accused was informed by the magistrate prior to the trial of his right to legal representation in general terms. He informed the magistrate that he would make his own arrangements for legal representation. However, there was nothing to indicate that he had ever been advised of his right to a legal representative at state expense. The accused ended up conducting his own defence. Also see *S v Gouwe* 1995 (8) BCLR 968 (B), where the failure of the presiding officer to inform the accused of his right to legal representation amounted to an irregularity with the trial being unfair.

447 The court also found that the trial court magistrate should have queried why the accused, after initially having indicated that they would make their own arrangements for legal representation, ended up at the trial without any representation.

448 *Mgcina v Regional Magistrate, Lenasia* 1997 (2) SACR 711 (W) 723g. The presiding officer's failure to explain the accused's right to legal representation, had resulted in a failure on the part of the state to secure a legal representative for him. This constituted a breach of the accused's fundamental constitutional rights, with the result that the conviction and sentence were set aside.

449 See *S v Bulula* 1997 (2) SACR 267 (V) 270; *S v D* 1997 (2) SACR 671 (C)).

450 *S v Simanaga* 1998 (1) SACR 351 (CK) 353h; *S v Radebe; S v Mbonani supra*. Also see *S v Khan* 1997 (2) SACR 611 (SCA), where the court found that there was neither a statutory provision nor judicial pronouncement at the time of the appellant's arrest and confession which required that the appellant had to be advised of his right to legal representation in terms of s 73(1) of the Act. Also see *Hlantlalala v Dyantyi supra*.

fundamental principle of a fair trial has not been observed.[451] Where the accused are only informed of the right after they have pleaded and made an incriminating statement, they should not be burdened with the prejudice flowing from the omission.[452] However, the omission is not fatal to the proceedings where the accused knows about the right.[453]

However, the Canadian courts have taken a different view. The fact that an accused is aware of his rights does not dispense with the police informing him of these rights. In *R v Richards*[454] the police had omitted to remind the accused, who was a lawyer, of his right to counsel in terms of section 10(b) before making a breathalyzer demand. The court allowed the appeal from the conviction and noted that it was not the privilege of a peace officer to determine those cases in which compliance with his Charter duties is unnecessary.[455] However, a different view was taken in *R v Olson*[456] where the British Columbia Court of Appeal overturned an acquittal which had been granted subsequent to the exclusion of evidence obtained in violation of section 10(b). However, the Quebec Court of Appeal reaffirmed the view in *Miller,* when it rejected the crown's contention in *R v Gratton*[457] that the effect of an alleged infringement of an accused's section 10(b) rights should be examined with regard to the accused's particular status.

Thus, the above discussion demonstrates that the purpose of the right to legal representation is to allow an accused to be informed of his rights and obligations under the law, but equally if not more important, to obtain advice as to how to exercise those rights.[458] The right to be informed of the right to legal representation, is seen to form an integral part of the judicial system. Any denial of this right will lead to a violation of the accused's fundamental rights. The accused should also be informed of his right to legal representation in a language that he understands. The right to legal representation thus provides a continuing interplay between the rights of an

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451 See *S v Mgcina supra* at 735c.

452 See *S v Mabaso supra* at 185.

453 *S v Moseki* 1997 (2) SACR 325 (T) 331C.

454 (1986) 45 MVR 151.

455 Also see *R v Miller* (1988) 4 WCB (2d) 306, where the Ontario Court of Appeal refused to admit a statement in evidence because the accused was not informed of his right to counsel, even though he may have been aware of this protection.

456 (1988) 7 MVR (2d) 172. The accused had been employed as a security guard at a department store and knew his Charter rights. The court held on appeal that the accused should not benefit from a breach of s 10(b) in these circumstances, as the evidence would not bring the administration of justice into disrepute.

457 (1989) RJQ 1794.

458 See, *inter alia*, *R v Manninen* (1987) 34 CCC (3d) 385 at 392. Also see *DPP v Ara supra* at 559, where the court held that fundamental to the right to legal representation at the police station, is the right to be informed of legal advise. This impliedly necessitates sufficient disclosure.

accused and the corresponding obligations of the state.[459]

5.6 THE RIGHT TO BE INFORMED OF THE RIGHT TO REMAIN SILENT

Every accused person is entitled to be informed of the right to remain silent and the consequences of not remaining silent. This must be done irrespective of whether the accused is reasonably aware of the right.[460] When informing an accused of the right to remain silent, it "must be done in a language that the accused understands".[461] The rationale for not remaining silent is that any incriminating statement could be used as evidence against an accused. The aim of informing an accused of the consequences of not remaining silent is to ensure an informed and intelligent choice.[462] Whether the accused is represented or not, the court still has a duty to establish that the accused's rights have been properly explained to him. The court's failure to inform the accused of the consequences of testifying violate the accused's right to remain silent and the accused's right against self-incrimination in terms of section 35 of the Constitution.

Therefore, the presiding officer has a duty to establish that the accused has made an informed decision to testify.[463] The rights to remain silent, of access to a lawyer and to be informed of the reason for the arrest, have the common requirement that an accused or detainee must be informed promptly of these rights. The rationale is that an accused is in the most vulnerable position at the time of arrest, because police interrogation may immediately commence and incriminating answers may be furnished.[464] If it is impossible to inform an accused of the right to remain silent at the moment of arrest, then the duty should be discharged as soon as possible thereafter.[465] However, furnishing the appropriate warning promptly on arrest does not completely discharge the duty to inform. It is incumbent upon the police to inform an accused again of the right to silence before taking any steps to enlist him as a prosecution witness.[466]

Similarly, in **Germany**, a defendant has the right to be heard in the trial and cannot be

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459 See Gautier *op cit* 210.

460 See *Miranda v Arizona* 384 US 436 (1966) at 468.

461 See s 35(4) of the Constitution. The purpose of this provision is to ensure effective communication in a language that the accused understands, albeit imperfectly. See *Naidenhov v Minister of Home Affairs supra* at 898. Therefore, the right to information is linked to the right to understand.

462 See *Miranda v Arizona supra* at 469. Also see De Waal *et al op cit* 515.

463 See *S v Nzima* [2001] 2 All SA 122 (C).

464 Steytler *Constitutional criminal procedure* 118.

465 *Id*.

466 See *S v Mathebula supra* at 132 E-F and *S v Marx* 1996 (2) SACR 140 (W) 149 b.

forced to give evidence against himself.[467] The accused must also be informed that he does not have to give evidence and is free to remain silent.[468] His silence may not be taken as evidence against him. However, the accused having exercised the right to remain silent, can subsequently waive that right.

Therefore, the above discussion demonstrates that an accused must be informed of his right to remain silent in a language that he understands. This will enable him to make an informed choice.

5.7 CONCLUSION

The principle of "equality of arms" implies, *inter alia*, that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he be given adequate time to prepare his case; that he be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by his adversary, and that he be given access to all material evidence held by the prosecution authorities which relates to his guilt or innocence.[469] The principle of "equality of arms" between the prosecution and the defence, is implicit in the concept of a fair trial, and is entrenched in most jurisdictions.[470] There are many ways to justify the importance of access to information. The most basic need is linked to the human fascination to uncover secrets. As a device for uncovering secrets, access legislation fulfills this human need. Democratic principles also favour broad access to information so that the people can understand and judge the performances and actions of their governments. Access legislation also improves government decision-making. It is also seen as a response to the increasing significance of information in society.[471] The benefits of disclosure are also said to be fairness and efficiency. Early and full disclosure of the state's case is in the interest of the prosecution, because such a fully informed defendant can more easily be persuaded to plead guilty, and if made at an earlier stage, this will save court time and resources and the nation's legal aid bill.[472]

An accused was entitled to information about the infringement of his rights, and the options that he may take before the advent of the Constitution. Section 335 of the Act provides that an accused is entitled to a copy of any statement that he himself has made.[473] Section 144(3) provides that when an accused is arraigned for a summary trial in a superior court, he is entitled to the indictment and a summary of the

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467 See s 136 of the German Criminal Procedural Code.

468 See Foster *op cit* 223.

469 See Leigh "The right to a fair trial" in Weissbrodt and Wolfrum (1998) *op cit* 664.

470 See the comments of the European Court of Human Rights in *Rowe and Davis v UK supra* at para 60 in this regard.

471 See Onyshko *op cit* 74-76 for a discussion about the need for access to information.

472 See Doyle and Hodge *op cit* 96.

473 Similarly, a summons or written notice informs the accused of the charge(s) against him and advises him about what options to take. See ss 54 and 57 of the Act respectively.

substantial facts of the case together with a list of witnesses and addresses. An accused is also entitled to request further particulars to clarify the charge and to enable him to prepare his defence.[474] However, the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts.[475] Section 39(2) of the Act also provides that an arrestee must be informed of the reasons for his arrest and be furnished with a copy of the warrant on demand.[476] Similarly, occupiers of properties must be furnished with a warrant informing them of the reason for the entry by police officers in terms of sections 26 and 27 of the Act. The police are also entitled to furnish persons whose rights are affected with a copy of the search warrant.

Most jurisdictions want to ensure that police investigation is not hampered by acceding to the accused's request for access to information in the police files. In a number of democratic societies, non-disclosure of certain categories of information is justifiable in that the public interest in the proper administration of justice overrides the right to disclosure.[477] This is understandable in the light of the fact that the possibility of a conviction is linked to the success of police investigation. Both the police and the prosecution work hand-in-hand to secure a conviction. However, this partnership needs to consider the rights of the accused. Both the accused and the state (represented by prosecution and police) must enjoy an equal footing in the court and neither should enjoy any substantial advantage over the other. It goes without saying that the accused requires entitlement of information in the state's possession in order to have a fair trial. The accused's rights to disclosure is therefore necessary for the protection and exercise of his rights. The accused is entitled to know what information the state has in order to know the case against him, and to enable him to make full answer and defence. This involves the disclosure of all relevant material in the prosecution's possession, with the exception of that which is subject to a claim of privilege.[478] Therefore, the obligation to disclose is only limited by relevance and privilege.

The relevant provisions affecting an accused's right to information in the Interim Constitution, were section 23 and section 25(3)(b). Section 23 provides for a right to information. Section 25(3)(b) guarantees the right to a fair trial, which includes the right to be informed with sufficient particularity of the charge concerned. Section 23 read with section 25(3)(b) was considered in various decisions of the Supreme Court resulting in accused persons being allowed access to police dockets. In some cases full access to the docket was granted,[479] whilst in other cases, the Supreme Court

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474 See, *inter alia*, *R v Mokgoetsi supra* at 622.

475 See *R v Heyne supra* at 617.

476 This requirement must be complied with in order for the arrest to be lawful. See, *inter alia*, *S v Ngidi supra*.

477 See Schwikkard *SACJ op cit* 337.

478 See, *inter alia*, *R v Stinchcombe supra.*

479 See, *inter alia*, S *v Majavu supra*.

formulated criteria to be applied in deciding the ambit of the right to information.[480] The principle of fairness requires that an accused should be properly informed of the case that the state intends to prove against him. This right to sufficient information to facilitate the proper preparation of an accused person's defence, has always enjoyed general recognition.[481] Section 35(3)(a) of the Constitution which stipulates that an accused's right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it, may thus be seen as an affirmation of the position which prevailed prior to the advent of the new constitutional dispensation. The Constitutional Court finally clarified the position in *Shabalala*.[482]

The *Shabalala* decision conforms with the right to a fair trial principle. Although there is no longer any "blanket docket privilege", this does not mean that the accused's rights of access are absolute. The result is that the state cannot make a unilateral claim of non-disclosure. However, the court retains a discretion to determine the legitimacy of the claim. Circumstances may arise where the accused's rights must be curtailed. However, this curtailment must be justified in such a manner that the accused's rights to a fair trial are not undermined. However, the decision is silent regarding the stage at which disclosure should be made. Disclosure should be made after completion of the investigation but before commencement of the trial.[483] Any disclosure of such information for other purposes is improper. *Shabalala* is also silent regarding the question of reciprocal access.[484] Although the court referred to the advantages of disclosure by the state, it does not mention disclosure by the defence. There will be added advantages if both parties disclose evidence simultaneously before commencement of trial. This would limit issues to be adjudicated by the court. The end result would be to increase the efficiency of the prosecutions, but this would not impede the fairness of proceedings.[485] The decision is also silent regarding the

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480 See, *inter alia*, S *v Fani supra*; *Phato v Attorney-General, Eastern Cape supra*.

481 See *S v Hugo supra* at 540 E; *S v Ismail supra* at 40C; s 84 - s 88 of the Act.

482 See *Shabalala v Attorney-General of the Transvaal supra*, which put an end to police docket privilege.

483 *R v Stinchombe supra* is instructive in this regard. Similarly, in **Germany**, access can be denied where the investigations are not complete, and where premature access would endanger the success of the investigation. See s 147 of the StPO.

484 The Criminal Procedure and Investigations Act 1996 in the United Kingdom *supra* encompasses reciprocal access and is instructive in this regard. So too are the Victorian legislation in Australia regarding reciprocal disclosure, and Federal Rule of Criminal Procedure 16(b) in the United States. Also see Senatle *op cit* 73, where he makes a very good case for reciprocal access. However, the South African Law Commission is not in favour of reciprocal disclosure by the defence. See *Project 73 Report* (August 2002) on a more inquisitorial approach to criminal procedure in this regard.

485 However, Dawkins disagrees. He maintains that an adequate case for mandatory reciprocal disclosure has yet to be made on the grounds of administrative efficiency and better case management. See Dawkins *op cit* 65.

absence of any evidence which has been in the prosecution's possession.[486]

Foreign jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right.[487] The accused's rights of access to material evidence is seen as an essential requirement of a fair trial.[488] However, the prevailing theme is that of the integrity of the judicial system. In Canada, the provisions of the Charter have been interpreted by the Supreme Court as providing a right of disclosure to accused persons. Indeed, the *Stinchcombe* case marked the dawn of a new era in disclosure to the defence, by holding that full and frank disclosure was a primary component of the right to make full answer and defence.[489] In England, defence counsel has access to evidence from an early stage. The English system provides for the disclosure of summaries of the case before committal proceedings, and the furnishing of witness depositions and reports as part of the committal proceedings.[490] The failure to disclose exculpatory evidence to the defence led to many miscarriage of justice cases. This led to the setting up of the Royal Warrant to the Royal Commission, which recommended the introduction of the CPIA of 1996.[491] In the United States, due process guarantees to the defence "access to certain information possessed by the prosecution",[492] and in order to prove a violation of due process rights, the defendant must show that the undisclosed evidence was material.[493] In New Zealand, the accused's right to a fair trial have been found to prevail over the interests of society.[494] Therefore, a survey of the foreign jurisdictions reveals that for the most part, the accused (or defence) is entitled to some rights of access.

Section 32 provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. This provision has implications, *inter alia*, for

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486 The decisions of the Canadian and American courts are instructive in this regard. See *inter alia*, *R v Stinchcombe supra*, where the state was required to furnish a satisfactory explanation regarding lost or destroyed evidence. Also see *Arizona v Youngblood supra*, where the accused was required to show bad faith on the part of the prosecution in order to succeed.

487 See *S v Majavu supra*.

488 Also see *Edwards v UK supra*, where the European Court of Human Rights stated that prosecution disclosure of all "material evidence for and against the accused" was a requirement of a fair trial under art 6.

489 See *R v Stinchcombe supra*, where the court stated that the general rule is that all relevant information must be disclosed, whether it is inculpatory or exculpatory.

490 See Leigh "Ensuring the right to effective counsel for the defense in English criminal procedure" 63 (1992) *International Review of Penal Law* 775 at 778.

491 See Sharpe *The Criminal Law Review op cit* 273.

492 See *Brady v Maryland supra*.

493 See *US v Bagley supra* at 682.

494 See *Commissioner of Police v Ombudsman supra*. In Germany, Australia and Islamic countries, the accused also has controlled rights of access to evidence in the prosecution's possession.

access to the basis for search warrants, the contents of police dockets and particulars relating to charge sheets. The Promotion of Access to Information Act is mandated by the constitutional right of access to information held by the state, and to information held by another person. It allows public parties to request records from private bodies. However, the Act does not apply to records required for criminal or civil proceedings already underway. Similarly, freedom of information laws in foreign jurisdictions are rarely used in the criminal context.[495]

The right of an unrepresented accused to be informed of his right to legal representation was confirmed in many cases some time before the Interim Constitution took effect in 1994.[496] The purpose of the right to legal representation, and its corollary to be informed of that right, was to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty.[497] Thus, this protection ensures that an accused was treated fairly throughout the entire criminal process from arrest to trial. In order to give proper effect to an accused's rights in terms of the Constitution, he had to be informed of the right to consult with a legal representative in a manner so as to allow him to understand the content of that right.[498] Similarly, an accused should be informed of the reason for his detention, and the right to remain silent in a language that he understands.[499] It is also necessary that the accused is able to comprehend the meaning of the information.[500] If an accused knows the reason for his detention, he can decide how best he can challenge his detention by exercising his right to remain silent or engaging legal representation.

The essential purpose of allowing an accused to engage in pre-trial discovery of the prosecution's case is to enhance the truth-finding process so as to minimise the danger that an innocent accused will be convicted.[501] The Constitutional Court is to be commended for its bold and innovative approach in *Shababala*. Its rejection of the common law position on police docket privilege heralded a new era for access to documents. It drastically changed the scene regarding docket privilege and thereby the extent of information available to an accused. Similarly, the bold approach of the New Zealand courts towards right to information in *Commissioner of Police*, and that

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495 See for example, the Federal Access to Information Act 1982 in Canada. In the United States, the FOIA is available as an alternative to conventional discovery as long as it does not exceed provisions of the Federal Rules. Similarly, in Australia, the courts have been hostile to freedom of information requests in aid of criminal discovery. See Taggart *op cit* 278-284.

496 See *S v Radebe*; *S v Mbonani supra* and *S v Mabaso supra*.

497 See *S v Melani supra* at 174 (E).

498 *Id*.

499 See s 35(4) of the Constitution. Also see *Naidenhov v Minister of Home Affairs supra*. A similar viewpoint is followed in Canada. See Gautier *op cit* 163-210.

500 See *S v Melani supra*.

501 See Brennan *op cit* 2.

of the Canadian courts in *Stinchcombe*, are welcomed.[502] These progressive decisions illustrate the courts' enthusiasm for law reform. This bodes well for its citizens. It is hoped that other countries will benefit from this criminal reform experience. The courts should strive to maintain a well-defined balance between the rights of the accused and those of the public. If the system of criminal justice is to be marked by a search for truth then disclosure must be the starting point.[503] The "right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[504] Indeed, the quest for better justice is a ceaseless quest, and our profession should strive for continuous examination and re-examination of our premises as to what law should do to achieve better justice.[505]

Therefore, the accused must be informed about his rights and the case against him in order for him to prepare for his case effectively. However, it is imperative that the accused also understands what the case is about before he starts preparing for his case. He must understand the proceedings to be instituted against him. This means that he must be able to follow and comprehend the proceedings. Thus, the accused must be "fit" to be tried or "mentally present". An informed accused can only participate in the proceedings if he "understands" the proceedings. Therefore, the next chapter will discuss the accused's right to understand the proceedings.

CHAPTER FIVE

THE RIGHT TO INFORMATION

5.1 INTRODUCTION

The word "information" is derived from the Latin word "informo", which was adopted as "inform" and "information" in English.[506] Numerous definitions have been subscribed to the word "information", depending on the context in which it is used. The Merriam-Webster Online Dictionary defines "information", *inter alia*, as "the communication or reception of knowledge or intelligence, or knowledge obtained from an investigation or study".[507] This definition of information is more relevant to the legal context. The right to information entails more than giving an individual access to documents compiled during an investigation. It also involves communication or

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502 So too the American decision in *Brady v Maryland supra*.

503 See *R v Bourget* 1988 (41) DLR (4th) 756 at 757.

504 See *R v Stinchcombe supra* at 9.

505 See Brennan "The criminal prosecution: sporting event or quest for truth?" (1963) *Washington University Law Review* 279.

506 Geldenhuys *Die regsbeskerming van inligting* (unpublished doctoral thesis) Unisa (1993) at 40.

507 Available at http://www.m-w.com/cgi-bin/dictionary 6 June 2000.

reception of knowledge to enable an individual to exercise his rights.[508] Man's interest in information stems from the fact that he is a social animal since his creation, and he needs to interact with other people and his surroundings in order to survive. Thus the collation, reception and communication of information is seen as an important part of man's existence, and the manner in which he conducts these activities will enhance his quality of life.

The law is constantly transforming to reflect the social realities of the time. An individual needs to be informed about these changes, especially where these changes would impact on his daily life. This knowledge is necessary for the exercise and protection of the individual's rights. The individual should receive sufficient notification of these changes and proper guidelines should be furnished to law enforcement officers. However, one also needs to protect information against misuse and abuse. Legal protection is not only accorded to information itself, but it is also accorded to those individual and community interests which are considered as being worthy of legal protection.[509] Legal rules are formulated in the Act to prohibit the infringement of these interests.[510]

The Constitution consolidates the position in the Act. The principle provisions which are relevant to the right to information are sections 32, 35(2)(a) and (b), 35(3)(a), (b) and (f) and section 35(4) of the Constitution.[511] The above provisions have important implications for access to documents in the police docket, access to particulars relating to charge sheets, lawful arrest and the right to be informed about legal representation.
This chapter will first address the accused's right to information during the pre-trial stage. This discussion will focus on the accused's right to information in the summons, written notice, indictment and charge sheet, further particulars, arrest warrant, entry of premises for purpose of interrogation, search and seizure and

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508 To illustrate this, an individual should know why he is being arrested or detained in terms of s 39(2) of the Act. This will enable him to exercise a choice whether to remain silent or obtain legal representation.

509 Individual interests relate to, for example, the rights of an arrested person to be informed of the reason for his arrest in terms of s 39(2) of the Act. Community interests relate to, for example, state security and the investigation and the solving of crime by the police.

510 The ensuing discussion in para 5.2 below will focus on the arrestee's or accused's rights to information in the Act.

511 Section 32 of the Constitution provides that everyone has the right of access to any information held by the state, and any information that is held by another person and that is required for the exercise of any rights. Section 35(2)(a) refers to the right of a detainee to be informed promptly of the reason for his detention whilst s 35(2)(b) refers to the right of a detainee to be informed of his right to legal representation. The latter right is similar to s 35(3)(f) which refers to the right of an accused to be informed of his right to legal representation. Section 35(3)(a) provides that an accused person has the right to be informed of the charge with sufficient detail to answer it. Section 35(3)(b) provides that an accused is entitled to adequate time and facilities to prepare a defence, whilst s 35(4) provides that information provided to a person must be given in a language that he understands. Please note that for future reference, the terms "accused" and or "detainee" will be interpreted in the masculine form for purposes of convenience. Nevertheless, this does not detract from the fact that the terms also apply to the feminine form as well.

statements to the police officer. Thereafter, it will address the pre-constitutional and constitutional position on an accused's right to information. To this end, police docket privilege, the Promotion of Access to Information Act 2 of 2000, the right to be informed of the reason for detention, the right to be informed of the right to legal representation and the right to be informed of the right to remain silent will be discussed respectively. Principles extracted from other countries will be applied to the relevant South African context. Finally, the conclusion will propose interim conclusions and recommendations drawn extensively from case law and legislation in South African law and foreign jurisdictions.

5.2 AN ACCUSED'S ACCESS TO INFORMATION DURING THE PRE-TRIAL STAGE

The notion that the accused in a criminal case should be informed in advance of the evidence against him is not foreign to South African criminal procedure. Under section 54 the Criminal Procedure Act 56 of 1955, the standard procedure in criminal trials in the High Court was for a preparatory examination to be held in the magistrate's court first, at which the state produced its evidence to establish a *prima facie* case against the accused.[512] The record of those proceedings was made available to the accused so that he had sufficient opportunity to prepare for the trial. However, since 1977, this procedure has in practice been substituted by the procedures under Chapter 19 of the Act.[513] Although sections 123 to 143 of the Act make express provision for the holding of a preparatory examination in anticipation of a trial before the High Court, this procedure is seldom used nowadays.[514]

A suspect or an accused has access to information during various stages of the criminal proceedings. The following discussion on pre-trial rights will illustrate this:

5.2.1 SUMMONS

A summons is used for summary trial in a lower court where the accused is not in custody or is about to be arrested.[515] A summons can be described as a document

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512 A preparatory examination was also known as a "mini-trial". It involved proceedings before a magistrate which preceded the actual trial before the High Court. This gave the accused an opportunity to effectively prepare for his case.

513 Chapter 19 refers to a plea in the magistrate's court on a charge justiciable in the High Court. It encompasses a plea of guilty in terms of s 121 and a plea of not guilty in terms of s 122.

514 Section 143(1) expressly states that an accused may inspect the preparatory examination record and be furnished with a copy of such record.

515 It is preferable to use a summons where there is no likelihood that the accused will abscond, attempt to hamper police investigation or attempt to influence state witnesses.

containing details of the charge and personal information of the accused.[516] The summons is issued by the clerk of the court and it specifies the place, date and time when the accused must appear in court.[517] Where a summons is served upon an accused, this must take place at least 14 days before the date of the trial.[518] However, if the accused finds that this period gives him insufficient time to prepare his defence, he may apply for, and the court will in appropriate cases grant a postponement for this purpose.[519] The summons therefore informs the accused of the charge/s against him and instructs him to appear in court to answer the charge/s against him. If the person who is summoned to appear fails to appear at the designated time and place, he is guilty of an offence and is liable for a punishment of a fine or imprisonment for a period not exceeding three months.[520] A warrant will be issued if the accused either fails to pay an admission of guilt fine or fails to appear in court on the specified date. Therefore, the summons secures the accused's attendance at the trial. However, the summons makes provision for the accused to pay an admission of guilt fine without appearing in court.[521]

The position in **Australia** is somewhat similar. A summons is issued by the court to the defendant to attend court to hear the information, complaint or charge.[522] It is issued on application by the informant.[523] The purpose of the summons is to notify the defendant of the proceedings so that he may answer the charge.[524] The decision to issue a summons must be exercised judicially.[525] The person issuing the summons should not be seen to have any interest in the subject matter of the information in

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516 This information pertains to the name, address, occupation and status of the accused. See s 54(1) of the Act.

517 See s 54(1) of the Act. Also see *Joubert et al Criminal procedure handbook* Juta (2001) at 92, for a detailed discussion about service of the summons.

518 This is in terms of s 54(3) of the Act. Sundays and public holidays are excluded.

519 See *S v Thane* 1925 TPD 850 and *S v Van Niekerk* 1924 TPD 486.

520 See s 55(1) of the Act. The court may issue a warrant for his arrest if satisfied that the summons was duly served and that the accused has failed to appear or to remain in attendance. Also see *Minister van Polisie v Goldschagg* 1981 (1) SA 37(A).

521 See s 55(2A) of the Act. Also see the proviso regarding s 55(2) which provides for instances when the accused need not be arrested in terms of the warrant. See *Joubert et al* (2001) *op cit* 93.

522 It should be noted that in foreign jurisdictions, the term "defendant" is constantly used. This term is merely a synonym for the term "accused".

523 See eg s 68(1) of the Judiciary Act 1903 (CTH), s 37 of the Magistrates' Court Act 1930 (ACT).

524 See *Plenty v Dillon* (1991) 171 CLR 635 at 641-644, where it was held that the essential purpose of the summons is to afford natural justice, and not to coerce a defendant to appear.

525 See for example, *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39. However, in Victoria, once the Registrar is satisfied that the charge discloses an offence, a summons must be issued. See s 28(4) of the Magistrates' Court Act 1989 (VIC).

order to exclude bias.[526] Before the summons is issued, the person must satisfy himself that it is not vexatious, that the information is not out of time and that there is *prima facie* evidence of the offence which requires the alleged offender to answer the charge.[527] The summons should also be issued within a reasonable time after the information is furnished.[528] The Australian experience illustrates that great care should be exercised in issuing a summons to avoid bias or unfairness.

5.2.2 WRITTEN NOTICE

A written notice to appear is prepared, issued and handed directly to the accused by a peace officer. It is used when minor offences are committed such as traffic offences.[529] The written notice specifies the name, residential address, occupation and status of the accused, and instructs the accused to appear at a designated time and place to answer a charge of having committed the offence. It also contains an endorsement in terms of section 57 of the Act that the accused may admit his guilt and pay a stipulated fine without appearing in court. It also comprises a certificate signed by a peace officer, which states that the original notice was handed to the accused and that the significance of the notice was explained to the accused.[530] If the accused fails to respond to the written notice, the provisions of section 55 with regard to the summons apply.[531] Therefore, the written notice also informs the accused of the charges against him and the options available to him.

5.2.3 INDICTMENT AND CHARGE SHEET

Section 144 of the Act provides that an accused in the High Court must be served with an indictment which contains, *inter alia*, details of the crime and the accused's personal details.[532] The indictment must be accompanied by a summary of the important facts of the case together with a list of witnesses and addresses, where no preparatory examination is held.[533] According to Joubert *et al*, the indictment informs the accused of the allegations against him provided that this will not be prejudicial to

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526 See *Electronic Rentals Pty Ltd v Anderson supra* at 45-46.

527 See *Ex parte Qantas Airways Ltd*; *Re Horsington* (1969) 71 SR (NSW) 291 at 301.

528 See *Metaxas v Ferguson* (1991) 4 WAR 272 at 274.

529 This is to expedite the course of justice in minor offences.

530 See s 56(1) of the Act.

531 See s 56(5) of the Act.

532 The indictment is drawn up in the name of the Director of Public Prosecutions. The accused's personal details pertain to his name, address, sex, nationality and age. The term "indictment" refers to prosecutions in the superior court, whilst the term "charge" refers to a prosecution in the lower courts.

533 Also see *S v Mpetha* (1) 1981 (3) SA 803 (C), where it was held that the purpose of the summary of substantial facts is to fill out the terse picture presented by the indictment.

the administration of justice or the security of the state.[534] However, the state is not bound by this summary of facts, and can lead evidence to contradict it.[535] Section 144(3) of the Act provides that an indictment must also contain a list of the names and addresses of witnesses. However, this may be withheld if the prosecution believes that this may lead to witness tampering or intimidation. The position is slightly different in the magistrate's court in that the accused is not served with a charge sheet, but it is presented in court. Rather, he is at liberty to examine the charge sheet at any stage of the criminal proceedings in terms of section 80 of the Act. The charge sheet should inform the accused of the case against him. Thus, both the indictment and the charge sheet inform the accused of the case that the state intends to prove against him.

Section 84(1) of the Act stipulates that a charge sheet "shall set forth the relevance offence in such a manner and with such particulars regarding the time and place at which the offence is alleged to have been committed". The relevant offence should also be set out in such a manner that the accused is sufficiently informed of the nature of the charge brought against him.[536] The accused is also entitled to know exactly what the charge against him is.[537] Charge sheets should also be simple and intelligible.[538] Thus, section 84(1) prescribes the requirements with which a charge sheet should comply.[539] The case in point is *S v Heugh*[540] where the court concluded that section 84(1) emphasises the difference between a charge and an offence. The

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534 Joubert *et al* (2001) *op cit* 171.

535 See *S v Kgoloko* 1991 (2) SACR 203 (A).

536 Also see s 35(3)(a) of the Constitution which provides that the accused has the right to be informed of the charge with sufficient details to answer it. Also see *S v Chauke* 1998 (1) SACR 354 (V), where the presiding magistrate failed to inform the accused, that he was in danger of being convicted of an offence which was a competent verdict on the original charge. This constituted a violation of the accused's right to be informed of the charge against him with sufficient details to be able to answer it in terms of s 35(3)(a) of the Constitution. Therefore, the trial was rendered unfair in terms of s 35(3) and the conviction was set aside. Also see *S v Singo* 2002 (4) SA 858 (CC). Similarly, it has been held in the **United Kingdom** that an individual who is likely to be directly affected by the outcome of a decision should be given prior notification of the action to be taken and be given sufficient particulars of the case against him so that he is able to prepare his case to meet them. See, *inter alia*, *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155.

537 See *S v Hugo* 1976 (4) SA 536 (A), where it was held that an accused is entitled to be informed by the charge with precision, or with at least a reasonable degree of clarity, what the case is that he has to meet. This is especially true of an indictment in which fraud by misrepresentation is alleged. The court also held that once the charge is furnished, the prosecution can't deviate from the charge during the trial because it sets the framework of the trial.

538 See *S v Rautenbach* 1991 (2) SACR 700 (T). Also see *S v Hugo supra* at 536.

539 Also see Joubert *et al* (2001) *op cit* 172-173, for a detailed discussion of the necessary averments in the charge sheet.

540 1997 (2) SACR 291 (E). The accused had pleaded guilty to a charge of dealing in dagga. However, the magistrate had failed to question the accused regarding the time and place of the offence during interrogation in terms of s 112(1)(b) of the Act. The issue was raised as to whether it had been proved that the offence was committed within the area of jurisdiction of the magistrate's court.

charge must set out the details of the offence as well as particulars regarding time and place where the offence is alleged to have been committed. The court concluded that section 84 does not require a charge to specify the district where the offence was committed for the purpose of establishing the court's jurisdiction, but merely to give particulars regarding the place where the offence was alleged to have been committed. Therefore, the intention of section 84 is to place an accused in possession of such information as would enable him to prepare his defence.[541]

Section 81(1) of the Act provides that a number of charges may be joined in the same proceedings against the accused, but before any evidence is led in respect of the particular charge.[542] The basic premise of the Act is that a person arraigned before a criminal court must know the exact extent of his potential exposure to conviction and sentence in the case before the trial proceeds.[543] A detailed charge also binds the prosecution to a specified offence and particularised factual allegations. The information obtained is thus of a more limited nature and does not include the disclosure of evidence.[544]

It should be noted that in the **United States of America**, the accused has a constitutional right in terms of the 6th Amendment, to be informed of the nature and cause of the accusation against him.[545] This right entitles the accused to insist that the indictment inform him of the crime charged with such reasonable certainty that he can prepare his defence and protect himself after judgment against such prosecution on the same charge.[546] In order for an indictment to be sufficient, it must allege all the elements that constitute the crime. An indictment in general language is regarded to be good if it describes the unlawful conduct in such a manner so as to reasonable inform the accused of the charges against him.[547] The Constitution does not require the Government to furnish the accused with a copy of the indictment.[548] However, the right to notice of accusation is regarded as such a fundamental part of the procedural

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541 See *S v Ismail* 1993 (1) SACR 33 (D) at 40 C.

542 Section 81(1) also provides that where the provisions are not complied with in that further charges are added after evidence had already been led, such proceedings are void. See *S v Thipe* 1988 (3) SA 346 (T).

543 *Id*.

544 *S v Thobejane* 1995 (2) SACR 339 (T).

545 Also see s 11(a) of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right "to be informed without unreasonable delay of the specific offence".

546 See *United States v Cruikshank* 92 US 542, 544, 558 (1876); *Bartel v United States* 227 US 427 (1913). Thus, the right to be informed is linked to the right to be prepared.

547 *Rosen v United States* 161 US 29, 40 (1896).

548 See *United States v Van Duzee* 140 US 169, 173 (1891). The American position is similar to that in the magistrate's court, where the accused is not served with a charge sheet.

due process, that the states are required to observe it.[549]

In **English law**, if the custody officer determines on arrival at the police station, that there is sufficient evidence to charge the person arrested with the offence for which he was arrested, he must be charged or released without charge.[550] Where a person is charged, he must be given a written notice showing the particulars of the offences. This must be "stated in simple terms" but also show "the precise offence in law with which he is charged".[551] Regarding a trial on indictment, each offence charged should be set out in a separate count, and each count must include a statement of the offence and such particulars as may be necessary to give reasonable information regarding the nature of the charge.[552] Similar principles apply to information which forms the basis of summary trials.

In **Scotland**, a solemn procedure takes place, whereby the crown must frame a relevant indictment, setting forth with sufficient specification the time of the alleged crime, the place where it occurred, and the modus by which it was committed.[553] In summary proceedings, the prosecutor must frame a complaint stating the substance of the charge. The indictment or complaint must be served on the accused.[554]

Section 9(2) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") provides that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Article 14(3)(a) of the European Convention for the Protection of Human Rights (hereinafter referred to as the "ECHR") refers to the right to be informed of the charge. It is expressly required that this right must be exercised in a language that the accused understands. The right is said to apply in all cases, and the information may be oral or written. However, the information must indicate both the law and the alleged facts on which it is based. The information must be given as soon as the charge is first made by a competent authority. Therefore, article 9(2) applies where a person is in custody "pending the result of police investigations", whilst article 14(3)(a) applies "once the individual has been formally charged".[555]

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549 *Rabe v Washington* 405 US 313 (1972). The constitutional requirement of due process is said to be violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that his contemplated conduct is prohibited, or the statute is so worded that he could not reasonably understand his conduct to be unlawful. Thus, statutes or ordinances have been held to be "void for vagueness". See *Papachristou v Jacksonville* 405 US 156 (1972). Thus, similarly, in the **United States**, the accused is entitled to be informed with a reasonable degree of clarity about the case against him.

550 See s 37 of the Police and Criminal Evidence Act of 1984 (PACE).

551 See para 16.3 of the Code of Practice (Code C) for the detention, treatment and questioning of persons by police officers.

552 See s 3(1) of the Indictments Act.

553 Harris and Joseph *The international covenant on civil and political rights and United Kingdom law* Clarendon Press Oxford (1995) at 222.

554 *Id*.

555 See *Kelly v Jamaica* 253/1987. *Id*.

In **Canada**, section 11(a) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be informed without unreasonable delay of the specific offence. Section 11(a) therefore guarantees that a person charged with an offence will be informed of the precise offence forming the charge. The purpose of the right guaranteed by section 11(a) is to ensure that the accused knows whether the offence is one known to law and what case must be met. Thus, this provision gives constitutional basis to the requirement at common law and under the Criminal Code that the charge must be one known to law and be sufficiently precise that the accused can defend himself effectively.[556] The appropriate and just remedy for a violation of section 11(a) is not a judicial stay of the proceedings, but an order squashing the indictment.[557]

A count must contain a statement that the accused has committed an indictable offence.[558] The statement that the accused has committed an indictable offence may be found in the words of the enactment that describes the offence or declares it to be an indictable offence.[559] A count must contain sufficient details of the circumstances of the alleged offence to provide the accused with reasonable information as to the act or omission of the offence and to identify the transaction referred to so as to enable him to prepare a defence accordingly.[560] The lack of certain allegations is not fatal provided the count satisfies the requirements of the Code in terms of reasonably

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556 See *Cotroni v Quebec Police Commissioner* (1978) 38 CCC (2d) 56 at 63 (SCC). Also see *R v Côté* [1978] 1 SCR 8 at 13, where the majority of the Supreme Court of Canada stated that:

> "The golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."

It should be noted that s 11(a) does not apply until the charge is laid. See *R v Heit* (1984) 11 CCC (3d) 97 (Tallis JA). However, the court pointed out that the accused might successfully invoke s 11(d) or s 7 of the Charter, or possibly establish an abuse of process, if it could be shown that an injustice was caused by the pre-charge delay on the police's part or the crown for an ulterior motive. A delay of 5 days from the date that the charge was laid until the accused was informed of the specific offence in the charge has been held not to violate s 11(a). See *Re Lamberti* (1983) 26 Sask R 213 (QB McIntyre J). Section 11(a) also does not require notice to be given in writing. See *R v McGregor* (1983) 2 CRD 725.120-02 (Ont HC, Callon J) in this regard.

557 See *R v Dennis* (1983) 8 CCC (3d) 411.

558 See s 581(1) of the Criminal Code. Also see *R v Brodie* [1936] SCR 188 (SCC) [Que] where it was stated that statements must be specified.

559 See s 581(2)(b) and s 581(5) of the Criminal Code.

560 See s 581(2)(c) of the Criminal Code. Also see *R v Goldstein* (1986) 70 AR 324 (Alta CA) where it was held that the original count in the information does not have to contain all the material required so that the accused is reasonably informed. Also see *R v Pretly* (1984) 31 Man. R (2d) 56 (Man QB), where it was held that multiple counts fail to provide sufficient particularity to enable the accused to plead *autrefois acquit* or rely on defence of *res judicata*. Consequently, the indictment was squashed. Also see *R v Dennis supra* where the information and indictment did not particularise the alleged offence sufficiently to allow preparation of the defence. There was thus a breach of the accused's right to be informed of the specific offence without reasonable delay.

informing the accused of the charge to be met.[561] Therefore, a charge is acceptable even if it does not name the person injured; the person who owns or has special interest in the property; or the person intended to be defrauded or it does not name or describe with precision, any person, place or thing.[562] It is also not necessary that the charge describe the means by which the alleged offence was committed.[563] The nature of the offence charged frequently determines the assessment of whether the standard of reasonable notice to the accused has being met.[564] An indictment which reasonably informs the accused of the case to be met will be upheld.[565]

In **Australia**, it is necessary that the information, complaint or charge must describe an offence known to law, including all the necessary elements of the offence.[566] It suffices if it sets out the offence in the words of the provision creating the offence.[567] The position at common law was that an information, complaint or charge which fails to disclose an offence known to law is null and void and does not give the court jurisdiction.[568]

The above discussion demonstrates that a charge or indictment should contain sufficient particulars so as to inform the accused of the case against him. A violation of this right will lead to the trial being rendered unfair.

5.2.3.1 THE REQUEST FOR FURTHER PARTICULARS

If the accused feels that the particulars in the indictment or the charge sheet are insufficient and do not inform him properly about the charges against him, the accused or his lawyer may request further particulars from the prosecutor in terms of

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561 See s 581 of the Criminal Code.

562 See s 583 of the Criminal Code.

563 See s 583(f) of the Criminal Code. Also see *R v B (AJ)* (1990) 80 Nfld and PEIR 76 (Nfld Prov Ct), where the information did not describe the manner in which indecent assaults occurred. However, the information contained sufficient information to avoid being squashed.

564 This especially applies in conspiracy charges, where it is insufficient to charge conspiracy in the abstract. See s 583 of the Criminal Code.

565 Where it is necessary, the court will order amendments or particulars or squash duplicate counts. See s 601 (regarding amendments)and s 587 (regarding particulars).

566 See, *inter alia*, *Reedy v O' Sullivan* [1953] SASR 114 at 129.

567 See for example, *Gabriel v Williamson* (1979) 1 NTR 6.

568 See for example, *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508. However, an amendment will not fail because it contains an error or omission in the factual particulars. See for example, s 182 of the Justice Act 1928 (NT), s 31 of the Justices Act 1959 (TAS), s 50 of the Magistrates' Court Act 1989 (VIC).

section 87 of the Act.[569] Section 87 forms the basis of the procedural avenue available to an accused to enforce his right to be sufficiently informed of the charge against him.[570] The purpose of further particulars is to clarify the charge and to enable the accused to prepare his defence.[571] The further particulars should also clear up the points in dispute but should not encumber the dispute further with excessive alternatives.[572] The purpose of the particulars is also to promote justice and equity for both the state and the defence.[573] The trial proceeds as if the charge has been amended in accordance with the particulars provided. The charge sheet can only be supplemented by the further particulars. There is no principle in the Act which justifies the state to refuse essential information simply because the provision of such information will disclose evidence. The accused is entitled to ask which facts will be proved, but **not how** they will be proved.[574] Therefore, the duty to furnish further particulars does not mean that the prosecution is obliged to disclose the evidence it

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569 The accused could obtain the particulars in the following two ways: Firstly, he can object against the charges in terms of s 85(1)(d) because they contain too little particularity. This will lead to the public prosecutor providing the particulars. If the prosecutor fails to furnish the particulars, the court can make an order if the objection is justified. If the state does not comply with the order, the court can declare the charge null and void. Secondly, the accused can ask for particulars before evidence is led.

570 However, see Plasket "The right to further particulars and to object to a charge: the constitutionality of the provisos to ss 85 and 87 of the Criminal Procedure Act when applied to ss 119 and 122A proceedings" (1995) *South African Journal on Human Rights* 303-310, where the writer argues that these amendments are challengeable against the equality before the law and fair trial provisions of the Bill of Rights contained in Chapter 3 of the Interim Constitution. He also states, (at 305), that these amendments give prosecutors a free hand to draft sloppy and inadequate charge sheets in the most serious of cases, and protects them from the normal consequences of their failure to do their work properly. It should be noted that s 119 refers to the appearance of an accused in a magistrate's court on an offence that may be tried in the High Court, whilst s 122A refers to pleas in the magistrate's court in which the offence may be tried in the regional court.

571 Also see *S v Cooper and Others supra*, where the court stated that the object of asking for further particulars is to enable the accused to know the case which is proposed to be made against him and thus to enable him to prepare his defence. Also see *R v Mokgoetsi* 1943 AD 622.

572 See *S v Sadeke* 1964 (2) SA 674 (T).

573 See *S v Cooper and Others supra* at 875, where the court held that the use of particulars is intended to meet a requirement imposed in fairness and justice to both the accused and the prosecution. Also see Watney "Particulars to a charge in cases where the state relies on the doctrine of common purpose: easy answers to difficult questions?" (1999) *Tydskrif vir die Suid-Afrikaanse Reg* 323 at 337, where the writer states that if proper regard is not paid to the purpose of a request for further particulars, a situation may develop in which a factual or legal argument is conducted on paper whereby the defence sets out to attack the strength of the state case and the decision to prosecute under the guise of a request for further particulars.

574 See *Behrman v Regional Magistrate* 1956 (1) SA 318 (T) at 321. Also see *S v National High Command* 1964 (1) SA 1 (T), where it has been held that in a summary trial, the accused is not entitled to be supplied with the evidence which the state proposes to lead, for example statements of witnesses, documents and so on.

intends using to prove the facts.[575]

Where the accused requires particulars of the substantive allegations against him to ascertain the true nature of the case he has to meet, the court will order the prosecution to furnish such particulars unless this is shown to be impracticable.[576] If a charge sufficiently discloses an offence, but contains inadequate particulars, the accused must apply for such particulars at the trial. His failure to do so will mean that he has waived his right to apply for particulars and he cannot set up such defect on appeal if he has failed to apply for such particulars at the trial.[577] In *S v Adams*[578] it was held that where further particulars are applied for the state may not merely refer to the record of the preparatory examination if such record is voluminous. The state may not reply to a request for particulars by stating simply that the particulars sought "are matters peculiarly within the knowledge of the accused", as such reply may lead to the indictment being squashed.[579] Where there is more than one count, the particulars applicable to each count must be set out.[580] Where particulars are given, the state must prove the charge as particularised,[581] and where a conviction is based on evidence not covered by the particulars supplied, the conviction may be set aside on review.[582]

If the state fails to provide the particulars, the accused can approach the court for an order to compel the state to grant the particulars. If the magistrate refuses to grant the order, the accused can apply for a *mandamus* against the magistrate in the High Court, in terms of which the magistrate can be ordered to direct that the particulars should be furnished.[583] In *Nangutuuala*[584] the High Court rejected the proposition that

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575 See *R v Heyne* (1) 1958 (1) SA 617 (W). However, Schwikkard maintains that the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts. See Schwikkard "Access to police-dockets – confusion reigns" (1994) *South African Journal of Criminal Justice* 323. Also see *S v Cooper and Others supra* at 885, where the court held that the prosecution must furnish further particulars of the relevant or material facts which it proposes to prove, but is under no obligation to disclose its evidence by which it proposes to prove the facts.

576 *S v Abbass* 1916 AD 233.

577 *S v Lotzoff* 1937 AD 196.

578 1959 (1) SA 646 (P).

579 *S v National High Command supra*. The prosecution must supply information in its possession which is reasonably necessary to enable an accused to properly prepare his defence.

580 *S v Nkiwani* 1970 (2) SA 165 (R).

581 *S v Anthony* 1938 TPD 602.

582 *S v Kroukamp* 1927 TPD 412.

583 In *Weber v Regional Magistrate Windhoek* 1969 (4) SA 394 (SWA), the court granted a *mandamus* directing that the magistrate order the prosecutor to deliver to the applicants further particulars regarding the charges against them.

584 1973 (4) SA 640 (SWA).

post-ponements and recalling of witnesses could serve as a substitute for the right of an accused to be sufficiently informed of the charges before he pleads and before he presents his defence. Courts are extremely reluctant to issue a *mandamus* directing the furnishing of further particulars.[585] However, if the trial court has refused an application for particulars and it appears on appeal that the accused has been prejudiced by such refusal and that it cannot be said that no failure of justice has resulted, the court will set aside the accused's conviction.[586]

In the **United States**, another conventional discovery tool is a Rule 7(f) motion for a bill of particulars. When the defendant is confronted with a vague or confusing indictment, a motion for a bill of particulars should be made.[587] The purpose of the bill is to supply sufficient details to enable the defence to prepare for trial and to minimise the danger of surprise at the trial.[588] Similarly, in **Australia**, an information need not contain all the particulars necessary for the defendant to defend the charge.[589] However, the court can request the prosecution to furnish further particulars and if the prosecution refuses, the charge should be dismissed.[590]

The above discussion illustrates that obtaining further particulars to the charge is regarded as an essential part of the preparation for trial. Not only does further particulars clarify the charge, but it also enables the accused to prepare his defence.

5.2.3.2 AMENDMENT OF CHARGE SHEET/INDICTMENT

Section 86(1) of the Act refers to the instances when an indictment may be amended.[591] Section 86(1) further provides that the court may order an amendment only if it considers that the making of an amendment will not prejudice the accused in

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585 See *Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T).

586 See *S v De Coning* 1954 (2) SA 647 (N), *S v C* 1955 (1) SA 464 (T).

587 See *US v Salazar* 415 US 985 (1974).

588 See, *inter alia*, *US v Schemban* 484 F 2d 931 (4th Cir 1973).

589 See for example, *Lafitte v Samuels* 1972 (3) SASR 1 at 17. Nevertheless, where the prosecution is relying upon an aggravating matter, it should furnish particulars of it to the defendant before a plea is made. See *Blair v Miller* [1988] WAR 19.

590 See for example, *Lafitte v Samuels supra* at 17. The information should disclose where possible, the manner in which the defendant is liable for the offence. See *inter alia*, *King v R* (1986) 16 CLR 423 at 425-6.

591 Section 86(1) provides that an indictment may be amended where it is defective for want of an essential averment; where there is a variance between the averment in the charge and the evidence offered in proof of such averment; and where words have been omitted or unnecessarily inserted or any other error is made. The object behind s 86 is said to facilitate the rectification of charge sheets by way of amendment in order to ensure that accused persons do not escape conviction on a mere technicality arising from a defective charge.

his defence.[592] The test for prejudice is whether the accused will be worse off after amendment of the charge.[593] However, the question of prejudice is said to depend upon an examination of the facts and circumstances in each particular case.[594] The prosecution is also bound by particulars of the charge and may not substitute another offence for the original one where the evidence supports the former.[595] Thus, section 86 makes provision for amendment of the charge and not for replacement thereof by a new charge.[596] The accepted approach is to establish whether the proposed amendment differs from the original charge in such a way that it is in essence an another charge.[597] If a new charge is framed during the course of the trial, then the possibility of prejudice to the accused is strong.[598]

Section 88 was introduced to overcome technical errors made by persons drawing up the charges.[599] Section 88 provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. This means that the accused can now be found guilty, even though the indictment does not disclose an offence as long as the evidence proves the offence. This reduces the burden on the prosecution. The language of the section indicates that the offence with which the

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592 *S v Taitz* 1970 (3) SA 342 (N). Also see *S v Kariko* 1998 (2) SACR 531 (NmHC), where the issue concerned the amendment on appeal of a defective charge sheet. The accused was charged with stock theft, and although the charge sheet alleged that such stock was stolen from a named complainant, the evidence failed to establish any person from whom the stock was stolen. The state tried to amend the charge sheet on appeal, by substituting "persons unknown" for the complainant's name originally specified in the charge sheet as the person from whom the stock had been stolen. An objection was lodged against the amendment on the basis that it would prejudice the accused in his defence. The court noted that throughout the trial in the lower court, the accused had raised the defence that the stock belonged to another person. Therefore, the amendment did not affect his defence, and he did not suffer prejudice.

593 See *S v Kuse* 1990 (1) SACR 191 (E).

594 *S v Pillay* 1975 (1) SA 919 (N). Also see *S v Coetzer* 1976 (2) SA 769 (A) at 772, where it was held that if an amendment would not have prejudiced the accused in his defence, the failure to effect an amendment will not invalidate the proceedings except where the court refused to allow an amendment. In **Canada**, the court has held in *R v McDougall* (1984) 50 Nfld and PEIR 275 (Nfld Dist Ct), that the amendment was possible at any time before judgment. However, in *R v Campbell* [1986] 2 SCR 376 (SCC) [Ont], the crown's motion to amend the indictment was dismissed where the amendment would cause irreparable prejudice to the accused's conduct of the case.

595 See *S v Kuse supra, S v Sarjoo* 1978 (4) SA 520 (N).

596 See *Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A).

597 See Joubert (2001) *et al op cit* 177.

598 See *S v Slabbert* 1968 (3) SA 318 (O).

599 Prior to 1959 our courts have held that an indictment could not be amended unless it disclosed an offence. See *S v Desai* 1959 (2) SA 589 (A).

accused is charged should be named in the indictment.[600] The prosecutor should exercise caution by framing the indictment in such a way that it does disclose an offence. If he fails to do so, the accused can raise an exception to the charge before pleading to the charge. If the accused brings the defective charge sheet to the court's notice before the judgment, and the court refuses to order the amendment, then the accused may rely upon the defect on appeal, if he has been convicted by the trial court.[601] The defect can only be cured by proper evidence.[602] However, section 88 does not authorise replacement of one offence by another offence proved by evidence.[603]

The position in **Australia** is that the magistrate or justice has power to amend the information or complaint in some jurisdictions.[604] It has been held that an amendment can only be made where an objection has been raised against the information.[605] An amendment may be made at any time during the trial unless it would cause injustice.[606]

The above discussion demonstrates that the court will order an amendment unless it will cause prejudice or injustice to the accused.

5.2.4 ARREST

The Act has prescribed strict rules concerning the arrest of a person. This is due to the fact that an arrest infringes an individual's right to freedom and security of the person and the individual's freedom of movement.[607] An arrest is preferably effected only after a warrant has been obtained in terms of the Act. However, in exceptional circumstances a private individual or the police may execute an arrest without a warrant. One of the requirements for a lawful arrest is that the arrestee must be

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600 See *S v Mcwera* 1960 (1) PH H 43 (N). Thus, the charge must contain some recognisable offence, even though no offence is, technically speaking, disclosed. See *S v Dhludhla* 1968 (1) SA 459 (N). Also see *S v Mayongo* 1968 (1) SA 443 (E), where the court was asked to consider when s 179 bis of Act 56 of 1955 should be invoked. The section should not be invoked when a charge is framed in an embarrassing fashion under the statutory enactments without clearly indicating which offence is intended to be charged. The section cures an indictment lacking essential averments, and not a poorly drawn indictment which leaves the person to whom it is addressed to in doubt as to the substantive offence which he is alleged to have committed.

601 See *S v Gaba* 1981 (3) SA 745 (O).

602 *S v AR Wholesalers* 1975 (1) SA 551 (NC).

603 See *S v Sarjoo supra*.

604 See for example, *Australian Federation of Air Pilots v Australia Airlines Ltd* (1991) 28 FCR 360, s 48 Justices Act 1886 (QLD) and s 31(3) of Justices Act 1959 (TAS).

605 See *R v Du* 1990 Tas R (NC 10) 257.

606 See for example, s 15c of the Crimes Act 1914 (CTH), s 365(1) of the Crimes Act 1900 (ACT). Also see *Maher v R* (1987) 163 CLR 221.

607 See s 12(1)(a) and s 21(1) of the Constitution respectively.

informed of the reason for his arrest in terms of section 39(2) of the Act.[608] The arrestee's custody will be unlawful if this requirement is not complied with.[609] Joubert *et al* submit that the question of whether the arrestee was given an adequate reason for his arrest depends on the circumstances of each case, particularly the arrested person's knowledge concerning the reason for his arrest.[610] However, the exact wording of the charge need not be conveyed at the time of the arrest.[611] The detention will also be lawful if the arrestee is later informed of the reason for his arrest.[612] However, the procedure differs when the arrestee is caught in the act, in that detailed information need not be given.[613]

Section 43(2) of the Act provides that a warrant for the arrest of a person is a written order directing that a person described in the warrant be arrested by a peace officer, in respect of the offence set out in the warrant. The arrested person must be brought before a lower court in terms of section 50 of the Act.[614] It is recommended that a warrant should be obtained before the liberty of a person is infringed, unless exceptional circumstances call for the summary arrest of the offender.[615] A charge of resisting an arrest made in terms of a warrant will fail provided it appears that the warrant was shown and explained to the arrestee, and that he knew or was informed that it was being executed by the police.[616]

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608 Section 39(2) provides that the arrestor must inform the arrestee of the reason for his arrest at the time of effecting the arrest or immediately thereafter or if the arrest occurred by means of a warrant, hand the arrestee a copy of the warrant upon demand. This requirement is also entrenched in s 35(2)(a) of the Constitution, which provides that the detainee must be informed promptly of the reason for his detention.

609 See *S v Kleyn* 1937 CPD 288 and *S v Ngidi* 1972 (1) SA 733 (N) respectively. Also see *Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A), where it was held that if the person effecting the arrest is not in possession of the warrant, and realises that he will not be able to comply with a demand made in terms of s 39(2), the arrest will be unlawful. The debate has recently arisen whether traffic and metropolitan police officers are legally able to execute warrants of arrest. According to the Automobile Association, an original warrant had to be produced by the officer concerned in arresting a motorist. However, a spokesperson for the Institute of Traffic and Municipal Police Officers has stated that s 39(2) of the Act clearly stated that in the event of an arrest being effected in terms of a warrant of arrest, a copy of the warrant had to be shown to the arrested person upon his request. He said that a certified copy need not be shown, but a copy was sufficient. Available at http:// legalbrief.co.za on 24-04-2003. Also see *Saturday Star* "Legal opinion on roadblock arrests" 10 May 2003: 5.

610 Joubert (2001) *et al op cit* 95.

611 See *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) and *Brand v Minister of Justice* 1959 (4) SA 712 (A).

612 See *Nqumba v State President* 1987 (1) SA 456 (E).

613 See *Macu v Du Toit* 1982 (1) SA 272 (C) and *Minister of Law and Order v Parker* 1989 (2) SA 633 (A). It is a trite fact that where the reason for arrest is known to the arrestee as when he is caught red-handed, the purpose of notification falls away and with it the duty to inform.

614 This relates to procedure after arrest.

615 For a detailed discussion about arrest with a warrant, see Joubert (2001) *et al op cit* 97.

616 *Id*.

It should be noted that in the **United States of America**, arrested suspects are often informed of reasons for their arrest when they are first taken into custody. They are usually so informed when they arrive at the police station for "booking". However, there does not seem to be any legal requirement for such notice.[617] Article 9(2) of the ICCPR, requires that there must be prompt notice of charges.[618] However, the United States does not comply with the Covenant in that after arrest, there is no established legal right to such notice prior to appearance in court. Even during custodial interrogation, police need not disclose all crimes they suspect.[619] Therefore, the South African position appears to be more progressive than the United States in that legal right to notice of arrest is entrenched in section 39(2) of the Act.

In **Canada**, anyone who arrests a person, whether with or without a warrant, must give notice to that person, where feasible, of the warrant or the reason for the arrest.[620] Section 10(a) is said to reflect the common law rule that, apart from special circumstances, an arrest without a warrant can be justified only if at the time of the arrest the reason for the arrest is made known to the accused.[621] Section 10(a) is said

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617 Frase in "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 42.

618 *Ibid* at 76. It should be noted that art 9(2) of the ICCPR provides that:

"Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

The latter obligation is said to be confined to arrests in criminal cases. The provision contemplates that a general description of the reasons for arrest must be given at the time and that the specific allegations must enable the persons to challenge the detention. Indeed, the United Nations Human Rights Committee has found breaches of these obligations in circumstances where reasons have been withheld altogether. See *Portorreal v Dominican Republic* (188/1984); *Carballal v Uruguay* (33/1978) in this regard. Where reasons were given after a delay of a week or more, see *Fillastre v Bolivia* (336/1988), where there was detention in custody for 10 days before being informed of the charges. Also see *Kelly v Jamaica* (253/1987), where details of the reasons for the arrest were not given for "several weeks" or where the reasons were insufficiently detailed in *Drescher Caldas v Uruguay* (43/1979), where mere references to the legal basis of prompt security measures without indication of the substance of the complaint was found to be inadequate. Also see Harris and Joseph *op cit* 202.

619 *Id*.

620 See s 10(a) of the Charter and s 29 of the Criminal Code respectively. Section 10(a) provides that: "Everyone has the right on arrest or detention ... to be informed promptly of the reasons therefore." Section 29(2) of the Criminal Code of Canada RSC 1970, CC-34 requires anyone arresting a person with or without a warrant "to give notice to that person, where it is feasible to do so of (a) the process or warrant under which he makes the arrest or (b) the reason for the arrest." Also see *R v Gamracy* [1974] SCR 640 (SCC) [Ont] where it was held that the existence of a warrant is sufficient reason. However, the Canadian courts have also held that it is not necessary to inform the arrested person where the circumstances are obvious. See, *inter alia, Eccles v Bourque* (1974) 27 CRNS, 325 (SCC) [BC]; *Garthus v Van Caeseele* (1959) 30 CR 67 (BCSC). In *R v Leemhuis* (1984) 11 CRR 337 (BC Co Ct) it was held that the right to be informed of the reason for detention arises upon being taken to the police station for a breathalyser test. It was further held that the questions regarding the accused's drinking and taking him to a breathalyser machine, sufficiently informed the accused.

621 See *Pedro v Diss* [1981] 2 All ER 59 (Div Ct).

to be similar to article 9.2 of the ICCPR and article 5(2) of the European Convention, which require that everyone arrested must be informed promptly of the reasons for his arrest and of any charges against him.[622] A breach of section 10(a) has occurred when the accused was not told of the reason for his arrest for three hours.[623] It has also been held that the word "promptly" does not require a police officer to give the arrestee reasons for his arrest until after the police officer has searched the arrestee incidental to the arrest.[624]

The position in **England and Wales** is that a requirement to give reasons on arrest was imposed at common law, and is now found in section 28 of PACE.[625] However, the requirement did not apply where the circumstances were such that the person must have known the general nature of the alleged offence for which he was arrested or made it practically impossible for him to be informed, for example by running away.[626] The requirement to give reasons also applies to stop searches in terms of section 2(2) of PACE. Therefore, a person arrested must be informed of both the fact and the reason for arrest at the time of the arrest or as soon as practicable thereafter. Where a person is arrested by a constable, these obligations apply regardless of whether these matters are obvious. A stop search may not commence until the constable has taken reasonable steps to inform the person of the proposed search and the grounds for making it. These requirements do "not mean that technical or precise language need to be used but that the person is entitled to know what ... are the facts which are said to constitute a crime on his part".[627] It has been held in *Geldberg v Miller*[628] that an arrest for "obstructing the arresting officer in the execution of his duty by refusing to move his car and refusing to furnish his name and address" was sufficient for an arrest for "obstructing the thoroughfare". Where no reason for arrest is given, the arrest is unlawful although the defect can be corrected, rendering the arrest valid prospectively.[629] According to Harris and Joseph, there is also a duty to give reasons at the time of arrest in Scotland.[630] A person detained in terms of

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622 The European Convention requires further that the person arrested must be so informed "in a language he understands". Thus, the right to be informed of the reason for one's arrest is linked to the right to understand.

623 See *R v Mason* (1983), 9 WCB 384 (BCSC Berger J). However, the court found that the violation of s 10(a) had no causal relationship to the answers being given to questions by the police after the accused had been told of the reason for his arrest. Therefore, the evidence was not excluded under s 24(2).

624 See *R v Maitland* (1984) 4 CRD 850.60-15 (NWTSC, De Weerdt J).

625 See the common law – *Christie v Leachinsky* [1947] AC 573 (HL).

626 See Harris and Joseph *op cit* 202.

627 See *Christie v Leachinsky supra* at 588-593.

628 [1961] 1 WLR 153. Also see *R v Telfer* [1976] Crim LR 562, where it has been held that the arrest "on suspicion of burglary" was insufficient as the person should have been told of the particular burglary in question.

629 See *Lewis v Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206.

630 See *Forbes v HM Advocate* 1990 JC 215. Also see Harris and Joseph *op cit* 204.

section 2 of the Criminal Justice (Scotland) Act 1980 must be informed of the constable's suspicion, of the general nature of the offence, and of the reason for the detention.[631] There is also a general rule that an arrest must be accompanied by a charge.[632]

Therefore, an arrestee is entitled to be informed of the reasons for his arrest so that he can challenge his detention.

5.2.5 ENTRY OF PREMISES FOR PURPOSE OF INTERROGATION

Police officials may not enter private premises to interrogate the occupiers **without informing them of the reason for such entry** in terms of sections 26 and 27 of the Act respectively. Section 26 of the Act provides that a police official may whilst investigating an offence or alleged offence where he reasonably suspects that a person who may furnish information with regard to the offence, is on any premises, **not enter such premises without a warrant** to interrogate such person, and obtain a statement from him.[633] Thus the occupier must be furnished with a warrant informing him of the reason for such entry. Section 27(1) of the Act provides that a police official who may lawfully enter any premises in terms of section 26 may use such force as may be reasonably necessary to overcome any resistance against such entry including the breaking down of any door or window of such premises. However, a proviso to this subsection provides that such police official must first **audibly demand** admission to the premises and **notify** the occupier of the **purpose** for which he seeks entry into such premises. Therefore, the occupier must be informed of the reason for such entry.

5.2.6 SEARCH AND SEIZURE

Section 21 provides that searches and seizures should be conducted only in terms of a search warrant issued by a judicial officer such as a magistrate or judge. Even though section 21 does not require that the suspected offence be described in the warrant, it is desirable to do so to facilitate the interpretation of the warrant.[634] It is also desirable that when law enforcement officials act in terms of a warrant, that the subject involved has access to the document which infringes upon his private rights. Section 21(4) provides that a police official who executes a warrant in terms of section 21 or section 25 must, once the warrant has been executed, and upon the request of the other party whose rights are effected by the search or seizure of an object in terms of the warrant, provide such person with a **copy** of the warrant.

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631 See s 2(4) of the 1980 Act.

632 See *Chalmers v HM Advocate* 1954 JC 66, 78.

633 Section 26 was enacted to prevent private property owners from hindering police from questioning them regarding an offence that is being investigated.

634 *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W) 581. In **Canada**, the offence in respect of which a search is to be conducted must be set out in the search warrant, and its omission renders the warrant invalid. See for example, *R v Dombrowski* (1985) 44 CR (3d) 1 (Sask CA), where the search warrant failed to disclose an offence; so the warrant was invalid.

According to *Joubert et al,* two objections may be raised against this subsection, namely, that if the subject is present at the time of the execution of the warrant, he should be provided with a copy of the warrant before the search and or seizure. Secondly, the delivery of the copy of the warrant should not depend on the subject requesting it, as many subjects won't be aware of this as a result of a lack of knowledge of the law.[635]

Section 48 provides that a peace officer or private person who is authorised by law to arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may if he **first audibly demands** entry into such premises and states the **purpose** for which he seeks entry and fails to gain entry, break open and enter and search such premises for the purpose of effecting an arrest. In *R v Jackelson*[636] certain people had ejected a police official who had entered the premises without first demanding permission and being refused permission. The court held that they could not be convicted of obstructing such police official in the execution of his duty. In *R v Rudolf*[637] a police official wanted to arrest a man who he had seen drinking wine in a public place. The man ran into the house followed by the constable and was arrested. The two accused tried to rescue the "wine drinker" from the custody of the police official. The defence contended that the police official had made an unlawful entry when he entered the premises without first demanding admission. However, the court found that the constable was justified in the circumstances of the case of entering the house to arrest the "wine drinker", and the arrest was lawful.[638]

Section 198 of the Summary Proceedings Act 1957 furnishes the search warrant authority in **New Zealand**. The relevant section provides that if the district court judge or the issuing judge has reasonable ground for believing that the fruits, instrument or evidence of a crime punishable by imprisonment is in particular premises, the justice may issue a search warrant to any constable.[639] However, section 198 differs from section 21 of the Criminal Procedure Act in that the executing constable must have the warrant in his possession and must show it, but not give it to the occupier on demand. Section 317 of the Crimes Act 1961 gives a police officer the power to enter premises for the purpose of arresting a person without a warrant.[640] If the police officer has found the person at some place off the premises committing an offence punishable by imprisonment and the officer is pursuing the offender, then the officer

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635 Joubert (2001) *et al op cit* 127.

636 1926 TPD 685.

637 1950 (2) SA 522 (C).

638 The court distinguished *Rudolf* from *Jackelson* in that the accused in *Jackelson* had ejected the constable before he had effected the arrest while in *Rudolf*, the arrest had been effected when the accused tried to rescue the "wine drinker".

639 See Doyle and Hodge *Criminal procedure in New Zealand* 3rd ed The Law Book Limited (1991) at 55.

640 *Ibid* at 57-58.

can enter the premises, using force if necessary to make the arrest.[641] The officer also has power to enter any premises by force where there are reasonable and probable grounds to believe that an offence likely to cause immediate and serious harm to any person or property is being committed inside. Therefore, the purpose of section 317 is to confer a right of entry to the police officer in an emergency situation where it is not practicable or desirable to obtain a warrant first from the District Court.[642] The power to enter premises in "hot pursuit" or to prevent a crime from occurring or continuing on those premises is a recognition of the common law authority applied in *Thomas v Sawkins*.[643]

Section 8 of the Canadian Charter provides that: "Everyone has the right to be secure against unreasonable search or seizure". The meaning of section 8 has been examined in a number of cases.[644] In *Collins v The Queen*[645] the Crown had failed to prove that the police officer had reasonable grounds for his search. Similarly, in *R v Dyment*[646] a medical doctor treating a victim of a motor accident, handed over the patient's blood sample to a police officer. The blood analysis showed a blood alcohol level exceeding the permissible limit. The Supreme Court held that the taking of the blood sample by the police officer was an unreasonable seizure. The doctor only had authority to take blood for medical purposes.

In the **United States**, Rule 41(d) refers to search warrants, and requires an officer to prepare an inventory of the items seized and, upon completion of the search to give the person from whom the property was taken a copy of the warrant and a receipt that the property was taken.[647] Several appeal courts have interpreted Rule 41(d) to require federal officers to serve warrants at the outset of a search, absent exigent

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641 The same principles apply if the police officer has good cause to suspect that a person has committed an imprisonable offence on the premises.

642 Doyle and Hodge *op cit* 58.

643 [1935] 2 KB 249. It was held that a constable could enter and remain on private premises if he had reasonable grounds to believe that an offence is imminent.

644 See *inter alia*, *Hunter v Southam Inc* [1984] 2 SCR 145; 11 DLR (4th) 641, where the issue concerned the execution of an authority issued under s 10 of the Combines Investigation Act authorising named officers of the Combines Investigation Branch to enter the respondent's premises and to search for, and take away, documents. The respondents contended that the seizure was illegal because s 10 breached s 8 of the Charter. The Supreme Court agreed. The court considered the competing interests, namely the individual's right to privacy and the government's interest in intruding on that privacy, in order to advance its goals of law enforcement. The court found that the purpose of s 8 is to protect individuals from unjustified state intrusions upon their privacy. A system of prior authorisation as a pre-condition for a valid search and seizure is needed to achieve this. The court also stated that reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard. This is consistent with s 8 of the Charter, for authorising search and seizure, which was not the case in the present situation.

645 [1987] 1 SCR 265 at 278; 38 DLR (4th) 508 at 521.

646 [1988] 2 SCR 417; 55 DLR (4th) 503.

647 See Fed Rule Crim P 41 (d).

circumstances. However, only the Ninth Circuit has found a violation of this interpretation sufficient to warrant suppression.[648] In the absence of a constitutional violation, however, courts generally will not exclude evidence seized in violation of Rule 41.[649]

5.2.7 STATEMENT TO POLICE OFFICER

Section 335 of the Criminal Procedure Act provides that an accused is entitled to a copy of a written statement made by him to a peace officer (including a police official and a magistrate) concerning any matter in connection with which criminal proceedings are instituted against him.[650] If the state decides not to institute criminal proceedings against a person, such a person will not be entitled to a copy of the statement that he made to the police. In *S v Mphetha*[651] it was held that a statement will relate to a matter in connection with which criminal proceedings are instituted if the contents of the statement are **relevant and admissible** at the person's trial, or if the state will be entitled to refer to it during the accused's cross-examination. However, in *S v Mogale*[652] it was held that an oral statement to the police that was recorded and later transcribed does not constitute a written statement for the purposes of section 335.

Thus the above discussion on pre-trial rights indicate that the accused had access to information in terms of the Act prior to the inception of the Constitution.

5.3 POLICE DOCKET PRIVILEGE

5.3.1 POSITION BEFORE THE CONSTITUTION: THE *STEYN* ERA

Prior to the inception of the Interim Constitution, the law had recognised two kinds of communications which had to be protected from disclosure in order to promote the efficient detection of crime. The first related to communications between government officials in the course of an investigation. The public interest would be prejudiced if the methods to investigate crimes contained in a police docket, were generally known. A police docket is a file containing information that is assimilated or collated during the investigation into an alleged offence. It contains, *inter alia*, statements by people who are potential witnesses to the case and also a diary setting out the progress made by the investigating officer during the investigation. This privilege was extended later to include the notes made by a state witness; notes made by the

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648 See *US v Gantt* 194 F3d 987, 1004 (9th Cir 1999), where evidence was suppressed because police intentionally violated Rule 41(d) by refusing to provide a copy of the search warrant at the outset of the search, but rather left the warrant at the apartment after the suspect was arrested and removed.

649 See for example, *US v Burke* 517 F 2d 377, 386-87 (2d Cir 1975).

650 A confession is also a statement to a peace officer, and is therefore also a statement to which the accused is entitled in terms of s 335.

651 1982 (2) SA 253 (C).

652 1980 (1) SA 457 (T).

investigating officer and the advice and instructions of checking officers; the contents of police pocket books and all relevant communications and notes for litigation purposes. These notes were privileged in that they were "part of the prosecution brief".[653]

The second category of communications which needed protection, comprised statements which would tend to reveal the identity of a private individual who has given information concerning the commission of an offence. This is known as "informer privilege" in terms of which the state could refuse to disclose the identity of informers on grounds of public policy. This privilege was regarded as necessary to encourage people to provide the police with information. The police may depend upon the services of informers in some cases. These informers would be unwilling to give assistance if their identities were disclosed. In *Marks v Beyfuss*[654] it was held that no evidence should be admitted if it would tend to reveal the identity of a person who had given information leading to the institution of a public prosecution. The rule in *Marks v Beyfuss* is confined to public prosecutions. The only exception is that the informer's identity is disclosed if it was necessary to enable the accused to establish his innocence. In *Marais v Lombard*[655] the court referred to the practice of the South African Police which is to claim privilege for statements made to them during investigations but to leave the decision to the court. However, it has been said that both in South Africa and in England, the court may overrule the privilege to establish the accused's innocence.[656]

Thus the common law privilege to refuse discovery of documents in the possession of the prosecution was well established, and save for certain exceptions, this privilege was jealously enforced by the prosecution. The classic case of *R v Steyn*[657] upheld the common law privilege in respect of police dockets. The court held that this protection against disclosure applies in both civil and criminal trials. The court also noted that where there is a serious discrepancy between the statement of a state witness and what he says on oath at the trial, the prosecutor must direct attention to that fact. The prosecutor must make the statement available for cross-examination unless there is special and cogent reason to the contrary. Therefore, the Supreme Court of Appeal (formerly known as the Appellate Division) laid down the rule in *Steyn* that a prosecutor must bring contradictions to the court's attention and must make the earlier statement available for cross-examination. In such a case the state also loses the privilege in respect of the statement.

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653 In *R v Abelson* 1933 TPD 277, for instance, the court upheld an objection by a senior police officer to the disclosure of reports which he had received from detectives who had been investigating a liquor offence.

654 (1890) 25 QBD 494.

655 1958 (4) SA 224 (E).

656 Zeffertt *et al The South African law of evidence* Butterworths (2003) at 659.

657 1954 (1) SA 324 (A). This case involved an appeal against a magistrate's refusal to allow the state to provide statements of witnesses to the defence. The court held that when statements are obtained from witnesses for the purpose of being used in a contemplated lawsuit, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance.

When *Steyn* was decided, an accused was relatively well informed prior to the trial of the identity of the prospective state witnesses who could be called and the contents of their testimony. This was so because the trial was usually preceded by a preparatory examination and the record of this examination was made available to the accused.[658] However, various developments thereafter led to the erosion or falling away of such full disclosure. The practice of holding preparatory examinations fell away when the regional court was given jurisdiction to try offences such as treason and murder, which was previously only tried in the High Court.[659] The preparatory examination was therefore deemed unnecessary in such cases. The Director of Public Prosecutions could also dispense with the preparatory examination where he felt that the administration of justice could be endangered. Although the preparatory examination is still part of criminal procedure,[660] it has in practice been substituted by "plea proceedings".[661] Therefore, all that remained to inform the accused of the allegations against him, was merely the right to be furnished with particulars of any matter alleged in the charge in terms of section 87 of the Act.

However, the *Steyn* case did not decide the question whether the privilege continued after the conclusion of proceedings. However, many provincial divisions of the High Court applied the "once privileged always privileged rule" to police dockets and held that the privilege persists after the conclusion of proceedings. The court in *Mazele v Minister of Law and Order*[662] upheld the rule, but recognised that its application leads to unfair treatment of the accused.

5.3.2 THE ISSUE OF INCONSISTENT STATEMENTS AND THE PROSECUTION'S DUTY

The court in *S v Hassim and Others*[663] held that if a witness gives evidence which reveals a serious departure from or contradicts matters contained in the police

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658 The court in *Steyn* also drew a distinction between the record of evidence given at a preparatory examination and the statements made by witnesses to the police in the course of an investigation of a crime and preparation for a prosecution. Numerous precautions were taken at preparatory examinations such as interpreters were used; evidence was taken by the prosecutor under the magistrate's supervision in the accused's presence, and the accused can cross-examine such evidence; and evidence was carefully recorded and read to the witness so that errors may be corrected. This leads to an accurate representation of the witness's views. However, statements made to police are made in different circumstances and may not constitute an accurate representation.

659 See s 89 of the Magistrates' Courts Act 32 of 1944 as amended by s 7 of the Lower Courts Amendment Act 91 of 1977.

660 See ch 20 of the Act.

661 See s 119 of the Act.

662 1994 (1) SACR 406 (E). The court remarked that it is unfair that the prosecution (state) has the entire record of the police investigation including sworn statements of potential witnesses at its disposal, whilst the accused cannot consult with state witnesses once the prosecution has commenced. This is a subtle reference to the principle of "equality of arms", which implies that both the defence and prosecution must come to court on an equal footing.

663 (2) 1971 (4) NPD 493.

statement which is in the prosecutor's possession, then the prosecutor is fully entitled to put the witness's previous inconsistent statement to him in order to discredit him in terms of section 286 of Act 56 of 1955.[664] If he decides not to do this at this stage, then he should, in the interests of fairness, make this statement available to cross-examining counsel in accordance with the finding in *Steyn*.[665]

When a state witness gives evidence which differs from a statement in the prosecution's possession, the prosecutor must consider the question whether or not the discrepancy is of a serious nature.[666] The prosecutor is not required to do anything if the discrepancy is of a minor nature. However, if the discrepancy is clearly a serious one, the prosecutor must as soon as possible make the statement available to the defence. If the accused is unrepresented, the prosecutor must disclose the discrepancy to the court.[667] The court held that the rationale of the rule requiring disclosure of a previous inconsistent statement is to provide a safeguard against the danger of an accused being convicted on the evidence of a witness who is not a credible and reliable witness. The prosecutor may not ignore an averment in a statement which is *prima facie* in conflict with the witness's evidence. If the prosecutor is in doubt, he must disclose it to the defence. If he fails to disclose the discrepancy which is indeed serious, that might well result in a failure of justice.

The prosecutor's duty was to make the original statement of the witness available to the defence in order that the credibility of the witness can be properly tested by cross-examination with the aid of that statement.[668] Where there are two conflicting statements, it is the prosecutor's duty to disclose and make available both statements to the defence. The absence of a request by the defence for the deviating statement to be made available (and, where such is the case, of mutually conflicting statements) does not relieve a prosecutor of this aforementioned duty unless the defence has been made aware of the existence of such statements and has indicated that it does not require them.[669] Thus, the dictum in *S v Xaba* was approved.

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664 However, the court remarked that the state prosecutor is still entitled to use s 286 of the Act after the defence counsel has completed cross-examination, irrespective of whether the defence has made use of the statement which has been handed to him by the state prosecutor.

665 See *R v Steyn supra*.

666 See *S v Xaba* 1983 (3) SA 717 (A).

667 The court noted that a prosecutor's duty of disclosure in these circumstances is one of the rules or principles of prosecutors which must be adhered to in a criminal trial in order to ensure that the accused has a fair trial and that justice is done. The failure of a prosecutor to observe this duty is an irregularity in the proceedings for the purposes of s 317(1) of the Act.

668 See *S v Ncaphayi en Andere* 1990 (1) SACR 472 (A), where the court had to entertain an application where the state prosecutor had failed to make the police statements of two state witnesses available to the defence when it appeared that their evidence differed materially from certain further particulars to the indictment. Further particulars were based on their police statements.

669 The court found no suggestion of any special circumstances which could justify non-disclosure of the statements in question. The court held that failure of the prosecutor to make the original and later statements of the two witnesses available to the defence was therefore a material irregularity in the proceedings.

In *S v Jija and Others*[670] the court was asked to make an order that a copy of the identification parade record be furnished to the defence. The court held that the duty to disclose could embrace documents relating to fingerprint evidence and the holding of identification parades.[671] However, the disclosure is subject to the documents not being privileged. The court's decision to grant the order led to the evidence of a witness identifying one of the accused being rejected because the report (now available to the court and the defence), showed that she had failed to point him out at the identification parade. This case illustrates the danger inherent in the state's refusal to disclose documents which favour the accused in a material way.[672] An accused cannot compel a prosecutor to do his duty in making disclosure. However, it should be pointed out that if the court becomes aware of the existence of such a document and the prosecutor succeeds in preventing its disclosure, an adverse inference can be drawn against the state.[673]

Similarly, in the **United States**, Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor in a criminal trial to disclose evidence that is favourable to the defendant. This requirement is said to be similar to the constitutional disclosure requirements established by the Supreme Court in *Brady v Maryland*,[674] where the court held that a prosecutor commits a due process violation, requiring reversal of a conviction, when it is shown that the prosecutor withheld favourable, material evidence. Nevertheless, there are important differences between the ethical requirements of the Model Rule and the legal requirements of the *Brady* rule.[675]

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670 1991(2) SA 52 (E).

671 The court noted that the defence was entitled to a postponement if it was taken by surprise at the trial. This places a duty on the prosecutor to disclose documents. However, this is not a general duty to disclose, nor does it have the same application as discovery of documents in a civil trial.

672 See Du Plessis JR "The accusatorial system – too much a game" (1991) *South African Law Journal* at 580. Also see *S v Van Rensburg* 1963 (2) SA 343 (N), where the prosecutor had neglected to produce letters during the trial indicating that the accused had been confined in a mental institution. This raised the question of whether the accused should have been sent to a mental institution for observation. This also raised the inference of whether the accused was not criminally responsible for the offence for which he was charged, namely, theft.

673 *S v Jija and Others supra* at 59. Also see *R v M* 1959 (1) SA 343 (A), where a conviction was set aside because a judge told a jury that they could assume that a witness's evidence was consistent with her previous statement since the prosecutor had not drawn attention to the discrepancy.

674 373 US 83 (1963). Since *Brady*, the court has continued to expand the prosecutor's constitutional duty to disclose exculpatory evidence. Thus, *Brady* and the following case law have established a prosecutor's constitutional duty to disclose exculpatory and impeachment evidence when it is in his possession or in the possession of the police. See, *inter alia*, *United States v Agurs* 427 US 97 (1976), *United States v Bagley* 473 US 667 (1985) and *Kyles v Whitley* 514 US 419 (1995).

675 To illustrate this, the ethics rule does not limit the prosecution's disclosure obligation only to evidence that is material to the case. On the other hand, the *Brady* rule, unlike the ethics rule, dictates that the prosecution must disclose evidence that could be used to impeach a prosecution witness. For a detailed discussion about the Model Rule, the *Brady* rule, and the prosecutor's duty, see Kurcias "Prosecutor's duty to disclose exculpatory evidence" 69 (2000) *Fordham Law*

The above case law also emphasises the prosecution's duty. Prosecutors have the benefit of the police that investigates their cases and gathers evidence for them. This access puts the accused (especially the indigent accused) at a great disadvantage in preparing their cases. Thus, the increased ethical obligations of the prosecutor are meant to ensure a fair process and minimise the disparity of resources between the prosecution and the defence in the criminal justice system.[676] The prosecution's duty is two-fold in that it must provide a detailed charge to the accused so that he has adequate time to prepare for his defence and to begin his trial without unreasonable delay. The prosecution must also disclose previous inconsistent statements for example, where a state witness's evidence in court deviates materially from statements to the police. The prosecutor has an ethical duty to disclose previous inconsistent statements and to make it available to the defence in order to enable the defence to test the credibility of witnesses by cross-examination on the contents of the statement[677] and to ensure that the accused has a fair trial.[678] Similarly, the prosecution is also obliged to bring to the court's notice information in its possession which may be favourable to the accused.[679] However, the prosecutor is not obliged to hand a statement by the witness to the defence where the inconsistency is of a minor or irrelevant nature.

5.3.3 RIGHT OF ACCESS TO INFORMATION IN THE CONSTITUTION

5.3.3.1 THE PRE-*SHABALALA* INTERPRETATION

With the advent of the Interim Constitution Act 200 of 1993, police docket privilege became the focus of the court's attention. Numerous applications requesting access to
police dockets have followed the enactment of the Interim Constitution. These applications have evoked different responses from the High Courts.[680] The Criminal Procedure Act provides that the accused has the right to be informed with sufficient particularity of the charges against him.[681] In the past, the accused had no right to obtain information on evidence against him,[682] nor was there any law which required

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Review 1205-1229.

676 *Ibid* at 1209.

677 See *S v Ncaphayi en Andere supra* at 472. Similarly, it has been held in a **New Zealand** case, *Mahadeo v The Queen* [1936] 2 All ER 813, that prior contradictory statements, from a witness who has been called at deposition and who is to be called at trial, must be given to the defence.

678 See *S v Xaba supra* at 717.

679 See *S v Van Rensburg supra* at 343.

680 Some decisions are conservative whilst others are progressive. The ensuing discussion will illustrate this.

681 See ss 80 and 144 respectively.

682 See *R v Steyn supra*.

the prosecution to disclose any evidence that was in favour of the accused.[683] However, the Interim Constitution provides that everyone has a right to receive all information which is in their interest. The two provisions in the Interim Constitution which affect police docket privilege were section 23 and section 25(3)(b).[684] The inclusion of section 23 reflects the concern generally in the Constitution with the openness of government. The right to be informed with sufficient particularity of a charge raises the issue of discovering police dockets and witness statements in criminal trials.

According to Du Plessis and Corder, a finding that accused persons have a right of access to witness statements and police dockets will not necessarily entail a "free for all" or unlicensed exercise of this right.[685] This right can be circumscribed by determining specific conditions for and the mode of *de facto* access. O Hollamby maintains that the accused and the state must approach the court on the same footing and neither should enjoy any substantial advantage over his opponent.[686] The right to a fair trial must go hand-in-hand with the right to equal protection of the law, the entitlement to information in the possession of an organ of the state goes hand-in-hand with the right to a fair trial.

Some of the first constitutional litigation dealt with the question of whether an accused had a right of access to information contained in the police docket. In *S v Fani*[687] Jones J held that if the accused is not sufficiently informed about the case against him, he will not be able to properly prepare his case and cannot be said to have had a fair trial. Therefore, the court held that the accused was entitled before plea to certain evidential information from the docket.[688] However, the court found that the state is not compelled by the Interim Constitution to allow the defence access to the whole

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683 However, see *S v Van Rensburg supra* where the court held that the prosecution was obliged to furnish the accused with favourable evidence.

684 Section 23 reads as follows: "Every person has a right of access to all information held by the state or any of it organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." Section 25(3)(b) provides that the accused's right to be "informed with sufficient particularity of the charge" is part of his or her right to a fair trial.

685 Du Plessis and Corder *op cit* 176.

686 This brings the "equality of arms" principle into play. See O Hollamby "s 23 of the Interim Constitution and access to information in police dockets" (1994) *Consultus* 140 at 142.

687 1994 (1) SACR 635 (E).

688 The accused was entitled to the following information:

(1) copy of any statement by the accused or co-accused;
(2) copy of all relevant medical evidence;
(3) copy of any report of a technical expert nature such as blood alcohol reports, fingerprints and so on;
(4) copies of relevant documents such as the report on an identification parade, a plan of an accident scene and so on;
(5) a list of potential state witnesses;
(6) a summary of the witnesses' statements;
(7) a copy of the accused's previous convictions.

docket. The guidelines proposed in *Fani* have been commended by du Plessis.[689]

The court considered the question whether section 23 of the Interim Constitution intended to have any application to criminal trials in *S v James*,[690] but left the question open. The court concluded that section 23 does not require that witness statements or summaries of them be furnished to the accused. The court held that the requirement in section 25(3) that an accused be informed sufficiently of the charges against him required that he be given adequate information to enable him to understand precisely what the allegations against him are, in order to plead to the charge and to prepare his defence. However, the court refused to order that the whole police docket should be handed to the defence.[691]

It has been held that police docket privilege is not the same as legal professional privilege, and the court has a discretion to override such privilege.[692] The court in *Smith*, approved the finding in *Fani* that witness statement privilege is not inconsistent with the Interim Constitution. It held that the effect of section 25(3)(b) and section 23 was that an accused person is entitled to full particularity of the charge as to enable him to adduce and challenge evidence except where such information is protected by privilege.[693] The court held that as the summary of the substantial facts in the case had failed to inform the accused adequately of the charges he had to meet, and the state had assured the court that handing over of the statements would not compromise any police informers or other interests of state security, the most expeditious method of conveying the necessary information to inform the accused fully of the charges would be to order the
state to hand over copies of statements to the defence. The state was ordered to provide the defence with copies of all the witness statements of the key witnesses.

A two-stage enquiry was followed in *Qozeleni v Minister of Law and Order and*

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689 See Du Plessis "Toegang tot polisiedossiere" (1994) *South African Journal of Criminal Justice* at 307, where she proposes that the guidelines in *Fani* be followed keeping in mind the *desideratum* of a well-defined balance between the interests of the individual and those of the public.

690 1994 (2) SACR 141 (E). The accused had applied for an order compelling the state to furnish the defence with a summary of the intended evidence of each of the state witnesses.

691 Judge President Zietsmann stated that in the circumstances of the case, the summary together with the documents and other information provided to the accused, constituted sufficient detail, and even if it did not, the defence was at liberty to make another application for further particulars in terms of s 87 of the Act.

692 See *S v Smith and Another* 1994 (2) SACR 116 (E). The court was asked to make an order that the state furnish the defence with copies of statements of witnesses or summaries of evidences of such witnesses.

693 This protection must also be justified in terms of s 33. The court also criticised the system of informing an accused of the charges against him in terms of s 144 of the Act where an accused is arraigned for summary trial in a superior court in that it falls far short of the standard applied in progressive jurisdictions such as the United Kingdom, United States of America and Canada.

Another[694] namely, whether a fundamental right had been infringed and if so, whether that infringement constituted permissible limitation in terms of section 33. The court held that the fundamental right contained in section 23 should be considered with section 8(1), because the basis of the right to disclosure can also be founded on the notion that a fair trial envisages an "equality of arms".[695] Therefore, all parties must have access to the same documents. It followed that disclosure of the police docket was necessary for the protection and exercise of plaintiff's rights during the civil trial. Therefore, the section 23 right had been infringed. The respondent had to justify non-disclosure in terms of section 33, which he had failed to do so. Therefore, the court concluded that the applicant was entitled to discovery of the police docket.

The issue arose in *S v Sefadi*[696] whether the state could rely on the common law privilege attached to police dockets in terms of sections 23 and 25(3) of the Interim Constitution. The court concluded that the privilege constitutes an unjustifiable limitation on the right of access to information and negates the right. The privilege also limits the rights contained in section 25(3) unjustifiably. The court also remarked that a trial is not fair when only one of the parties (state) has access to statements taken by the police. The court concluded that the privilege is in conflict with sections 23 and 25(3) of the Interim Constitution. Therefore, it held that the state is compelled to allow the defence access to the docket. The state was ordered to provide the summaries which had been requested by accused's counsel.

In *S v Majavu*[697] the court concluded from a survey of foreign jurisdictions such as Canada, the United States of America and the United Kingdom, that generally other jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right. The court held that while section 23 is not a discovery measure, it applies equally to the prosecution and the right of access of information has to be considered in conjunction with the rights contained in section 25(3). This means that in order to have a fair hearing, the need may arise to have access to information in the possession of the prosecution or police in order to prepare the defence of an accused properly. The court also noted that the words chosen in framing section 23 indicate the wide ambit of the intention and this is in keeping with the transparency and openness sought by the framers of the Constitution. The court therefore concluded that an accused is generally entitled to the information contained in the police docket at any stage of the investigation or prosecution in order to protect his rights. The onus rested on the state to establish that the limitation on that right was justifiable in terms of section 33. However, the state had failed to do this in the

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694 1994 (1) BCLR 75 (E). In this case the plaintiff in an action for damages for unlawful arrest and detention and assault by members of the police force, brought an application for an order compelling the police to disclose the relevant police docket.

695 Section 23 refers to access to information, whilst s 8(1) refers to equality before the law.

696 1994 (2) BCLR 23 (D). Counsel for an accused arraigned in the High Court, had applied for a ruling that he was entitled to access to the statements or summaries of potential witnesses contained in the police docket.

697 1994 (2) BCLR 56 (Ck). The court was asked to make an order that the state furnish the accused with copies of all documentation and information in its possession relating to an intended prosecution.

particular case. The court also remarked that the prosecution is obliged to inform an undefended accused of his rights to discovery and to supply him with the relevant documentation and information.

The above discussion demonstrates that in *James*, *Fani* and *Smith*, the court found that the common law privilege was not inconsistent with the provisions of the Constitution. According to Schwikkard, this conclusion arose as a result of the failure to distinguish between establishing the existence of a right, and the justification of the limitation of an existing right in terms of section 33(1).[698] On the other hand, in those cases such as *Majavu* and *Qozeleni*, where a clear distinction was made between these two enquiries, the courts found that the privilege of non-disclosure was inconsistent with the provisions of the Constitution. However, a refusal to disclose some or all of the information contained in the police docket might, depending on the circumstances, be justified in terms of section 33(1).[699]

The issue arose in *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others*[700] whether an accused person should be given access to witness statements and other information prior to his prosecution. The court concluded that on a proper interpretation, section 23 gives an accused person the right of access to information contained in the police docket. However, it is not an absolute right and remains subject to section 33(1) qualification. The court compared the position of an accused under our constitution with his position in other democratic countries and noted that our practice of criminal discovery should be brought in line with the international trend towards greater openness. The court concluded that the blanket docket privilege of common law is *prima facie* inconsistent with the Interim Constitution. Docket privilege *per se* was regarded as a limitation on the right which is not reasonable and justifiable in terms of section 33(1).[701]

A purposive approach was followed by the court in *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal*.[702] The court held that section 23 provided for a purposive approach in that the purpose for which it was being invoked

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698 See Schwikkard (1994) *SACJ op cit* 333.

699 *Id*.

700 1994 (5) BCLR 99 (E). The first applicant had sought an order that the prosecution furnish him with statements contained in the police docket relating to charges on which he was arraigned. The second applicant, the Commissioner of the South African Police Services sought a declaratory order that the common law relating to docket privilege which was in force prior to the commencement of the Constitution remained in force and was consistent with ss 23 and 25 of the Constitution.

701 Therefore, the court declined to grant the declaratory order sought by the Commissioner. The court also considered the question of who is entitled to claim privilege in respect of those contents of the docket which are subject to privilege proper or who could justify refusal to make disclosure. The court held that in each case it will be the Attorney-General (now known as Director of Public Prosecutions), until the stage when the prosecution is complete, and thereafter the police. The court thus granted the first applicant an order that the information in the docket be disclosed to him.

702 1995 (1) SACR 88 (T).

had to be considered. The court noted that there were sound reasons for not making available copies of the statements of state witnesses namely; the risk of perjury and intimidation of witnesses. The court also noted that the public interest in ensuring that the accused was given a fair trial could be served without allowing the accused access to the police docket and thereby weakening the position of the prosecutor. The court concluded that the applicants in the present case had not shown that they were entitled to access to statements in the police docket. The court therefore found that no such duty exists and dismissed the application. However, the court referred the issue of constitutionality of the following rules to the Constitutional Court namely:

(1) Whether the common law rules of privilege precluded an accused person from having access to the contents of a police docket in all circumstances and,

(2) Whether an accused was precluded by the common law rule of practice from consulting with state witnesses without first obtaining the consent of the prosecution which was entitled to refuse consent in its sole and absolute discretion.

The court examined the right in section 23 in *Nortje and Another v Attorney-General of the Cape and Another*[703] and noted that statements in the police docket would ordinarily be reasonably required by an accused to exercise his right to defend himself. The court noted the benefits of disclosure to the accused such as assisting an innocent person in obtaining his acquittal. The court also noted that the risks of "tailoring" and other adverse consequences to the administration of justice could not be eliminated without simultaneously negating the essential content of the right. The enactment of section 23 would eventually lead to the demise of general docket privilege in *Steyn's* case. The court concluded that in the absence of some specific reason found to be good and sufficient, an accused is entitled to pre-trial disclosure of statements of both the witnesses the state intends to call and those of persons whom it does not intend to call. Therefore, the applicants were entitled to the statements they sought.[704]

The above cases illustrate a gradual shift in the courts' thinking towards granting the accused greater access to police dockets on the basis of a fair trial. The above discussion also illustrates that the right of access to information contained in section 23 of the Interim Constitution, has been considered and enforced in a number of cases relating to access to information in police dockets.[705] These cases demonstrate

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703 1995 (2) BCLR 236 (C).

704 Also see *S v Thobejane* 1995 (1) SACR 329 (T) where the court stated that an accused has a right of access to police docket as a matter of course. If s 23 was applicable as a matter of course, then the privilege was a justifiable limitation. However, the court found that it had not been shown that the information in the docket was required by the accused in terms of s 23 for the protection of his rights. The information given to the accused such as copies of post-mortem reports, medical examination reports, notes and photographs pertaining to pointing out, ballistic and identification parade forms were found to be adequate for the purpose of meaningful consultation and for the accused to plead to the charge.

705 According to Schwikkard, the cases favour the view that s 23 provides the accused with a right to disclosure of the contents of the police docket. A pre-requisite for the exercise of such right is that the information is required to enable the accused to exercise or protect any of his rights.

that it was essential for the applicant to show that the information sought was required to protect a right. Where this could not be shown, the applicant was unable to enforce any constitutional right to the information sought.

5.3.3.2 THE *SHABALALA* DECISION AND THE RIGHT TO A FAIR TRIAL

The Constitutional Court finally clarified the situation in *Shabalala v Attorney-General of the Transvaal*.[706] The Constitutional Court was required in *Shababala* to determine *inter alia,* whether or nor the common law privilege pertaining to the contents of police dockets, defined in *R v Steyn*[707] is consistent with the Constitution. The question thus arose whether an accused was entitled, in addition to the particulars in the indictment read with the summary of substantial facts and any particulars obtained under section 87 of the Criminal Procedure Act, to access to the contents of the police docket itself and whether such access was required to ensure a fair trial.[708]

The Constitutional Court in *Shabalala* found that the answer to the question actually lay in section 25(3), namely that the accused has a right to a fair trial. The court found that the police docket privilege is unconstitutional because it protects all the documents in a police docket from disclosure whether or not the accused requires those documents for a fair trial. However, the court held that if the state can show that the accused does not need access to the docket for purposes of a fair trial, disclosure will not be necessary. The state could also justify refusal of access in terms of section 33, for example, where there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or of state secrets, intimidation of witnesses or prejudice the proper ends of justice. However, the trial court retains a discretion to order disclosure even where such disclosure prejudices the state and the ends of justice because the right to a fair trial is a fundamental right of the accused.[709]

Denying the accused access to state witness statements in the police docket is said to violate the accused's right to a fair trial in that the accused is not fully informed of

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The existence of such a right will be established if the information in the docket is relevant to any issue before the court. The state will have to discharge its onus of proving that non-disclosure of any information contained in the docket is reasonable and justifiable in an open and democratic society. See Schwikkard (1994) *SACJ op cit* 337.

706 See *Shabalala and Others v Attorney-General of the Transvaal supra* at 1593. Please note that this case will also be discussed in subsection 7.4.2.2 below.

707 See *R v Steyn supra* at 324.

708 The three constitutional provisions which were relevant, were s 23 which pertains to the fundamental right of access to all information held by the state, s 25(3) which pertains to the fundamental right to a fair trial, and the limitation clause in s 33.

709 *Shabalala* approaches the issue from the fair trial angle and conforms with the position in the United States, United Kingdom, Germany and New Zealand. The basis for furnishing the accused with material in the United States is the accused's right to a fair trial. See *S v Majavu op cit* 67. Similarly, the accused's right to a fair trial is used to grant the accused access to evidence in the United Kingdom, Germany and New Zealand. For a detailed discussion about this, see the discussion in 5.3.6.

the case he has to meet and is unable to prepare an adequate plea or defence. Without prior access to such statements the defence cannot adequately challenge or assess the evidence for the prosecution.[710] In *Shabalala* it was held that "details of how the court should exercise its discretion in all these matters must be developed by the Supreme Court from case to case but it is always subject to the right of an accused to contend that the decision made by the court is not inconsistent with the Constitution".[711] *Shabalala* illustrates that the accused has in principle the right of access to all witnesses statements in the police docket. Those statements which are least contested are those which are exculpatory from the accused's perspective.[712] There is a general duty to disclose as far as all other witness's statements are concerned.

The right to a fair trial also means that information in the possession of third parties could be necessary for the adequate preparation of a defence. The principle of "equality of arms" should also apply during the preparation for trial and should entail the compulsory process of obtaining documentary evidence from third parties, such as private therapeutic records of sexual assault complainants held by psychiatrists or psychologists.[713] However, an accused's claim to a fair trial may conflict with a third party's right to privacy. The Supreme Court of Canada has tried to balance these rights by requiring an accused to first approach the trial court to obtain a court order by convincing the court that there are reasonable grounds to believe that a specified document is in the third party's possession and that it is "likely to be relevant" for the preparation of the defence.[714]

The defence's ability to competently challenge expert evidence depends on the extent of information available to it. The timing of disclosure relating to expert

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710 See *S v Nortje supra*. Also see *S v Nassar* 1995 (1) SACR 212 (Nm), where the court held that to do justice to a fundamental right that the accused was presumed innocent until proven guilty in terms of art 12(1)(d) of the Namibian Constitution, was the prerequisite that an accused be placed in the position whereby he knew what case he had to face so that he could properly and fully prepare his defence. The court stated further that the accused was entitled to be provided with all reasonable practicable time and facilities to ensure that the trial was fair. "Facilities" in terms of art 12(1)(e) of the Constitution was interpreted to include providing an accused with all relevant information in the state's possession including copies of witness statements and relevant evidential documents.

711 See *Shabalala and Others v Attorney-General of the Transvaal supra* at s 58.

712 The accused is entitled to documents which are "exculpatory" (documents which are helpful to the defence) unless the state can justify refusal.

713 See Meintjies-Van der Walt "Expert evidence and the right to a fair trial: a comparative perspective" 17 (2001) *South African Journal on Human Rights* 301 at 314.

714 Thus, it has also been held in Canada that information in the hands of third parties may in certain circumstances be necessary for the adequate preparation of a defence. See *R v O'Connor* (1995) 103 CCC (3d) 1 SCC at 15, where it was held that there must be reasonable grounds for disclosure and disclosure must be relevant for preparation of the defence. Also see *R v Beharreill* (1995) 103 CCC (3d) 92 SCC. This two stage enquiry is now regulated by legislation, namely, Bill - C 46 Production of Records in Sexual Offence Prosecutions, which became law on 12/5/97. The aim of these amendments is to improve the protection and equality rights of complainants while recognising the rights of the accused. Also see Meintjies-Van der Walt (2001) *SAJHR op cit* 314.

evidence could be crucial to the proper preparation of the defence case. This is because access to comprehensive expert reports and pre-trial meetings between experts can contribute to delineating the issues in the dispute.[715] According to *Shabalala*, the timing of disclosure will depend on the circumstances of the case. Disclosure can occur at a later stage provided the accused has sufficient time to prepare the defence.[716] The Constitutional Court stated in *Shabalala*, that the primary reason for disclosure is that an accused may prepare a defence by being fully informed of the case that he has to meet, and that disclosure should take place at a time "when the accused is acquainted with the charge or indictment or immediately thereafter".[717] However, the duty to disclose is said to be a continuing one.[718]

The *Shabalala* decision has been endorsed in a number of decisions.[719] The *Shabalala* decision also led to the perception that the defence had extensive rights of access even at the bail stage. Consequently, the need arose for necessary legislation.[720] Section 60(14) empowers a prosecutor to deny a bail applicant access to the contents of the police docket. The constitutional validity of section 60(14) was attacked in *S v Dhlamini*; *S v Dladla*; *S v Joubert; S v Schietekat*[721] where the

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715 See Meintjies-Van der Walt (2001) *SAJHR op cit* 313.

716 See *S v Scholtz* 1997 1 BCLR 103 (NmS). Also see *S v Smile* 1998 (1) SACR 688 (SCA), where the accused had initially been denied access to statements of state witnesses. However, once it had been ascertained that they were entitled to such statements as a constitutional right the latter were made available to the accused. However, this was during the trial and after some of the witnesses had already testified. The court held that although the initial refusal to furnish the statements was a constitutional irregularity, this in itself was not a ground for setting aside the convictions. The subsequent availability of the statements remedied the defect which, was not of such a nature as to immediately warrant the vitiating of the trial.

717 See *Shabalala v Attorney-General of the Transvaal supra* at s 56.

718 See *R v Stinchcombe* (1991) 68 CCC (3d) 1 at 14 (SCC) where the Canadian court held that the duty to disclose is also a continuing one.

719 The decision was favourably referred to in *S v Kandovazu* 1998 (9) BCLR 1148 (NmS), where the court held that the order refusing disclosure of the witness statements to the defence was tantamount to a denial of the right to a fair trial to an accused person. Also see *S v Makiti* 1997 (1) All SA 291 (B), where the court held that although *Shabalala* does not require witness statements to be handed over to the defence in all cases, if the matter appeared not to be trivial and there was no prejudice to the state, the statements should be made available to the defence in order to give effect to the spirit and tenor of the Constitution.

720 See s 60(14) of the Act, which provides that "notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket ... unless the prosecutor otherwise directs". It also contains a proviso that this subsection "shall not be construed as denying an accused access to any information, record or document to which he ... may be entitled for purposes of his trial". Thus, this proviso ensured that s 60(14) would not be in conflict with the decision in *Shabalala*.

721 1999 (2) SACR 51 (CC). Also see Van der Merwe "Borgverrigtinge en toegang tot die polisiedossier: het die staat 'n regsetiese beskikbaar stellingsverpligting?" 12 (2001) *Stellenbosch Law Review* at 215-221, where the writer argues that there is at least one special situation where a prosecutor who has decided to rely on s 60 (14) in withholding the contents of the police docket from a bail applicant, will on the grounds of legal ethics be compelled to reserve

Constitutional Court confirmed the
constitutional validity of this provision. However, the *Shabalala* decision has been the butt of some critical comment.[722]

5.3.4 RIGHT OF ACCESS TO INFORMATION IN THE FINAL CONSTITUTION

Section 35(3)(a) of Constitution 108 of 1996 provides that the accused has a right to be informed of the charge with sufficient details to answer it.[723] This right is linked to the right to have adequate time and facilities for the preparation of his defence. The accused's rights to have adequate time and facilities to prepare a defence is linked to his right of access to information.[724] Section 35(3)(b) provides that every accused has a right to a fair trial which includes the right to have adequate time and facilities to prepare a defence.[725]

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his decision. This situation will arise where there is a material discrepancy between the oral evidence of a state witness at the bail proceedings and his written statement contained in the police docket. Also see Van der Merwe "Artikels 60(14) en 335 van die Strafproseswet: het 'n borgapplikant 'n reg van toegang tot sy eie verklaring in die polisiedossier?" 14 (2001) *South African Journal of Criminal Justice* 297, where the writer argues that despite the fact that s 60(14) applies "notwithstanding anything to the contrary contained in any law", a prosecutor should as a rule permit a bail applicant to have access to a copy of a statement falling within the ambit of s 335 of the Act.

722 See Senatle "Access to information in the police docket" (1999) *The Judicial Officer* 55 at 72-73, where the writer states that the *Shabalala* decision has not taken the position regarding police docket privilege any further. The effect of the case is that the state can no longer make a unilateral claim of non-disclosure. The decision is also silent regarding the stage at which the disclosure should be made. The writer proposes that disclosure should be made after the completion of investigation, but before commencement of the trial. The decision is also silent regarding reciprocal disclosure which requires the defence to disclose to the prosecution certain elements of the case that it plans to present at the trial, such as names of defence witnesses, their addresses and their statements. However, the South African Law Commission does not support reciprocal disclosure by the defence. It sees no scope for any duties upon the accused during the course of the trial which do not already exist at common law and in the rules and practices of cross-examination. See the *South African Law Commission (Project 73) Report* "A more inquisitorial approach to criminal procedure – police questioning, defence disclosure, the role of judicial officers and judicial management of trials" (August 2002) at 109.

723 See *S v Lavhengwa* 1996 (2) SACR 453 (W) 482 at 484, where the court examined whether the nature of the statutory offence of contempt of court was sufficiently clear and unambigious to comply with the constitutional right to be informed with sufficient particularity of the charge. The court held that if the definition of an offence is so vague about the prohibited act, it not only allows the unfair prosecution of an unwitting person but it also grants the state a widespread prosecuting discretion which it may abuse. Thus, there should be a fair notification to those citizens subjected to the law and adequate guidance for law enforcement agencies. The South African Law Commission also prefers the *Lavhengwa* approach, as the offence and field of prohibition is clear. See *South African Law Commission Discussion Paper 90* "The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing" (31 March 2000) at 64.

724 See chapter 7 on "The Right to be Prepared" for a more detailed discussion about the accused's right to adequate time and facilities to prepare a defence.

725 Article 14(3)(b) of the ICCPR and art 6(3)(b) of the ECHR have similar provisions. The United Nations Human Rights Committee (hereinafter referred to as the "HRC") defines "adequate time" as depending on the circumstances of each case while the word "facilities" means that an

The right of access to adequate facilities also imposes a positive duty on the state to furnish the accused with such facilities which include allowing an accused access to results of the police investigation.[726] In *Edwards v UK*[727] the European Court held that it is a requirement of a fair trial that "the prosecution authorities disclose to the defence all material evidence against the accused". The HRC also held in *Harvard v Norway*[728] that it is important for the guarantee of a fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against the accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel.[729]

The information must also be given to the accused in a language that he understands.[730] The ICCPR provides that the accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.[731] The ECHR has a similar provision in terms of article 6(3)(a).[732] In *Kamasinski v Austria*[733] the court accepted that information could be given orally as long as the accused is adequately informed. The court also noted that an accused who is "not conversant in the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a

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accused should be granted access to documents and records necessary for the preparation of the defence, but it does not include an entitlement to be furnished with copies of all relevant documents.

726 Steytler *Constitutional criminal procedure* 232.

727 (1992) 15 EHRR 417. Also see *Bendenoun v France* (1994) 18 EHRR 54, where the principle was applied to an administration court; certain documents or even the whole file may have to be supplied, but then the applicant has to give specific reasons, even briefly for the request to have access.

728 Case no 451/1991.

729 See De Zayas "The United Nations and the guarantees of a fair trial in the International Covenant on Civil and Political Rights and the Convention against torture, and other cruel, inhuman or degrading treatment or punishment" in Weissbrodt and Wolfrum (1998) *op cit* 684.

730 See s 35(4) of the Constitution. Section 35(4) should also apply when the summons or indictment is served on the accused outside the courtroom. Where the accused is represented, communication is effective if the lawyer understands the language of the documents. Where notification is in court, the right to an interpreter in terms of s 35(3)(k) applies. The charge sheet need not be translated into language other than the court language as long as it has been competently interpreted to the accused. It is acceptable if the accused is represented provided that the defence lawyer understands the language in which the document is written. See Steytler *Constitutional criminal procedure* 226. Also see chapter 6 on "The Right to Understand" for a more detailed discussion.

731 See art 14(3)(a).

732 Article 6(3)(a) provides that a person charged with a criminal offence must be informed of the nature and cause of the accusation against him.

733 (1991) 13 EHRR 36.

language that he understands".[734] However, there is compliance with the right if the defence counsel understands the language in which the information is given.[735]

Section 32 provides that everyone has the right of access to any information that is held by the state and another person and that is required for the exercise or protection of any rights. The ratio for section 32 is to produce an open and accountable government. The following case law refers to the interpretation of section 32 of the Constitution:

In *Leech and Others v Farber NO and Others*[736] the question involved the extent to which the examinee at such enquiries was entitled to access to information in the possession of the Commissioner as a creditor. The court found generally it would not be "unfair" to require the witnesses to be examined without first being given access to the information in the possession of the Commissioner or a creditor who intended to participate in the enquiry. The mere fact that the enquiry was under the control of the commissioner did not have the consequence that documents in the possession of a creditor who desired to participate were *ipso facto* held by the creditor as agent on behalf of the commissioner. Such documents were not documents in the state's possession as contemplated by section 32 of the Constitution. Documents to which applicants sought access were the documents of the creditor and were not held by the commissioner. The reliance upon section 32 was therefore found to have been misconceived.[737]

The court held in *Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council*[738] that the respondent had established that the information was confidential. The tenderers and particularly the successful tenderer had a direct and substantial interest in not having the contents of their tender documents revealed to

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734 Steytler *Constitutional criminal procedure* 226.

735 *Id.*

736 1999 (9) BCLR 971(W). Here, enquiries were held in terms of ss 417 and 418 of the Companies Act 61 of 1973.

737 The court held that fairness did not dictate that in general the questioner should disclose to witnesses all information which was already in his possession or any suspicions that may be held in relation to the particular witness as a pre-condition to questioning him. If circumstances arose in which a witness required an opportunity to consider an aspect more fully in order to place himself in a position to provide a meaningful reply, that was a matter which could and should be dealt with by the Commissioner if and when it arose.

738 1999 (9) BCLR 1052 (W). The issue involved an application for access to documents which was sought by an unsuccessful tenderer. The facts were that the applicant relied upon the provisions of s 32 and s 33 read with items 23(2)(a) and 23(2)(b) of Schedule 6 to the Final Constitution and s 217 of the Constitution. Section 32 guarantees to every person the right of access to any information held by the state where such is required for the exercise or protection of any rights. Section 33 guarantees to every person the right to administrative action that is lawful, reasonable and procedurally fair. Section 217 provides that when a state organ contracts for business, it must ensure that the system is fair, equitable, transparent, competitive and cost-effective.

the applicant who was their competitor.[739] The court noted that the framers of the Constitution had clearly not intended to confer a right of unrestricted access. They would have been conscious of the fact that unscrupulous persons would exploit such a position for selfish reasons. A balance had to be struck between the right of access to documents and the right of third parties to privacy.[740] Therefore, the application was dismissed. Similarly, in *Goodman Brothers (Pty) Ltd v Transnet Ltd*[741] the court found that a party seeking access had to show a reasonable basis for believing that a disclosure of documents in the state's possession would assist him to protect or exercise a right. The court found that no *prima facie* basis had been made out for the infringement of a right which the applicant had sought to exercise or protect.

In the case of *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*[742] the court held that the content of the right of access of information should be examined within the context within which it is claimed. The court also held that the purpose of section 32 is, *inter alia*, to provide a framework for a statute guaranteeing freedom of information, and to enable courts to examine whether a denial of information would undermine the notions of fairness, openness and transparency.[743] Similarly, a medical practitioner relied on the constitutional right of access to information, when he sought an order against the Health Professions Council of South Africa, to compel it to grant access to certain hospital records.[744] The professional body was conducting an enquiry into a complaint of negligence laid against the medical practitioner, and it possessed hospital records relating to the complaint. The court held that such relief was not competent against the council because the council was not an organ of the state. The complainant was, however, entitled to access to those documents in the possession of the council emanating directly or indirectly from the hospital records. The respondent was therefore ordered

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739 If each tenderer was able to obtain access to its competitors' confidential information, this would have a chilling effect causing prospective tenderers to withhold important information and possibly even refraining from submitting a tender. The commercial implications of such a state of affairs were obvious.

740 Also see the Canadian case of *R v O'Connor supra* which is also instructive regarding the maintenance of a balance between the accused's right of access to information and the third party's right to privacy.

741 1998 (8) BCLR 1024 (W). Here, an unsuccessful tenderer had sought an order compelling the respondent to furnish reasons for the rejection of the applicant's tender as well as the furnishing of information in the possession of the respondent relating to the evaluation of the tenders, including copies of tenders received. The court found that the applicant was entitled to an order compelling the respondent to furnish reasons for the rejection of the applicant's tender. However, it was not entitled to the relief it sought in respect of access to documents in the respondent's possession.

742 2000 (5) BCLR 534 (C). Here, the applicants had sought an order compelling the first respondent to furnish a wide range of information, including a transcript of all the evidence presented to the first respondent's committee on Human Rights Violations, upon which the findings complained of were investigated.

743 However, the application was dismissed with costs, because the applicants had not made out a case why the information was needed immediately to exercise their right to launch a claim for defamation.

744 See *Korf v Health Professions Council of South Africa* 2000 (3) BCLR 309 (T).

to allow the applicant to inspect and make copies of all such documentation. It has also been held that whilst the information to which access is sought in terms of section 32 does not have to be essential, it certainly has to be more than useful to a party who alleges that he requires the information.[745]

The above discussion demonstrates that the case law does not deal with criminal matters *per se*. However, the principles extracted from these cases clearly apply to the realm of criminal discovery. The above cases illustrate that a witness must be given access to information in the other party's possession according to the dictates of fairness. However, this right of access is not absolute, and a balance must be struck between one party's right of access and the other party's right to withhold such access. This view conforms with the Constitutional Court's finding in *Shababala*.[746]

5.3.5 CURRENT POSITION: PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

The **aim** of the Information Act is to give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights, and to provide for incidental matters.[747] The object of the Information Act is to foster a culture of transparency and accountability in public and private bodies, thus giving effect to the right of access to information. Similarly, it seeks to promote a society in which the people of South Africa have access to information so as to enable them to more fully exercise and protect all of their rights. However, the right of access to any information held by a public or a private body may be limited to the extent that the limitations are reasonable and justifiable in terms of section 36 of the Constitution.

When a court interprets the provision of the Information Act, it must prefer any reasonable interpretation of that provision which is consistent with the objects of the act over any alternative interpretation that is inconsistent with those objects. The Information Act applies to a record of a public body and a record of a private body. However, the Information Act does not apply to records required for criminal or civil proceedings after commencement of proceedings.[748] The Information Act is said to apply despite the provisions of any other legislation.

The information officer (chief executive officer of a public or private body) has a right to refuse a request of access to a record of the body in the following circumstances:

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745 See *Ngubane v Meisch NO* 2001 (1) SA 425 (N).

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

747 See Government Gazette No 20852. Sections of the Promotion of Access to Information Act of 2000, formerly known as the Open Democracy Bill, are modelled on Freedom of Information Acts in Australia, New Zealand, Canada and the US. For a detailed discussion about this Act, see *The Star* "Promotion Of Access to Information Act of 2000" 23 March 2001:16.

748 See s 7(1) of the Act. However, any record obtained in contravention of s 7(1) is admissible as evidence in the criminal or civil proceedings referred to in s 7(1), unless the exclusion of such record by the court in question would be detrimental to the interests of justice.

(1) for the protection of the privacy of a third party who is a natural person (s 34). This means that the information officer must refuse a request for access to the record of the body if its disclosure would invoke the unreasonable disclosure of personal information about a third party including a deceased individual (s 34(1));

(2) . . . . . (s 35);

(3) . . . . . (s 36);

(4) . . . . . (s 37);

(5) . . . . . (s 38);

(6) for the protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings (s 39). This means that the information officer may refuse a request for access to a record if

(a) the record contains methods, techniques, procedures or guidelines for the prevention, detection, suppression or investigation of offences or the prosecution of alleged offenders and the disclosure of those methods, techniques, procedures or guidelines would prejudice the effectiveness of
those methods or lead to the circumvention of the law or facilitate the commission of an offence;

(b) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record would impede that prosecution or result in a miscarriage of justice in that prosecution;

(c) if the disclosure of the record would prejudice the investigation of any possible offence, reveal or enable a person to ascertain the identity of a confidential source of information in respect of a law enforcement matter, resulting in the intimidation or coercion of a witness or endangering the life or physical safety of that witness; resulting in the commission of an offence facilitating escape from lawful detention, depriving a person of a right to a fair trial or an impartial adjudication;

(d) if the disclosure facilitates the commission of a contravention of a law including escape from lawful detention, or prejudices or impairs the fairness of a trial or the impartiality of an adjudication.

(7) for the protection of records privileged from production in legal proceedings (s 40). This means that the information officer must refuse a request for access to record if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.

(8) . . . . . (s 41);

(9) . . . . . (s 42);

(10) . . . . . (s 43).

However, the information officer must grant a request for access to a record if the public interest in the disclosure of the record outweighs the harm (s 46).

It is apparent from the above that sections 34, 39 and 40 have a bearing on criminal discovery practice. The exclusion of the Information Act for records required for criminal and civil proceedings is harsh. This clearly restricts the accused's rights to obtain access to information in police dockets. The Information Act clearly places emphasis on law enforcement which is understandable in the light of the violent times we live in. However, the rights of accused persons should also be protected. It is noteworthy that the Information Act stipulates that any limitation on the right of access must be justified in terms of section 36 of the Constitution. This would certainly ensure that a fair and equitable balance is maintained between the accused's rights of access to information and the law enforcement's right to refuse disclosure. The effect of this justification requirement and section 46 above, is that the Information Act requires the information officer to use great care in exercising his right of refusal. This is indeed commendable. The Information Act is heralded as a milestone for public sector accountability.[749] South Africa was a closed and secretive society before the advent of the Constitution. Therefore, it was impossible for interested parties to obtain access to sensitive information. However, the Constitution brought with it transformation and a welcome shift from the secretive authoritarianism of the past towards a democracy based on openness and transparency.[750]

5.3.6 ACCESS TO INFORMATION IN FOREIGN JURISDICTIONS

The position in international law varies from country to country.[751] In some instances discovery is virtually non-existent, whilst in other countries discovery is generally applied and is very extensive. This comparative study is also relevant in terms of section 39(1) of the Constitution which requires consideration of international law and

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749 See *The Star op cit* 16.

750 The Promotion of Access to Information Act illustrates this transformation. Also see Williams "Access to information in the new South Africa" (1997) *De Rebus* at 563-565.

751 Roger Traynor, former Chief Justice of the Supreme Court of California, made the following appropriate comments regarding the use of comparative law:

> "Such differences do more than elucidate the stuff of comparative law. They also serve to remind us, in any advance upon its dusky area, how apt are the uses of diversity. It is no flat world, this world of law, and we need as many views as are envisaged how much of it still awaits discovery."

See Traynor "Ground lost and found in criminal discovery in England" 39 (1964) *New York University Law Review* 749 at 770.

foreign law.[752] Many foreign jurisdictions have also taken a progressive approach towards the right of access to information as the ensuing discussion will demonstrate.

5.3.6.1 CANADA

There was virtually no discovery in criminal cases in Canada. However, that situation changed as a practice of voluntary disclosure by the prosecution developed. Efforts to make discovery mandatory were initially resisted. An "experiment" in Montreal had revealed that greater discovery led to an increase in guilty pleas.[753] Rules have developed through precedent as courts have been required to balance the interests of the state with the right of an accused under the Canadian Charter to make "full answer and defence". Any rule of evidentiary privilege or non-disclosure which prevents relevant material from coming into the hands of parties or the court "acts as an exception to the truth-finding process".[754] It may conflict with the defendant's right to make full answer and defence, a right described by the Supreme Court in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[755] The court noted that "the principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material".[756] The court in *Stinchcombe* also reaffirmed the principle that "there is a general duty on the crown's part to disclose all material it proposes to use at the trial and especially all evidence which may assist the accused even if the crown does not propose to use it".[757]
However, the obligation to disclose is not absolute and it is subject to the discretion of counsel for the crown (prosecution).[758] The general principle applied is that information ought not to be withheld if there is a reasonable possibility that the

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752 Section 39(1) states that when interpreting the bill of rights, a court, tribunal or forum:

> "(a) .....
> (b) must consider international law; and
> (c) may consider foreign law."

However, care must be adopted when foreign law is taken into consideration. See *inter alia*, *Shabalala v Attorney-General of the Transvaal supra*.

753 *S v Majavu supra* at 63.

754 See *R v Beharreill supra*.

755 See *R v Stinchcombe supra* at 68. The extent of the Crown obligation is to produce the fruits of the police investigation to the accused, including statements made by witnesses and notes of interviews. Thus, the Court of Appeal accepted the principle that an accused is entitled to discovery of documentation in the prosecution's possession.

756 *Ibid* at 74. The court stated that if the system of criminal justice is to be marked by search for truth, then disclosure and discovery of relevant materials rather than suppression must be the starting point.

757 It was so stated in *R v C* (MH) 1988 46 CCC (3 d) 142 at 155.

758 This discretion extends both to the withholding of information in the following instances for example, to protect the identity of informer, to prevent prejudice and harm to an informer and to the timing of disclosure. The discretion of the Crown counsel is reviewable by the trial judge. This view conforms with *Shabalala supra*.

withholding of information will impair the accused's right to make full answer and defence, unless non-disclosure is justified by the law of privilege.[759] The crown's counsel must disclose all relevant information. Initial disclosure should occur before the accused is called upon to choose the mode of trial or to plead. Nevertheless the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.[760] It has also been stated that the crown has a duty to make timely disclosure to the defence of all evidence supporting innocence of the accused or mitigating the offence. However, the obligation is not reciprocal.[761] The Law Reform Commission of Canada has also adopted the view that it would be inconsistent with the principles of the adversarial process to compel the defence to make pre-trial disclosure.[762] However, Maude favours the introduction of reciprocal disclosure in Canada.[763]

The Supreme Court decided in *Stinchcombe* that the test for relevance is one of potential usefulness in making a full answer to the allegations, in terms of assisting the case for the defence or damaging the prosecution. The onus rests on the prosecution to justify non-disclosure of information in its possession. However, relevance is defined differently when the information is in the hands of third parties, who are not in the same position as the crown.[764] According to the Supreme Court, parties may only be ordered to produce material that is likely to be used for evidential purposes, and not merely for strategic or tactical reasons. Thus, the test is one of probative value. The defence may use the material for limited purposes only. To illustrate this, in *Mandeville*, the court directed that "the defence be restricted from reproducing or releasing this material except for the purpose of instructing its expert witnesses" and that the "material should not be disclosed to the accused except for the necessary soliticor-client communications".[765] There will usually be a duty to disclose medical information to the defendant when "the right to make full answer and

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759 See *R v Stinchcombe supra* at 77.

760 This conforms with the finding in *Shabalala*. It should be noted that defence counsel who become aware of any failure by the Crown to comply with the duty to disclose must bring it to the court's attention at the earliest opportunity, in order to avoid a new trial. Any failure to comply with this obligation will be an important factor in determining on appeal whether a new trial should be ordered. See *R v Stinchcombe supra* at 12-13, 68.

761 See *R v Stinchcombe supra*. Also see *R v Stone* [1999] 2 SCR 290.

762 See Law Reform Commission of Canada *Criminal Procedure: Discovery* (Working Paper No 4 1974) 29, para 64. A current proposal is being put forth for reciprocal disclosure of expert evidence in terms of the Criminal Code Amendment Bill 2001. Also see Dawkins "Defence disclosure in criminal cases" (2001) *New Zealand Law Review* 35 at 56-57.

763 See Maude "Reciprocal disclosure in criminal trials: stacking the deck against the accused, or calling defence counsel's bluff?" (1999) *Alberta Law Review* 715, where the writer examines if there is room to incorporate defence disclosure into Canada's criminal trial proceedings. He concludes that the introduction of reciprocal disclosure would be a moderate expansion of already existing notice requirements, and that defence counsel should start to introduce their own guidelines regarding defence disclosure.

764 See *R v O'Connor supra*.

765 See *R v Mandeville* (1993) [1994] NWTR 126 (SC) 21 CR (4th) 272. Also see *R v Ross* (1991) 119 NSR (2d) 177 at 180 (SC AD), where it was determined that any order for production should be "as restrictive as possible".

defence is implicated by information contained in the records".[766] It was determined by the majority in *O'Connor* that "information in the crown's possession which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege which might arise".[767] Compelled disclosure is necessary to satisfy these defence interests only if the information cannot reasonably be obtained by other means.

The crown (state) is only entitled to produce what is in its possession or control. However, the crown is entitled to explain the absence of evidence which has been in its possession, and is no longer available. A satisfactory explanation will lead to the crown discharging its obligation, unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Charter.[768]

The Federal Access to Information Act of 1982 (hereinafter referred to as the "AIA") covers the major agencies for the administration of justice, including the federal police (RCMP), the Department of Solicitor General, and the Department of Justice. However, the law enforcement exemptions are "distressingly broad".[769] To illustrate this, section 16(1)(c) permits withholding of information if disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations".[770] Indications are that the AIA is rarely used in the criminal discovery context. The reason for the lack of impact of the federal and provincial Freedom of Information legislation on criminal discovery practice is that these law exemptions are too broad. This nullifies the practical use of the Federal Access to Information Act by criminal defendants.

In Canadian criminal proceedings, the defendant's information rights are protected by legislation governing criminal procedure and by the inherent powers of courts to ensure fairness in trials. *Stinchcombe* set out the general principle that an accused's ability to access the necessary information to make full answer and defence is now constitutionally protected under section 7 of the Canadian Charter of Rights and Freedoms. The *Stinchcombe* case also "marked the dawn of a new era in disclosure

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766 See *R v O'Connor supra* at 411. Also see Dawson "Compelled production of medical records" 43 (1998) *McGill Law Journal* 25- 65, for a discussion of the form of analysis that a court is likely to adopt in resolving a dispute concerning the compelled production of medical and psychiatric records in legal proceedings, when the defendant seeks access to the records.

767 See *R v O'Connor supra* at 431.

768 See *R v Stinchcombe supra* at 96, where the loss of relevant evidence due to the death of the investigating officer did not require a stay of proceedings. However, in *R v Carosella* (1997) 112 CCC (3d) 289 (SCC) [Ont], a deliberate shredding by a rape crisis centre, of notes compiled during an interview with the complainant required a stay of proceedings.

769 Rankin "The new Access to Information and Privacy Act: a critical annotation" 15 (1983) *Ottawa Law Review* 1. Also see Onyshko "The Federal Court and the *Access to Information Act*" 22 (1993) *Manitoba Law Journal* 73-144 for a more detailed discussion about how the Federal Court of Canada has treated the Federal Access to Information Act in Canada. Onyshko criticises the Federal Court for not treating the Access to Information Act on the same level as the Charter.

770 Taggart "The impact of freedom of information legislation on criminal discovery in comparative common law perspective" (1990) *Vanderbilt Journal of Transnational Law* 235 at 266.

to the defence, by transforming a professional courtesy into a formal obligation".[771] The innovation of *Stinchcombe* is in the creation of an avenue of judicial review in which the crown will have to justify non-disclosure on the basis that the material sought is clearly irrelevant or privileged.[772]

5.3.6.2 UNITED STATES OF AMERICA

In the United States of America, discovery is more limited. The history of discovery illustrates that the common law of England prior to the Revolution made no provision for discovery by a criminal defendant. Indeed, the first effort at discovery occurred after the Revolution, when a motion was made for an order requiring the prosecution to make a report available for inspection by the defendant.[773] However, a different position was taken up by the English courts in 1833, when the prosecution was ordered to allow the defendant to examine a threatening letter allegedly written by him, in order to give his witness an opportunity to study the handwriting.[774] Nowadays, discovery is regulated by federal and state laws of criminal procedure.[775] Many states have recognised that a defendant has a right to discovery in criminal cases.[776] In

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771 See *R v O'Connor supra*. Also see *R v Mills* [1999] 3 SCR 668 at 671-673, where the Supreme Court of Canada stated that the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. On the other hand, the accused will have no right to the records if they contain information that is either irrelevant or distorts the search for truth.

772 However, see Young "Adversarial justice and the Charter of rights: stunting the growth of the 'living tree' Part II" (1997) *Criminal Law Quarterly* 419 at 421. The writer contends that the *Stinchcombe* requirements are being enforced without the creation of any new pre-trial mechanism to give practical effect to its sweeping theoretical principles.

773 The motion was denied as the court found "no principle to warrant it". See *King v Holland* 4 TR 691, 100 Eng Rep 1248 (KB 1792). Also see Perkins and Boyce *Criminal law and procedure: cases and materials* The Foundation Press Inc (1977) at 970-975.

774 See *Rex v Harrie* 6 Car and P 105, 172 Eng Rep 1165 (1833). Similarly, in 1861, a defendant charged with false pretenses was given permission to inspect letters written by him to the alleged victim. See *Regina v Colucci* 3 F and F 103, 176 Eng Rep 46 (1861).

775 Where discovery in a criminal case is recognised it has included not only confessions but such subjects as guns and bullets, reports of scientific analyses, autopsies and photographs of persons and places. See *inter alia*, *State v ex rel Mahoney v Superior Court* 78 Ariz 74, 275 P2d 887 (1954), *State v Thompson* 54 Wash 2d 100, 338 P 2d 319 (1959) and *Norton v Superior Court In and For San Diego County* 173 Cal App 2d 133, 343 P 2d 139 (1959). Also see DelRosso and Ernst "Discovery" (2001) *The Georgetown Law Journal* at 1343-1376 for a detailed discussion about criminal discovery in the United States.

776 In 1927, the Missouri court had recognised that the defendant in a criminal case has a right to discovery when circumstances make this important for the proper preparation of his defence. See *S v Tippet* 317 Mo 319, 296 SW 132 (1927). An Iowa statute had also permitted such discovery, but this was held not to be mandatory. See *S v Howard* 191 Iowa 728, 183 NW 482 (1921). The state of California had also recognised the defendant's right to pre-trial inspection of evidence in the possession of the prosecution. The leading California case is *Powell v Superior Court In and For Los Angeles County* 48 Calif 2d 704, 312 P 2d (698) (1957), where the defendant Powell was granted an order of inspection of his signed statement to the police and a type written script of a tape recording, with the right to make copies as requested. Thus, in *Powell v Superior Court*, the Supreme Court established the basic right of the accused in a criminal case to obtain

federal criminal cases and in some states, the names and pretrial statements of prosecution witnesses are not disclosed prior to trial. In other states, felony prosecutors disclose everything in their files unless justification for a protective order for certain items is made. However, a court has a discretion to assist an accused who makes out a case for the discovery of particular documents. The basis for requiring the production of such material is the accused's right to a fair trial.[777] Although most of the rules regarding defence discovery of prosecution evidence are based on statutes and procedural rules, some disclosures to the defence are constitutionally required.

Due process requires the prosecution to turn over exculpatory[778] or other pro-defence evidence in its possession whenever such evidence is "material" to either the determination of guilt or to sentencing.[779] Thus, a prosecutor's suppression of material evidence favourable to the defendant, following a defendant's request, violates due process.[780] This applies "irrespective of the good faith or bad faith of the

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discovery before trial as well as during the trial itself.

777 See *S v Majavu supra* at 67. Also see *Cash v Superior Court* 53 Calif 2d 72, 75, 346 P 2d 407, 408 (1959), where the court stated that "the basis for requiring pre-trial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." Also see Brennan "The criminal prosecution: sporting event or quest for truth? A progress report" 68 (1990) *Washington University Law Quarterly* 1, where the writer discusses the advances in criminal discovery in the United States over the last quarter-century. The writer concludes (at 18) that considerable more discovery to the defence is required than is now permitted if one wants to ensure the fairness of criminal trials. However, see Dennis "The discovery process in criminal prosecutions: towards fair trials and just verdicts" 68 (1990) *Washington University Law Quarterly* 63, which is a critical response to Justice Brennan's arguments. Dennis contends that not only is broader discovery not needed, but it might diminish fairness in criminal trials, by promoting and facilitating the defendants' attempts to subvert justice.

778 The term "exculpatory" comes from the word "exculpate", which means to free from blame or to prove guiltless. Thus, exculpatory evidence may include such evidence that will prove the accused's innocence or would create such doubt as to prevent the prosecution from establishing the guilt of the accused beyond a reasonable doubt. See Webster's *New World Dictionary* World Publication (1971) at 262. Also see Balbastro "Due process right of the accused to be informed before trial of exculpatory evidence: proceedings of symposium on the rights of the accused" 11 (1996) *Institute of Human Rights University of Phillipines Law Centre* 311, for a discussion about the relevant American jurisprudence.

779 See Frase "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 43. Also see *Brady v Maryland supra*, which held that due process of law required that the Government disclose, upon request "evidence favourable to an accused which is material either to guilt or to punishment". This is known as the *Brady* rule. According to Robert Clinton, *Brady* provides a broad constitutional right of the accused to discover upon request any evidence in the prosecution's possession useful to the accused's prosecution of a defence. Another important issue which arises under *Brady* is the timing of the required disclosure of evidence favourable to the accused. Once the courts recognise that the *Brady* decision rests not on an effort to prevent "suppression" of favourable evidence, as its language suggests, but on the right to present a defence, it is clear that disclosure must be made sufficiently early to facilitate effective defence use of the favourable material. See Clinton "The right to present a defence: an emergent constitutional guarantee in criminal trials" (1976) *Indiana Law Review* 713 at 842-843.

780 See *Brady v Maryland supra* at 87.

prosecution".[781] The government obligation has been extended to include a duty to seek out evidence favourable to the accused not in government possession or control.[782] In the post- conviction context, evidence is "material" if there is a "reasonable probability" that the result as to guilt or sentencing would have been different had the evidence been disclosed.[783]

The government is required to preserve evidence only in certain circumstances.[784] Courts have held that the failure to produce evidence requires dismissal of the prosecution in order to protect the accused's right to defend.[785] "Lost evidence" cases involve situations in which the government has been in possession of physical evidence such as bullets, weapons, drugs, blood samples or written statements which are material to the defence, and is unable or unwilling to produce the evidence at trial.[786] When alleged exculpatory evidence is lost or destroyed by the prosecution and is therefore not available for assessment and use at trial or retrial, the defendants must show that comparable evidence is not reasonably available and that the evidence was lost or destroyed in bad faith.[787] Unless the defendant can show bad faith on the police's part, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.[788]

At the Federal level, Rule 16 of the Federal Rules of Criminal Procedure provides for pre-trial discovery of certain information and material in the prosecution's possession. Thus, the inherent power of the trial court to allow discovery in criminal cases in the interests of justice may be exercised with regard to matters not explicitly authorised under the limited discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure or state counterpart.[789] This rule allows the accused to inspect and copy

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781 *Id*. Also see *United States v Bagley supra* at 682, where it was held that the suppression of material evidence is a constitutional violation regardless of whether there has been a specific or general request, or no request at all.

782 See *Kyles v Whitley supra* at 434.

783 See *US v Bagley supra* at 682.

784 See *California v Trombetta* 467 US 479, 488-489 (1984).

785 See *US v Perry* 471 F 2d 1057, 1063 (DC Cir 1972). Also see Clinton *op cit* 847.

786 This problem has often arisen in connection with statements required to be produced under the Jencks Act. Courts have also dismissed prosecutions or reversed convictions because of the prosecution's failure or inability to supply exculpatory evidence previously in its possession. See, *inter alia*, *Johnson v State* 249 So 2d 470 (Fla Ct App 197), 280 So 2d 673 (Fla 1973). These cases demonstrate that the courts are safeguarding the accused's right to defend by presuming that the lost or destroyed evidence would be exculpatory and therefore vital to the accused. Therefore, the government cannot constitutionally act in such a way as to physically deprive the accused of evidence which is material to the defence case. See Clinton *op cit* 848.

787 See *California v Trombetta supra*.

788 See *Arizona v Youngblood* 488 US 51, 58 (1988).

789 The following is open to discovery and inspection in terms of Rule 16:

"(i) Any statement by defendant whether oral or in writing

any statement made by himself, but it does not require the prosecution to disclose the names and addresses of any prosecution witnesses, nor does it oblige the prosecutor to furnish the accused with copies of statements made by prospective witnesses.[790] The defendant is thus given access to material which the government has in its possession, but which is not available to him. Nevertheless, the defendant is given a substantial right of pre-trial discovery under Rule 16. An important aspect of Rule 16 discovery is the continuing duty to disclose.[791] Most of a defendant's reciprocal discovery obligations under Rule 16 arise only after the government has complied with defence requests for disclosure.[792] The fifth amendment is also not an absolute bar to criminal discovery in favour of the prosecution.[793] It has been assumed that the prosecution would have no right to pre-trial discovery in a criminal case. However, a Californian court has held that where important, it is entitled to such discovery as will violate neither the defendant's privilege against self-incrimination nor the attorney-

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(ii) Documents and tangible objects
(iii) Reports of examination and tests such as results or reports of physical or mental examinations and of scientific tests or experiments or copies thereof
(iv) However, statements by other state witnesses and evidence before a Grand jury are excluded except evidence of the defendant himself."

See Rule 16 of the Federal Rules of Criminal Procedure. Also *S v Majavu supra* at 67.

790 See Taggart *op cit* 238.

791 See Rule 16(c) which provides that the Government must "promptly notify" the defendant of additional discoverable material which has been the subject of a previous discovery request, upon receiving knowledge of the existence of the material. See *US v James* 495 F 2d 434 (5th Cir) 419 US 899 (1974).

792 See Rule 16(b)(1)(A)-(B) of the Federal Rules of Criminal Procedure. Rule 16(b)(1) allows reciprocal discovery by the government of documents, tangible objects, and results or reports of examinations and tests within the possession of the defence, if the government has already complied with a defence request for discovery of similar items under R 16, or the defence intends to present the requested material as evidence, or the defence witnesses who prepared a report will testify regarding its contents. The only exception is Rule 16(b)(1)(c) which requires a defendant to disclose a summary of expert testimony where he has filed a notice under Rule 12(2)(b) of intent to present expert testimony regarding his mental condition. See Jordan, Kehoe and Schechter "The Freedom of Information Act – a potential alternative to conventional criminal discovery" 14 (1976) *The American Criminal Law Review* 73 at 92-96 for a detailed discussion about Rule 16 discovery.

793 See *Williams v Florida* 399 US 78, 85 (1970) where it was stated that "Nothing in the Fifth amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defence." Here, the Supreme Court upheld the requirement under Federal Rule of Criminal Procedure 12.1 that the defendant give notice of an alibi defence. This decision is said to be the turning point in the development of compulsory defence disclosure in the United States. Also see Beckler *et al* "Protecting defence evidence from prosecutorial discovery" 68 (1990) *Washington University Law Quarterly* 71. Also see Williams "Sidestepping *Scott*: modifying criminal discovery in Alaska" (1998) *Alaska Law Review* 33, where the writer examines the possibility of instituting reciprocal criminal discovery in Alaska. The writer makes out a case for reciprocal discovery, by contending (at 34) that without reciprocal discovery, the defence has access to more information than does the prosecution from putting on a strong case as possible. Reciprocal discovery systems thus aim to rectify this imbalance by providing the prosecution with greater discovery access to the defendant's information.

client privilege.[794]

The leading case of *Jencks v United States*[795] established the defendant's right in a criminal case to inspect written reports such as FBI records, after the witness has testified in court, to aid in cross-examination. This led to the advent of the so-called Jencks Act, 18 USCA s 3500, which relates to the production of statements and reports of witnesses.[796] The Jencks Act narrowly defined which statements were discoverable and prohibited courts from ordering disclosure before the witness testified at trial.[797] If the government does not turn over the requested documents, the testimony of the witness will be stricken and the trial will continue, unless the court determines that the interests of justice call for a mistrial.[798]

Criminal discovery at the federal level falls far short of the American Bar Association Standards for Criminal Procedure which require the prosecution to provide, upon request, names and addresses of witnesses together with any relevant witness statements.[799] The experience at the state level varies a great deal. Defence counsel are using the federal Freedom of Information Act (hereinafter referred to as the "FOIA") and state open record laws as substitutes for, or aids to criminal discovery, due to the restrictiveness and complexity of federal criminal regime and the diversity of state criminal discovery practice.[800] Indeed, FOIA access has a number of advantages over conventional criminal discovery.[801]

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794 See *Jones v Superior Court of Nevada County* 58 Cal 2d 56, 22 Cal Rptr 879, 372 P 2d 919 (1962).

795 353 US 657, 77 S Ct 1007, 1 L ed 2d 1103 (1957).

796 The Jencks Act provides that : "In any criminal prosecution ... no statement or report ... made by a Government witness or prospective Government witness (other than the defendant) ... shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case." Thus, the Jencks Act provides for defence access to statements made by a Government witness which relate to the subject matter of his testimony at trial.

797 See Douglass "Balancing hearsay and criminal discovery" 68 (2000) *Fordham Law Review* 2097 at 2135. This article discusses how the process of criminal discovery can and should adapt to correct the hearsay-discovery balance when the government relies on hearsay.

798 See 18 USC s 3500(d).

799 See Taggart *op cit* 239.

800 Three general types of countervailing interests are said to be recognised in the FOIA, namely:

(1) the nation's interest in self-preservation;
(2) the agency's interest in maintaining the secrecy of its decisional processes and information sources; and
(3) the individual's interest in remaining secure from invasions of privacy.

See Jordan *et al op cit* 75.

801 These include the following: although a potential defendant can't seek discovery before charges are laid or after the time provided for by the court rule, the defendant can make the FOIA request before charges are brought, during conventional discovery period or after the period expires; some records that would not be discoverable under the rules or that would be the subject of

The courts in the United States have generally resisted attempts by criminal defendants to gain access to a wider range of material under the FOIA than is available by conventional discovery. However, some judges have indicated their willingness to use the FOIA as a criminal discovery tool.[802] Nevertheless, the FOIA has had little impact on federal criminal discovery practice. The major factor is that most judges are unwilling or reluctant to allow the FOIA to supplement and amend the partial code of pre-trial discovery in the Federal Rules of Criminal Procedure.[803] In those courts that have taken a restrictive approach, the FOIA remains available as an alternative to conventional discovery as long as FOIA disclosure would not exceed the provisions in the Federal Rules.[804]

The above discussion demonstrates that the Federal Rule of Criminal Procedure 16, the Jencks Act and the *Brady* rule govern discovery in criminal proceedings in the United States. The general trend over the past two decades is to expand the scope of pre-trial discovery permitted to defendants. Thus in American Law, the accused not only has the right to interview all witnesses, even those held in custody by the state, but also the right through the discovery process, of gaining access to all the material available to the prosecutor, which would include statements made by witnesses, exhibits, forensic reports and the like. The American experience illustrates that the accused is not entitled to discovery as of right but the court has a discretion to come to his assistance on application by him to the extent that the court is satisfied that he has made out a case for discovery of certain documents.[805]

5.3.6.3 UNITED KINGDOM

In the **United Kingdom**, the disclosure of evidence against the accused is a major

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privilege are available under the FOIA such as witness lists, prosecution guidelines and instructions to prosecutors; FOIA also requires no showing of reasonableness or relevance unlike the discovery motion. See Taggart *op cit* 239-240. Jordan *et al* also describe the advantages of FOIA discovery to be the absence of any timing or standing requirements in an FOIA action, and the fact that the Government rather than the FOIA plaintiff carries the burden of proof regarding the applicability of a disclosure exemption. See Jordan *et al op cit* 131-134 for a detailed discussion.

802 In the case of *United States v Wahlin* 384 F Supp (WD Wis) (1974) 43, the accused who was charged with excise tax evasion filed a discovery motion under Rule 16, seeking access to Internal Revenue Service private letter rulings which were necessary for the preparation for his defence. The court found that the Government's contention that the defendant can't rely on the FOIA to obtain discovery in a criminal action is "preposterous".

803 The FOIA also has disadvantages. Jordan *et al* set out the disadvantages of using the FOIA such as delay, expense and inadequate remedies. See Jordan *et al op cit* 134-138.

804 See Taggart *op cit* 242. Also see Jordan *et al op cit* 91, where the writer examines ways that the FOIA can assist the criminal lawyer during pre-trial discovery.

805 Also see Louisell "Criminal discovery: dilemma real or apparent?" (1961) *California Law Review* 56-103, for a detailed discussion about criminal discovery in the United States. The writer concludes that when criminal discovery genuinely promotes the ascertainment of facts, it cannot arbitrarily be withheld in the name of protecting the balance between the state and the accused. He also states that the long-term path for discovery is one of development, that focusses on the difficulties that inhibit growth such as tackling organised, professional or conspirational crime and their intelligent resolution. Also see *Powell v Supreme Court supra*.

element of a fair hearing. Article 6(3)(a) of the European Convention on Human Rights requires that a person charged with a criminal offence be informed of the nature and cause of the accusation against him.[806] The need for the accused to have access to information necessary for the proper preparation of the defence arose as a result of several cases in England involving miscarriages of justice.[807] This led to changes to prosecution disclosure by precedent and statute.

5.3.6.3.1 THE POSITION BEFORE 1996

It was suggested in *Marks v Beyfus*[808] that material which assists the defence should always be disclosed. However, in *R v Keane*,[809] the Court of Appeal favoured a balancing exercise between public interest in the non-disclosure of the documents and the public interest in the proper administration of justice. Disclosure should always be ordered if the withholding of the information "may prove the defendant's innocence or avoid a miscarriage of justice".[810]

Prior to the Criminal Procedure and Investigations Act 1996 (hereinafter referred to as the "CPIA"), the matter was governed by guidelines issued by the Attorney-General in 1981 supplemented by court cases.[811] These guidelines demonstrate that an accused who is tried in the English High Court is given access well before the trial. The information made available to the accused by means of the procedures set out in the Attorney-General's guidelines is additional to the information the accused receives in the form of the "committal bundle", the indictment and further particulars. The accused's access to the prosecution's statements is curtailed only in special circumstances for which there are detailed guidelines to ensure that there is no abuse of the access given.[812]

A prosecutor is obliged to inform an accused of his rights to request advance information.[813] If the prosecutor receives such a request, he must furnish the accused with a copy of those written statements which he proposes to use in the proceedings, or a summary of the evidence of which he proposes to use in the proceedings.

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806 The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law.

807 Cheney D *et al Criminal justice and Human Rights Act 1998* Jordans (1999) at 91.

808 (1890) 25 QBD 494, 488. Also see *R v Governor of Brixton Prison, ex p Osman* [1991] 1 WLR 281, 290.

809 [1994] 1 WLR 746.

810 See *R v Turner* (Paul) [1995] 1 WLR 264.

811 In practice the most extensive access to information is given to an accused charged in the High Court on an indictment, in terms of guidelines laid down by the Attorney-General.

812 *S v Sefadi supra* at 29-33.

813 *Halsbury's Laws of England* Vol 11(2) 1990 at 692. Also see *S v Majavu supra* at 69.

However, if the prosecutor believes that the disclosure of any evidence might lead to a witness being intimidated or the course of justice being interfered with, he is not obliged to comply with the request. The prosecution must however indicate in writing that he refuses to give such advance information. However, the court can compel the prosecutor to provide such information.[814] The prosecutor's failure to disclose to the defence statements of witnesses which might help the defence case amounts to a denial of natural justice, and any conviction obtained in such circumstances is liable to be squashed by the Divisional Court.[815] This principle also applies to the disclosure of witness statements when a material discrepancy exists between evidence given on oath and the contents of written statements in a trial of a summary offence.

The prosecution thus owes a duty to the courts to ensure that all relevant evidence which assists an accused is either led by them or made available to the defence.[816] This right is said to be part of the general right to a fair trial.[817] If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness requires that the rules of natural justice must be observed. Under the common law, the prosecution was obliged to provide material which had or might have some bearing on the offences charged. This meant that all "material" evidence was discloseable.[818] There was a duty to provide all statements which have been taken, whether or not the witnesses were apparently credible.[819] This includes material relevant to the credibility of prosecution witnesses, but not material which relates only to the credibility of defence witnesses.[820]

Therefore, the position prevailing before 1996 was that full disclosure of prosecution material before trial was regarded as an essential element of a fair trial. The position regarding trials on indictment was that the defendant is entitled to advance disclosure not only of the evidence on which the prosecution is intending to rely but also of "unused material".[821] The position prevailing in the magistrate's courts was that there was no obligation on the prosecution to disclose evidence regarding summary offences. However, there is a statutory obligation in the magistrate's court regarding

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814 These rules originate from the Magistrates' Courts (Advance Information) Rules of 1985.

815 See *R v Leyland Justices ex parte Hawthorne* (1979) 1 QE 2(3).

816 See *R v Ward* (Judith) [1993] 1 WLR 619, 645;[1993] 2 All ER 577.

817 See *R v Brown* (Winston) [1998] AC 367, 374 F, where the learned judge Lord Hope stated that "the rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial."

818 See *R v Keane supra* at 746.

819 See *R v Mills* [1998] AC 382.

820 See *Wilson v Police* [1992] 2 NZLR 533.

821 In *R v Maguire* [1992] 94 Cr App R 133 and *R v Ward supra*, the courts ruled that "unused material" applied to almost all material collected during the prosecution. The prosecution also had to disclose any matters which might be used against prosecution witnesses for example, that the witness had been subject to police disciplinary hearings.

triable-either-way offences which are being tried summarily.[822] In *R v Liverpool Crown Court ex p Robinson,*[823] it was held that a general duty rests on the court to ensure a fair trial which would require the prosecution to produce all the material evidence.[824] The prosecution had to determine what was relevant, though the defence could ask the court to rule on this if there was a dispute. The police and prosecution resented these developments because they were now faced with the dilemma of either having to disclose sensitive and confidential material, especially in relation to informants, or having to discontinue prosecution.[825]

There was no common-law obligation on the defence to disclose the nature of the defence before 1996. However, it was introduced by statute in the following circumstances: for alibi defences under the Criminal Justice Act 1967; for expert evidence in terms of section 81 of the PACE 1984 and for preparatory hearings in serious fraud cases in terms of section 9 of the Criminal Justice Act 1987.[826] This was done to facilitate the jury's function to arrive at the truth.

The prosecutor may also seek immunity from disclosure on the grounds of public interest immunity because the information would reveal the identity of informants or details of police operational practices. If the prosecutor believes that the disclosure would not be in the public interest he can apply to the court for an order to that effect.[827] If after a conviction, it becomes clear that the material does exist which, if disclosed, would have influenced the way in which the defence was conducted, then the non-disclosure by the prosecution amounts to a material irregularity which entitles an appeal against conviction to succeed. Usually the defence would be aware of an application to decide on a public interest immunity claim and could make representations in court. However, the courts have now approved an *ex parte* procedure whereby the prosecution can approach the court for an order for immunity from disclosure without informing the defence at all.[828] These procedures limit the

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822 See s 48 of the Criminal Law Act 1977 and Magistrates' Courts (Advance Information) Rules 1985, SI 1985/601.

823 [1986] Crim LR 622.

824 The following definition of "material" has been made by the judges:

(a) anything which was possibly relevant to an issue in the case
(b) anything which possibly raised a new issue not already apparent and
(c) anything which held out a real prospect of providing a lead on evidence concerning the material in (a) or (b).

See *R v Liverpool Crown Court ex p Robinson supra*.

825 See Cheney *et al op cit* 91.

826 *Ibid* at 92.

827 The court will consider the issue by balancing the public interest in non-disclosure against the interests of justice as far as the defendant is concerned. After making an order of non-disclosure, the court must consider under review, whether it remains contrary to the public interest to disclose the material. *Ibid* at 93.

828 It was so held in *R v Keane supra* and *R v Davis* [1993] 2 All ER 643.

access of the defence to sensitive material.

5.3.6.3.2 POSITION IN TERMS OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 ("CPIA")

The position in the United Kingdom has been modified by the Criminal Procedure and Investigations Act 1996 (the "CPIA") and the Code of Practice issued under it. These replace the common law rules regarding prosecution disclosure.[829] The CPIA has had a major impact on the procedure for disclosure.[830] The 1996 Act involves a three-stage process namely, primary disclosure by the prosecution which is automatic, submission of a statement by the defence and secondary disclosure by the prosecution. The prosecution is required to disclose to the defence any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused ("primary disclosure").[831] The prosecution is obliged to furnish the defence with copies of all relevant material to the offence, details about the offender and the circumstances of the case, as well as evidence of expert scientific witnesses. The second stage involves a statement by the defence setting out the material basis of its case. The defence must give a "defence statement" to both the court and the prosecutor setting out in general terms the nature of the accused's defence and indicating why he disagrees with the prosecution.[832] Flaws in the defence statement may lead to adverse consequences for the accused as the jury may draw adverse inferences.[833] According to Sharpe, this reciprocal disclosure provision weakens the privilege against self-incrimination, and may be challenged under article 6(2) as infringing the presumption of innocence.[834]

The prosecutor must respond to the defence statement and disclose to the defence any prosecution material which has not previously been disclosed and which might be

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829 See s 21(1) of the CPIA.

830 See Sharpe "Disclosure, immunity and fair trials" 63 (1999) *The Journal of Criminal Law* 67-82, for a detailed discussion about the Criminal Procedure and Investigations Act 1996. Also see Sprack "The Criminal Procedure and Investigations Act 1996: (1) The duty of disclosure" (1997) *The Criminal Law Review* 308.

831 See s 3(1) of the CPIA.

832 See s 5 of the CPIA. It should be noted that Scotland also has a scheme of defence disclosure. The defence is entitled to disclose any pleas of special defence such as insanity or alibi 10 days before the trial. The defence is also entitled to furnish the prosecution with a list of their witnesses before the trial. A quasi-inquisitorial procedure is also held in advance of the trial, whereby the defendant is examined regarding the nature and particulars of his defence. For a more detailed discussion about the Scottish scheme, see Dawkins *op cit* 58.

833 According to Sharpe, s 11 of the CPIA imposes a penalty by allowing the court to draw adverse inferences at trial for "faults in disclosure" by the accused, but a failure by the police or prosecutors to divulge information required under the act is not penalised. This clearly demonstrates inequalities of structure and treatment. See Sharpe *The Journal of Criminal Law op cit* 71.

834 See Sharpe "Article 6 and the disclosure of evidence in criminal trials" (1999) *The Criminal Law Review* 273 at 277.

reasonably expected to assist the accused's defence ("secondary disclosure").[835] Thereafter the prosecutor must consider whether at any time there is prosecution material which ought to be disclosed. Where the accused has given a statement to the prosecution, the prosecutor is obliged to make any additional disclosures that may be necessary. Where the prosecution comes across material which might undermine the prosecution case and which has not been disclosed to the accused, such material should be disclosed to the accused as soon as possible.[836] The duty to disclose under article 6, extends to any material for and against the accused. This includes material which may undermine the credibility of defence witnesses, as well as those appearing for the prosecution.[837] The disclosure provisions do not apply until after committal.[838] It is envisaged that some disclosure may be required before then, although this would not normally exceed primary disclosure.[839] The aim of these new rules is to make prosecutions more efficient but to maintain fairness.

The Criminal Procedure and Investigation Act of 1996 has not changed the procedures regarding disclosure on public interest immunity much. Section 8 of the Act requires the prosecutor on application to the trial court, not to disclose information where it would not be in the public interest to do so. Where material has not been disclosed on the grounds of public interest immunity, an accused person can apply to court for a review of this decision during the trial.[840] The common law rules regarding

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835 See s 7 of the CPIA. The prosecutor is said to be under a continuing duty to review questions of disclosure. See s 9 of the CPIA. The prosecutor's continuing duty to disclose conforms with the viewpoints in *Shabalala* and *Stinchcombe supra*.

836 The CPIA 1996 now requires the prosecutor to share with the defence the evidence that he does not intend to use, that is, "unused material". This not only applies to proceedings on indictment but also to all forms of summary trial. See Spencer "Procedural anomalies" (2000) *Cambridge Law Journal* 51.

837 In *R v Brown* [1997] 3 All ER 780, the prosecution did not disclose statements by a potential defence witness which the prosecution did not consider credible. The Court of Appeal held that informing the defence of the name and address of the witness was sufficient. However, the House of Lords concluded that the non-disclosure was a material irregularity. Although the failure to disclose material to the defence is a breach under art 6, the Commission has accepted that the late introduction of previously undisclosed evidence by the prosecution under the *ex improviso* rules does not infringe the Convention.

838 See Azzopardi "Disclosure at the police station, the right to silence and *DPP v Ara*" (2002) *Criminal Law Review* 295-300, where he states that the guidelines contemplate that disclosure should sometimes occur before the duty arises under the CPIA. For example, when disclosure is given prior to a bail decision or before committal proceedings.

839 See *R v Director of Public Prosecutions*, *ex p Lee* [1999] 2 All ER 737.

840 However, a different view is taken of police disclosure of information obtained at interviews. See *Woolgar Chief Constable of Sussex* [1999] 3 All ER 604, where the appeal court stated that information obtained from the police from interviews with suspects is *prima facie* confidential and is normally to be used in the course of ensuing criminal proceedings. However, when a regulatory body in the course of its statutory duty is holding an inquiry, the police are entitled to release information in their possession to it for the purpose of that inquiry (but for no other purpose), whether or not the person affected consents and whether or not the information has been requested by the regulatory body.

whether disclosure is in the public interest will still apply.[841]

The obligation to make pre-trial disclosure does not apply to trials in the magistrate's court. The absence of such disclosure does not affect the fairness of any trial. However, justices must grant reasonable adjournments to enable the defendant to deal with the evidence.[842] Such disclosure ought to be given if requested unless there are good reasons for the refusal, such as protection of a witness.[843] However, the provisions of the CPIA do not affect the disclosure position.[844] This approach is said to be consistent with article 6 of the Convention.[845]

According to Sharpe, the CPIA has restricted the availability of information to the defence, placed new disclosure obligations on an accused prior to trial and has, through the Code expanded the scope of public interest immunity.[846] It has also been suggested that the provisions of the CPIA may be in breach of article 6 of the Convention.[847] Thus, the CPIA has been subjected to criticism. Indeed, the statutory disclosure regime imposed by the CPIA is said to increase the structural imbalance that exists between the

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841 See s 21(2) of the CPIA. A number of categories of documents fall under public interest, namely documents which would tend to disclose the identity of informers (see *Savage v Chief Constable of Hampshire* [1997], WLR 1061); documents which might reveal the location of police observation posts (for example, *R v Rankine* [1986] QB 861); police reports (see *Taylor v Anderton* (Police Complaints Authority Intervening) [1995] 1 WLR 447 or manuals. Regarding third party disclosure in England and Wales, see Temkin "Digging the dirt: disclosure of records in sexual assault cases" (2002) *The Cambridge Law Journal* 126, where the writer calls for amendments to the present law. It should be noted that the existing regime under the Criminal Procedure (Attendance of Witnesses) Act 1965 as amended by s 66 of the CPIA, has a two-stage process requiring the defence first to demonstrate materiality and the court to perform a balancing act required by public interest immunity.

842 See *R v Kingston-upon-Hull Justices*, *ex p McCann* (1991) 155 JP 569.

843 See *R v Kingston supra* at 573E-574B; *R v Stratford Justices*, *ex p Imbert* (1999) 2 Cr App R 276.

844 See *R v Stratford Justices exp Imbert supra* at 376.

845 *Ibid*. Also see Clayton and Tomlinson *The law of human rights* Oxford University Press (2000) 592-595.

846 See Sharpe *The Journal of Criminal Law op cit* 67.

847 This is because there is no independent assessment of the relevance of material; disclosure is "conditional" on the services of a "defence statement"; there is no obligation to disclose material obtained in other investigations or held by other people, and there is no obligation to provide disclosure in the case of summary trials. For a more detailed discussion see Clayton and Tomlinson *op cit* 707-709. Also see Sharpe *The Criminal Law Review op cit* 273, where the writer examines the possible impact of the Human Rights Act 1998 on the law relating to the disclosure of unused material in criminal cases. The writer concludes that despite a reduction in the prosecution obligation of disclosure in terms of the CPIA, it is unlikely that the Act, as a whole, will be impugned by the direct application of art 6.

state and the defence.[848] According to Sprack, the courts should interpret the CPIA in such a way as to ensure that material relevant to the question of the accused's guilt is made available.[849] Therefore, UK courts must ensure that the use which is made of the defence statement, does not infringe the principle enshrined in article 6(2) of the European Convention.[850]

Therefore, in the United Kingdom, the accused is given relatively extensive rights of access to information in order to prepare his defence properly. This is in line with Convention case-law which suggests a broader obligation to disclose any material which may "assist the accused in exonerating himself" to ensure "equality of arms".[851]

5.3.6.4 GERMANY

German Law recognises the right of an accused to have access to the contents of the prosecution's documents. Article 147 of the German Criminal Procedure Act (better known as "StPO") provides that the defendant or his legal representative can see all the documents from the outset.[852] The defence lawyer has the right to examine all the files
and evidence of the prosecution and to make photocopies of them.[853] This right to examine the files represents a necessary element of the "equality of arms" principle derived from the principle of a fair trial. However, the accused's right of access is not unlimited, and it may be curtailed in cases where the investigation has not been completed and access to the documents may prejudice the investigation.[854] Thus, the prosecution may deny defence counsel an inspection before the conclusion of

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848 Sharpe *The Journal of Criminal Law op cit* 80-82, where the writer concludes that the crown has been given greater control of information and greater scope to seek immunity from disclosure of matters that may be relevant to the defence case. She advocates a random review by an independent disclosure Commissioner to discourage investigators and prosecutors from non-compliance with the minimum criteria of the Act.

849 This trend will conform with the UK's obligations under art 6 of the European Convention on Human Rights which deals with the right to a fair trial. See Sprack *op cit* 319.

850 Article 6(2) of the European Convention states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law". *Ibid* at 320.

851 See Cheney *et al op cit* 94. However, Sharpe maintains that it would be naïve to assume that the incorporation of the European Convention on Human Rights will necessarily lead to a "declaration of incompatibility" in respect of the CPIA statute. See Sharpe *The Journal of Criminal Law op cit* 80. According to Azzopardi, the issue of inequality of arms need to be addressed. In *DPP v Ara* [2001] 4 All ER 559, common sense and good practice dictated that disclosure should have been forthcoming from the outset. This will assist both sides to come to a fuller understanding of all documents at an early stage and possibly obviate a costly trial and avoid the emotional and financial losses to the accused and his family. See Azzopardi *op cit* 295-300.

852 In Germany, the accused also has the right of access to read all the files of the state attorney and the court, including the recordings of the interrogations of the police and state attorney. This amounts to full pre-trial discovery. See s 147 of the German Criminal Procedural Code or StPO. Also see Foster *German legal systems and laws* Blackstone Press Ltd (1996) 220.

853 In the German Federal CCP, only the defence lawyer, and not the accused, is given the opportunity to inspect the files.

854 See s 147 II of StPO.

investigations, if the inspection will endanger the purpose of the investigation.[855]

Therefore, if the prosecutor refuses to allow the defence to examine the files, his decision can't be appealed against.[856] No violation of the fair trial principle in this regulation was found by the Federal Constitutional Court, because the restriction only applies as long as the prosecutor is still investigating.[857] When the investigation phase is concluded, the right of access to the documents is revived and the defence counsel has unrestricted sight of the documents and an unlimited right to inspect the files.[858] The right to examination of files explicitly extends not over all files brought before the court but does only exist in so far as the accused needs the information they contain.

Thus, the experience in Germany illustrates that an accused is allowed extensive albeit controlled rights of access to information in the police files.

5.3.6.5 THE DECISIONS OF INTERNATIONAL INSTRUMENTS

In criminal cases, every party to the proceedings must have a reasonable opportunity of presenting his case to court under conditions which do not place him at substantial disadvantage *vis-á-vis* his opponent.[859] The right to "equality of arms" means that all parties must have access to records and documents which are relied on by the court.[860] The parties should have the opportunity to make copies of the relevant documents from the court file. The prosecution is obliged to disclose to the defence

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855 However, this does not apply to the following inspections, namely, the records of the investigation of the accused, examination hearings before the judge for which the defence lawyer was granted the right to be present or should have been granted such a right, or of expert witnesses' testimonies. In such cases, the defence lawyer may not be fully denied access to documents at any stage in the proceedings. See Eser "The acceleration of criminal proceedings and the rights of the accused: comparative observations as to reform of criminal procedure in Europe" 3 (1996) *Maastricht Journal of European and Comparative Law* 341 at 360.

856 See Samson "The right to a fair criminal trial in German criminal proceedings law" in Weissbrodt and Wolfrum (1998) *op cit* 530.

857 The Federal Constitutional Court had to make a finding in a decided case whether the denial of the right to examination of files violates the right to a fair trial. The Court held that the prosecution's advantage in having the information during the investigation is constitutional. It also declared that an oral notification of the incriminating circumstances is sufficient in "normal cases". The Court held:

> "From the right of an accused to a fair trial complying with the law and order, follows the right of an accused in custody to have his defence lawyer examine the file, if and as far as he needs the information in them in order to effectively influence the judicial custody decision and if an oral notification of the facts and evidence that the court plans to base its decision on is not sufficient."

Ibid at 531.

858 See *S v Sefadi supra* at 34-35. Also see Eser *op cit* 360.

859 See *De Hals and Gijsels v Belgium* (1997) 25 EHRR para 53.

860 See *Lobo Machado v Portugal* (1996) 23 EHRR 79 para 31.

all the material evidence for and against the accused.[861] The European Commission and court have also considered complaints regarding the non-disclosure of evidence to defendants in criminal trials. In *Edwards v UK* [862] the applicant complained that evidence which had not been disclosed by the prosecution in the course of his trial rendered the trial unfair. The court said that its task is to ascertain whether the proceedings in their entirety were fair. It held that the defects of the original trial were remedied by the subsequent procedure before the court of appeal and that, as a result, there had been no breach of article 6.

The Commission has found breaches in the following circumstances.[863] The Commission has held that the prosecution must disclose any material in their possession which "may assist the accused in exonerating himself or obtaining a reduction in sentence".[864] Where it is claimed that the material which is not disclosed is subject to "public interest immunity", the prosecution must make an application to the trial judge, if necessary, without notice. In *Jasper v UK*[865] the court accepted that, in some cases, it might be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Only such measures restricting the rights of defence that were strictly necessary were permissible. The court held that where the defence had been informed about the application for non-disclosure and had been able to outline its position, there was no breach of article 6(1). However, in *Rowe and Davis v UK*[866] the court held that the prosecution's failure to make an application to the trial judge to withhold material was a breach of article 6. The fact that the material had been subsequently reviewed by the court of appeal, was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld material by the trial judge. Occasionally, the courts may approve the non-disclosure of evidence to the defence, for example, an application by the prosecution authorities to protect informers or security interests. The extent to which *ex parte* review of the material by the trial judge or court of appeal provides sufficient procedural guarantees of fairness, and lack of arbitrariness is under examination in cases pending before the Commission.[867]

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861 See *Jespers v Belgium* 8403/78 (Rep), Dec 14, 1981, 27 DR 61.

862 See *Edwards v UK supra* at 417.

863 Where the applicant was not given the opportunity to comment on a medical report. See *Feldbrugge v The Netherlands* (1986) 8 EHRR 425.

864 See *Edwards v UK supra*. However, see *Bendenoun v France* (1994) 18 EHRR 54, where there was no breach as a result of a failure to disclose a bulky file whose contents the applicant was aware of and which was not relied on by the court.

865 2000/30 EHRR 1, Application No 27052/95.

866 28901/95, *The Times*, 1 March 2000. Also see *Atlan v United Kingdom* (2002) 34 EHRR 33, where the European Court held that the prosecutor's failure to place evidence before the trial judge and allow him to rule on the question of disclosure deprived the applicants of a fair trial. Therefore, a violation of art 6(1) was found.

867 See *inter alia*, *Rowe v Davis v UK supra* at 28901/95.

A procedure is said to be not truly adversarial if it fails to ensure "equality of arms".[868] In *Adams v Jamaica*[869] a witness statement that incriminated the accused in a murder trial had not been disclosed to the defence, nor presented at the preliminary inquiry. However, it was admitted as evidence at the trial notwithstanding defence counsel's objection. The United Nations HRC held that even though his counsel had objected to the production of this evidence, as he did not request a postponement, "or even ask for a copy of the statement," no violation of the Covenant had been committed in this respect.[870] However, a state cannot withhold evidence that indicates another person committed the crime.[871] The Committee has held that the failure to make a statement implicating another person in *Peart* "seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants," and violating article 14(3)(e).[872]

Therefore, both the European Court and the HRC have found disclosure to be necessary for purposes of a fair trial and to ensure "equality of arms".

5.3.6.6 NEW ZEALAND

In New Zealand, formal pre-trial disclosure in criminal cases is said to be quite a recent development. The accused is not entitled to discovery as of right, but the court

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868 See *Larry v Belgium* (1989) 11 EHRR 529, where Mr Larry had sought inspection of the investigative case file. The court held that it was essential to inspect the documents in question to challenge the lawfulness of the arrest warrant effectively. Whereas crown counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity to challenge appropriately the reasons relied upon to justify a remand in custody. The failure to ensure equality of arms led to the procedure not being truly adversarial, and therefore it was a breach of art 5(4).

869 Communications No 607/1994 UN Doc CCPR/C/58/D/607/1994 (1996).The accused contended that his opportunity to cross-examine witnesses on the same terms as the prosecution had been denied, as well as his right to benefit from adequate facilities to prepare his defence.

870 The Committee also expressed concern that there is no obligation on the prosecution in Japan to disclose evidence that it may have gathered during the course of the investigation other than that which it intended to produce at trial, and also that the defence has no right to ask for the disclosure of that material at any stage of the proceedings. See the concluding observations of the Human Rights Committee: Japan CCPR/C/79/Add 102 (1998). Therefore, the Committee recommended that Japan revise its law and practice to enable the defence to have access to all relevant material in terms of art 14(3). See Weissbrodt *The right to a fair trial* Martin Nijhoff Publishers (2001) 136-137.

871 See the case of *Garfield and Andrew Peart v Jamaica* Communications Nos 464/1991 and 482/1991 UN Doc CCPR/C/54/D/464/1991 (1995), which concerned a murder case where the main witness for the prosecution had identified the accused as the murderer, leading to his conviction and sentence. However, during cross-examination, the witness admitted to having made a written statement to the police implicating another person on the night of the incident. The prosecution refused defence counsel's request for production of the statement in *Peart*, and the trial judge found that counsel had failed to put forward any reason why the statement should be provided. The defence counsel only saw the statement after the rejection of the appeal and the submission of his petition for special leave to appeal to the Judicial Committee of the Privy Council, named another man as the murderer.

872 See *Garfield and Andrew Peart v Jamaica supra*. This case illustrates the link between the right to information and the right to present one's case.

has a discretion to come to his assistance when he applies for discovery. However, the court must be satisfied that he has made out a case for discovery of certain documents before granting his request. The Official Information Act of 1982 (hereinafter referred to as the "OIA") has impacted on the practice of discovery.[873] The OIA gives citizens the right to personal information but permits the government to refuse to disclose if disclosure would prejudice, *inter alia,* the maintenance of the law.[874] Therefore, the prosecution's obligations of disclosure have expanded significantly, both at common law and as a result of legislative intervention, especially with the advent of the Official Information Act.[875]

The provisions of the OIA were interpreted by the New Zealand Appeal Court in the case of *Commissioner of Police v Ombudsman*,[876] where the issue concerned a request by the defence for copies of statements in the police docket. The police refused to disclose these statements on the basis that the information was exempt from disclosure in terms of section 6(c) of the OIA.[877] The majority held that before criminal charges are laid, investigations by the police will be protected from disclosure by section 6(c). However, once criminal proceedings have commenced, the balance aimed at by section 6(c), will shift in favour of disclosure. The court held therefore, that the decision of the Commissioner of Police to withhold access to the police briefs was incorrect. The court also found that to allow the defendant access to the police briefs would not jeopardise the administration of the law. Therefore, the defendant's right to a fair trial was found to prevail over the interest in investigative secrecy. The disclosure of such documents was viewed as being essential to a fair trial. This decision demonstrates that prosecution disclosure is linked to the duty of fairness and the defendant's right to a fair trial.[878] The case also illustrates the innovative and bold approach of the New Zealand courts.

However, defence disclosure obligations have not changed much in New Zealand. The only formal obligation on the defence is to disclose intended reliance on evidence

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873 The Official Information Act of 1982 governs pre-trial discovery in New Zealand. Discovery under the OIA is available as of right under the statute. See Doyle and Hodge *op cit* 118.

874 It has been held that "maintenance of the law" includes the public's interest in the fairness and finality of a criminal trial, and that "personal information" includes information held by the police which is relevant to an offence charged against the person. See Taggart *op cit* 288.

875 See Dawkins *op cit* 36. This article reviews the main arguments for and against increased defence disclosure.

876 (1988) 1 NZLR 385. These statements were made by two witnesses who were policemen. The accused had been charged with driving with excess blood alcohol, refusing to accompany a police officer and driving without a licence.

877 The exemption provides that the official information may be withheld if such information would prejudice the maintenance of law including the prevention, investigation and detection of offences and the right to a fair trial. See Taggart *op cit* 288.

878 The *Commissioner of Police v Ombudsman* decision illustrates the transformation of the Official Information Act 1982 into an engine of criminal discovery. This case is said to regulate the duty of fairness at common law.

of alibi in trials on indictment.[879] Dawkin disagrees with the argument that reciprocal pre-trial disclosure regimes promote the pursuit of truth and the more efficient conduct of criminal trials.[880] Rather, he suggests that instead of compelling the defence to reveal all, a greater degree of voluntary pre-trial disclosure could be encouraged by the introduction of a comprehensive code on prosecution disclosure.[881] Prosecution disclosure is also implicitly required by section 24(d) and section 25(a) of the New Zealand Bill of Rights Act 1990 respectively.[882]

Thus in New Zealand, the disclosure of prosecution documents is seen as an integral part of the accused's right to a fair trial.

5.3.6.7 AUSTRALIA

In Australia, the rights of discovery are virtually non-existent. Indeed, it has been said that there is no right to discovery in the criminal law.[883] Academic writers have criticised as "archaic" the rationales underlying "the maintenance of an adversarial system without modification".[884] Committal proceedings, names of prosecution witnesses and copies of statements are the usual scope of discovery. Generally, the magistrate has a discretion to grant the defendant access to statements of prosecution witnesses where the defendant has sought their production.[885] There are provisions in all jurisdictions, except Tasmania, for the committal proceedings to take place by the tendering of the statements of witnesses, either with or without oral evidence, provided that the statements are in the necessary form.[886] The prosecution is obliged to serve copies of exhibits on the defendant prior to a hearing.[887] The defendant is obliged to indicate whether he objects to the statements being tendered or wishes any of the witnesses to attend for cross-examination.[888]

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879 See Dawkins *op cit* 36.

880 He states that in principle, mandatory defence disclosure is also difficult to reconcile with the nature of the adversarial process and a defendant's right not to be coerced into assisting the prosecution. *Ibid* at 38.

881 *Ibid* at 60-64.

882 Section 24(d) relates to the right to adequate time and facilities to prepare a defence, whilst s 25(a) refers to the right to a fair hearing. Also see *Allen v Police* [1999] 1 NZLR 356, 359-363; *Police v Keogh* [2000] 1 NZLR 736-749.

883 See, *inter alia*, *Sobh v Police Force of Victoria* [1994] 1 VR 41.

884 See *S v Majavu supra* at 68.

885 See, for example, *Cheng Kui v Quinn* (1984) 11 FCR 217, 21 A Crim R 447.

886 See, for example, s 90AA of the Magistrates' Court Act 1930 (ACT); s 105B of the Justices Act 1928 (NT).

887 See, for example, s 90 of the Magistrates' Court Act 1930 (ACT).

888 See, for example, s 90AA(3) of the Magistrates' Court Act 1930 (ACT); s 105B(3) of the Justices Act 1928 (NT).

However, the Australian courts are reluctant to disclose prosecution evidence to the defence.[889] There are limited statutory requirements imposed on the prosecution regarding the disclosure of material collated by the state to the defence in criminal proceedings.[890] The prosecution's duty to disclose is mostly governed by the common law. However, steps have recently been taken in Victoria and been proposed in New South Wales, to improve the efficiency of the criminal justice system. These steps provide the criminal courts with greater powers to control pre-trial processes.[891]

Victoria is presently the only Australian jurisdiction to have implemented the statutory reciprocal disclosure scheme. Recent legislative changes in Victoria have imposed disclosure obligations on accused persons in criminal trials, whereby they are now required to actively participate in narrowing the issues in the case and to disclose the nature of their defence before trial.[892] These changes have been attacked on the basis that they abrogate the presumption of innocence and reverse the onus of proof. However, Flatman and Bagaric contend that accused disclosure does not violate any criminal law objectives, but will result in many distinct advantages including considerable cost savings to the community and a greater emphasis on pursuit of the truth.[893] The Victorian scheme is said to be more flexible than its English counterpart in the CPIA .[894]

Freedom of Information Acts (the Freedom of Information Act is hereinafter referred to as the "FOIA") exist in most Australian jurisdictions to confer a public right of

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889 In *National Company and Securities Commission v News Corporation* 52 ALR (1984) 417, the court held that if an investigator were to disclose his hand prematurely it will not only alert the suspect to the progress of the investigation, but would also close off other sources of inquiry. The court also reaffirmed the principle that an accused should not be entitled to discovery as against the prosecution.

890 See *inter alia*, s 104 of the Summary Procedure Act 1921 (SA); s 8 of the Crimes (Criminals Trials) Act 1993 (Vic). Also see Hinton "Unused material and the prosecutor's duty of disclosure" (2001) *Criminal Law Journal* 121 at 122.

891 See the Crimes (Criminal Trials) Act 1999 (Vic) and the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW). This has included powers relating to both the prosecution and the defence.

892 See the disclosure requirements imposed on accused pursuant to the Crimes (Criminal Trials) Act 1999 (Vic). Also see the statutory scheme requiring reciprocal disclosure in New South Wales, the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW) *supra*. For a more detailed discussion about this statute, see Dawkins *op cit* 51-55.

893 See Flatman and Bagaric "Accused disclosure – measured response or abrogation of the presumption of innocence?" (1999) *Criminal Law Journal* 327. The writers argue that imposing disclosure obligations on an accused does not abrogate any fundamental tenets of the criminal justice process. Rather, it represents a measured and justifiable response to curtailing the ever increasing length and expense of criminal trials. Also see pages 333-334 for a list of the advantages and benefits flowing from accused disclosure provisions.

894 This is because it allows optional disclosure procedures, prosecution disclosure is not dependent on defence disclosure, and the sanctions for non-compliance apply as much to the prosecution as to the defence. See Dawkins *op cit* 48-51, for a more detailed discussion about the Victorian scheme of reciprocal defence disclosure.

access to government documents.[895] However, the Northern Territory is the only jurisdiction that has not enacted a FOIA. The pertinent features of the scheme in the FOIA, are that there is no standing requirement, in other words, to obtain access, a person does not have to explain or justify why they need a document; the government's right to withhold documents from disclosure is circumscribed by exemptions in the legislation, and a refusal of access can be questioned before an independent court or tribunal, in which the government bears the onus of establishing the correctness of the decision under review.[896]

Although the language of Australia's federal and state freedom of information acts allows scope for criminal discovery-motivated requests by criminal defendants, the courts have also rejected discovery-motivated FOIA access. The courts and administrative tribunals have been hostile to freedom of information requests in aid of criminal discovery. Exemptions in the FOIA may also frustrate attempts to use it as a criminal discovery tool. The protection of documents subject to legal professional privilege in section 42 of the Act may also serve as a barrier to criminal discovery-motivated FOIA requests.[897] In *Austin v Deputy Secretary, Attorney-General's Department*[898] the Government Solicitor withheld several documents on the ground of legal professional privilege and the Administrative Appeals Tribunal (AAT) upheld the decision. Upon further appeal the Federal Court found no error of law on the Tribunal's part. Similarly, the AAT upheld a claim for exemption in terms of section 42, thus protecting from disclosure, statements of potential witnesses. These were taken by police officers in the course of a criminal investigation and were obtained for the sole purpose of obtaining legal advice.[899] In *Stewart and Victoria Police*[900] the applicants had sought access to evidence gathered in the course of an internal investigation into complaints alleging assault against the police officers. The police refused to disclose this information on several grounds and the AAT upheld the appeal.[901] The AAT also stated that "the whole area of 'criminal discovery' should, as a matter of policy remain with the criminal courts". This statement led to the

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895 See for example, Freedom of Information Act 1982 (Cth) and Archives Act 1983 (Cth).

896 See Kinley *Human rights in Australian law* Federation Press (1998) 68. For a more detailed discussion about freedom of information laws in Australia, see Bayne "Freedom of information in Australia" (1993) *Acta Juridica* 197 at 200, where it is stated that the object of the federal FOIA law is "to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government". It should be noted that this article focusses on the realm of administrative law reform.

897 See Taggart *op cit* 278.

898 67 ALR 585 (Federal Court 1986). Austin was charged with sending an explosive substance through the mail which was contrary to postal legislation. He sought access to the file of the Australian Government Solicitor under the FOIA.

899 *John and Secretary, Attorney-General's Department* 4 Freedom Information Review 54 (Admin Appeals Tribunal) (1986). Also see Taggart *op cit* 279.

900 15 Freedom Information Review 27 (Victoria Admin Appeal Tribunal) (1988).

901 Factors which influenced the AAT's decision were the confidentiality of the information and the possibility of harassment of civilian witnesses.

implication that it was contrary to public interest to apply the FOIA according to its terms. However, this view was rejected by the Deputy President of the Commonwealth ATT as being contrary to the spirit and amendment of the FOIA Act.[902]

The Australian experience illustrates its conservative approach. This can be compared to the *Steyn* era where the common-law privilege to refuse disclosure was jealously enforced by the prosecution.[903] Not surprisingly, a call for reform on prosecution disclosure in Australia has been made on the basis of the "equality of arms" principle.[904]

5.3.6.8 ISLAMIC LAW

Islamic Criminal Procedure attempts to strike a balance between the interests of the accused and those of society. The Qur'an states:

> "Nor would we visit our wrath until we had sent an apostle to give warning."[905]

This has been interpreted to mean that individuals should be informed of the law before they may be prosecuted or punished. The accused and his attorney are informed of the charges and the supporting evidence. They are also informed of any evidence in the prosecution's possession that indicates the defendant's innocence.[906] In order for a case to be acceptable, it must fulfill some conditions called conditions of validity. If these conditions are incomplete, the judge cannot commence the trial until they are fulfilled.[907] The defendant is entitled to obtain a copy of the case against him and to ask the judge for a period of time to study it and prepare his defence. The defendant can also obtain
copies of documentary evidence tendered by the plaintiff besides witness statements which are necessary to prepare his defence.[908]

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902 See Taggart *op cit* 284.

903 However, the state of Victoria is to be commended for its statutory reciprocal disclosure scheme, which has been described as being more flexible than its English counterpart in the CPIA.

904 See Hinton *op cit* 139, where he opines that the Director of Public Prosecutions should adopt and implement the principle of "equality of arms" as the basis upon which requests by the defence for disclosure of unused material by the prosecution will be considered. This approach together with the greater involvement by the judiciary in pre-trial disclosure, will ensure that all the relevant material is placed before the jury, thereby minimising the risk of a false conviction and contributing to justice.

905 See Qur'an, XVII: 15. Also see Mahmood "Criminal procedure" in Mahmood *et al Criminal law in Islam and the Muslim world* Qazi Publishers (1996) at 298.

906 *Ibid* at 300.

907 The procedure is that the judge listens to the plaintiff in the defendant's presence. The defendant (accused) is then questioned. See Attia "The rights to a fair trial in Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 351.

908 *Id*.

Therefore, Islamic law also makes some provision for disclosure of evidence to the defence. The discussion on foreign jurisdictions reveals that for the most part, an accused is entitled to disclosure of evidence by the prosecution on the basis of his right to a fair trial.

5.4 THE ACCUSED'S RIGHT TO BE INFORMED OF THE REASON FOR DETENTION

The two relevant provisions are section 25(1)(a) of the Interim Constitution and section 35(2)(a) of the Final Constitution respectively. Section 25(1)(a) provides that every detained prisoner has the right "to be informed promptly in a language which he or she understands of the reason for his or her detention". The provisions of section 35(2)(a) are similar. Section 35(2)(a) provides that:

> "everyone who is detained, including every sentenced prisoner, has the right-
>
> (a) to be informed promptly of the reason for being detained;"

The right to be informed of the reason for detention is long established in South Africa.[909] A person needs to know the reason why he is deprived of his freedom in order to decide whether or not to resist the arrest and to take reasonable steps to regain it. Therefore, the requirement of prompt notification enables the individual to decide whether to remain silent or to obtain legal representation. It is a trite fact that when a person is arrested, not only is he informed of the right to silence in terms of section 35(1)(a), but he is also informed of the reason for the arrest and the right to a lawyer in terms of section 35(2)(b). The objectives of section 35(2)(a) will be defeated if the police arrest an accused on the pretext of one charge, but detain him on a serious charge.[910] The accused cannot exercise an informed choice about remaining silent or engaging a lawyer if he does not know that the detention is based on a more serious charge. However, in *R v Evans*[911] the Supreme Court of Canada accepted that the requirements of section 10(b) of the Charter were met even where the accused was arrested on the pretext of one charge and the subsequent questioning indicated that he was held on a more serious charge.

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909 See s 39(2) of the Act. Also refer to the discussion in 5.2.4 above.

910 Section 35(2)(a) provides than an accused must be informed of the true purpose of arrest. The wording of s 35(2)(a) is similar to art 5(2) of the ECHR and s 10 of the Canadian Charter. Article 5(2) of the ECHR provides that "everyone who is arrested shall be informed promptly in a language which he understands of the reasons for his arrest and of any charges against him", whilst s 10 of the Charter provides that "everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore". Section 9(2) of the ICCPR provides that "anyone who is arrested shall be informed at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Therefore, the reason for the arrest should be given "at the time of the arrest". The Criminal Procedure Act also provides that the arrestor should notify the arrestee "at the time of effecting an arrest or immediately after effecting the arrest" in terms of s 39(2). Thus, the Act contains more explicit provisions.

911 (1991) 63 CCC (3d) 289 (SCC) 303. It should be noted that s 10(b) of the Canadian Charter states that "Everyone has the right on arrest or detention ...

> (b) to retain and instruct counsel without delay and to be informed of that right ..."

The detainee needs to know the reason for his arrest, and this information will also enable the detainee to exercise his right to *habeas corpus*.[912] In *Fox, Campbell and Hartley v UK*[913] the defence contended that the concept of "terrorist" was vague in that the accused were not given adequate and understandable information when they were arrested. The court held that merely being informed by the arresting officer of the legal basis for the arrest in terms of section 11(1) was insufficient for the purposes of section 5(2). However, the court regarded the interrogation on specific criminal acts that followed within 5 hours of the arrest, as being sufficient to enable the applicants to understand why they had been arrested.[914] The accused also has a right "to be informed of the reason for the detention to continue". Two reasons have been advanced for this namely, that an accused should be informed of the immediate reason why it was necessary to remand the case, thus necessitating the bail decision and the reason why the bail has been denied.[915]

The requirement that the detainee must "be informed promptly in a language which he or she understands" is incorporated in section 35(4) of the Constitution.[916] Similar provisions are contained in foreign systems.[917] The reason for detention should be given to the detainee explicitly and unambiguously. The detainee should not have to deduce from the arrestor's conduct what the possible reason could be.[918] Steytler submits that a person who is fully conversant with the official language is not entitled to be addressed in a specific minority language of a country. However, special arrangements may have to be made in the case of foreigners to ensure adequate

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912 *Habeas corpus* is defined as a writ issued to produce a prisoner in court. The purpose of the right is to inform a detainee about what is happening to him. See Steytler *Constitutional criminal procedure* 150.

913 30 Aug 1990 Series A no 182 and 40. In this case, the applicants were arrested in terms of s 11(1) of the Northern Ireland Emergency Provisions Act of 1978. This Act provided for the arrest of any person "suspected of being a terrorist".

914 The court's decision has been criticised by many academic commentators. The effect of the court's decision means that the person is left to deduce from the interrogation the reason for his arrest. This negates the notification requirement. Similarly, the fact that the interrogation followed 5 hours after the arrest is not "prompt". See Steytler *Constitutional criminal procedure* 150.

915 *Ibid* at 129-130. Also see *Minister of Law and Order v Kader supra* at 501-511J, where the then AD remarked that justice requires that the accused should be informed of the reason for remanding a case. The accused should also be informed about the reason why the bail has been denied.

916 Section 35(4) provides that "information must be given to a person in a language that the person understands". Thus, the right to information is linked to the right to understand. The chapter on "The right to understand" (chapter 6) will elaborate on the language requirement.

917 See art 5(2) of the ECHR and art 9(2) of the ICCPR in this regard.

918 See *Fox*, *Campbell and Hartley v UK supra* .

communication.[919] In *Naidenhov v Minister of Home Affairs*[920] the court had to consider the position of a Bulgarian immigrant detained as an illegal immigrant. The court held that section 25(1)(a) of the Interim Constitution did not require that a detainee should be informed in his native language but it should be a language which he understood. Although the detainee's knowledge of English was limited, he understood enough to communicate in it. Therefore, *Naidenhov* confirmed the principle that an arrestee has a right to be informed promptly in a language that he understands of the reasons for his detention.

The European Court has interpreted "promptly" as not imposing a duty to inform at the moment of the arrest and periods of longer than five hours after arrest have been accepted.[921] On the other hand, the Supreme Court of Canada requires notification to occur at the moment of arrest.[922] This is due to the fact that a person is not obliged to submit to an arrest if he does not know the reason for the arrest and cannot exercise the right to counsel meaningfully.[923] Steytler submits that the latter approach is correct as it conforms with the common law in terms of section 39(2) of the Act.[924] A detainee should be informed of the reason for arrest at the moment of the arrest. If notification is impossible at the time of arrest, the duty should be discharged as soon as it is practically feasible in terms of section 39(2) of the Act.

The above discussion demonstrates that a detainee has a right to be informed of the reasons for his detention in a language that he understands at the time of the arrest or soon thereafter.

5.5 THE ACCUSED'S RIGHT TO BE INFORMED OF THE RIGHT TO LEGAL REPRESENTATION

The detainee has a right to be informed of a right to a lawyer in terms of section 35(2)(b). He has a right to be informed of the right to choose and to consult with a

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919 Steytler *Constitutional criminal procedure* 151.

920 1995 (7) BCLR 891 (T). The facts were that a Bulgarian arrestee was informed in English of the reasons for his detention. The arrestee had some knowledge of English, albeit with some difficulty, and he did not indicate a failure to understand the information given to him. He also did not request the assistance of an interpreter. The court held that in the circumstances, the requirements of the provision had been satisfied.

921 See *Fox*, *Campbell and Hartley v UK supra*. Also see *Murray v United Kingdom* (1996) 22 EHRR 297, where it was held that it would be sufficient for purposes of art 5(2) if the alleged offence for the detention "must have been apparent" to the detainee in the course of her questioning. Here, the interview which was held 1 hour and 20 minutes after the initial arrest satisfied the requirement of "promptness" in terms of art 5 (2).

922 See *R v Evans supra*.

923 *Id*.

924 Steytler *Constitutional criminal procedure* 154.

legal practitioner and to be informed of this right promptly.[925] The information should be conveyed in such a manner that a detainee will be able to understand the right and know how to exercise it.[926] The information need not be given in an official language of a detainee's choice, only in a language which he understands in terms of section 35(4), albeit imperfectly.[927] The **Canadian** courts have also held that an accused is entitled to be informed of his rights in a language, and in a manner that he understands in a meaningful way.[928] The usual way of expressing the right is to use the words in the Charter, and the practical risks of not conforming to this standard are that the police will convey incomplete information.[929] When a police officer is aware that a detainee's ability to understand the terms used to explain his rights is compromised by an inadequate knowledge of the language, then he is required to make a particular effort to ensure that the detainees' constitutional guarantees are respected.[930] In these circumstances, the
accused has the right to be informed of his rights in his own language by means of a card, through an interpreter, or with the assistance of a bilingual officer.[931]

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925 Section 73(2A) of the Criminal Procedure Act now provides that every accused "shall (a) at the time of his arrest be informed of his right to be represented at his own expense by a legal adviser of his own choice." Thus, the accused should be informed by the police that he has the right to consult with a lawyer of his choice. It should also be conveyed to the accused that he has a reasonable opportunity to contact a lawyer. See s 73(2B) in this regard. This was inserted by s 2 of the Act 86 of 1996. Also see *S v Gumede* 1998 (5) BCLR 530 (D) and *S v Mfene and Another* 1998 (9) BCLR 1157 (N). Similarly, in **Germany** the detainee must be informed of the right to a lawyer and the right not to speak. See ss 136-137 of the German Criminal Procedural Code.

926 *S v Melani* 1996 (2) BCLR 174 (E) at 189E. The court also remarked that where it is clear that the detainee has difficulty in understanding the right, the police should take additional steps to ensure that the right is adequately communicated. This may often be the case with juveniles. The court also stated that the right to consult with a legal practitioner during the pre-trial procedure and the right to be informed of that right is closely connected to the presumption of innocence, the right to silence and the proscription of compelled confessions and admissions. Thus, the failure to recognise the importance of informing an accused of his right to consult with a legal adviser had the effect of depriving many persons of the protection of their right to remain silent and not to incriminate themselves. The court also noted that s 25(1)(c) provides no absolute prohibition on questioning an accused or obtaining a statement from him in the absence of legal representation. This is only done when it is clear that the accused has waived his right to consult with counsel. However, the right could only be validly waived if the person abandoning it knew and understood what was being abandoned. Therefore, the right to be informed of the right to legal representation is linked to the right to understand.

927 See *Naidenhov v Minister of Home Affairs supra* at 898 J.

928 *R v Stagg* (1987) 7 MVP (2d) 283.

929 *R v Marshall* (1987) 50 MVR 278. It is also noteworthy that Scullin J remarked in *R v Nelson* (1982) 3 CCC (3d) 147 at 152, that: "if the unsophisticated accused is to be confused, it is better that he be confused about what the constitution states, rather than confused about what the police say the constitution states".

930 Gautier "The Charter, the right to counsel and the breathalyzer" (1990) *Revue du Barreau* 163-210 at 190.

931 *R v Vanstaceghem* (1987) 58 CR (3d) 121. This case illustrated the necessity of observing precautions. The failure of a police officer to inform an accused of his right to counsel in French was held to constitute a "regrettable disregard" for the respondent's constitutional rights.

Both section 10(b) of the Canadian Charter of Rights and Freedoms and section 23(1)(b) of the New Zealand Bill of Rights 1990 guarantee to an arrestee or detainee *inter alia*, the right to be informed of the right to counsel.[932] According to Butler, the purpose of the right to be informed is to secure in the detainee an understanding of the existence of the right to counsel.[933] The Canadian courts have consistently held that a mere recitation of the Charter formula will not satisfy the requirements of the section.[934] The courts have also held that, notwithstanding advice by a law-enforcement officer regarding the existence of the right to counsel, detainees have not been "informed" of the right to counsel within the meaning of section 10(b), where the existence of certain disabilities hindered or impeded the ability of the detainee to understand and act upon information communicated by the law enforcement official.[935] The leading New Zealand case on the accused's right to be informed of his right to a lawyer is *R v Mallinson*.[936] The *Mallinson* decision demonstrates a purposive interpretation of the right to be informed of the right to counsel, in that the police advice regarding the right to counsel must indicate to the detainee that he has that right. Thus, the detainee must understand the substance of the right which exists in his favour. The case also established a link between waiver and informed, in that an arrested person who understands the position would be able to make an informed choice regarding the waiver of the guaranteed right.[937]

Therefore, the court held that the admission of the results of the breathalyser tests would tend to bring the administration of justice into disrepute. This case differs from *R v Beauparlant* (1988) 5 MVR (2d) 161 where the correct procedure was followed by the police. When the arresting officer noticed that the accused was not fluent in English, he informed the latter that a French speaking officer would be available at the police station. He also informed the accused of his rights in French and repeated the breathalyser demand in French. The Ontario Court of Appeal concluded that all reasonable steps had been taken to ensure that the accused's Charter rights have been respected.

932 Section 10(b) provides that "everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 provides that "everyone who is arrested or detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right."

933 See Butler "An objective or subjective approach to the right to be informed of the right to counsel? A New Zealand perspective" (1994) *Criminal Law Quarterly* 317. Butler concludes (at 330) that the proper test for the concept of "informed" under s 10(b) of the Charter is one based on the subjective understanding of the information conveyed to the accused by the law-enforcement officer.

934 See *inter alia*, *R v Evans supra* at 289, *R v Vanstaceghem supra* at 121. It has also been held that it is not a breach of s 10(b) to question a detainee who fails to take advantage of an opportunity to contact a lawyer, provided that the detainee is fit to choose his course of conduct. See *Smith v The Queen* [1989] 2 SCR 368, 61 DLR (4th) 462. On the other hand, where a detainee submitted to questioning whilst intoxicated, brushing aside the advice of a relative not to answer questions until she had a lawyer present, the court held that s 10(b) was breached and the resultant confession inadmissible. See *Clarkson v The Queen* [1986] 1 SCR 383.

935 Examples of such disabilities include subnormal intelligence (see *R v Evans supra*), intoxication (see *R v Cotter* (1991) 62 CCC (3d) 423) and inability to speak the language in which the advice was communicated (see *R v Vanstaceghem supra*). Also see Butler *op cit* 319.

936 [1993] 1 NZLR 528.

937 Butler *op cit* 326.

Section 35(2)(c) provides that the detainee must be "informed of the right to counsel promptly". This means that the detainee must be informed of this right immediately on arrest. The reason advanced is that the detainee requires immediate need of legal advice because incriminating questioning will commence.[938] The police is obliged to inform the accused of his right to legal representation again when they take any steps to obtain information from him.[939] However, the existence of such an obligation will depend on the circumstances of each case.[940] The question has also arisen in Canadian law regarding the precise moment that the police are required to inform the accused of his right to counsel. The wording of section 10(b) is said to create some ambiguity as to whether the words "without delay" also qualify the right to be informed. In *R v Kelley*[941] the Ontario Court of Appeal interpreted section 10(b) to mean "without delay". However, it has recently been stated unequivocally that the right to be informed of the right to counsel is triggered immediately on arrest.[942] The question also arises whether the duty to inform applies again if the reason for detention shifts to a different offence or more serious offence. The Canadian courts have held that the duty to inform applies again.[943] The reason advanced is that a different charge or more serious charge may lead the accused to reconsider his initial waiver.

Section 35(2)(c) provides that the detainee must be informed of the right to have a legal practitioner assigned to him by the state and at state expense, if substantial injustice would otherwise occur. This section may be interpreted to mean that the

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938 *R v Brydges* (1990) 53 CCC (3d) 330 (SCC) 343.

939 These steps include, for example, pointing out incriminating evidence, making a statement to the police officer, participating in an identification parade or making a confession to a magistrate. See *S v Mathebula and Another* 1997 (1) BCLR 123 (W) 132 E-F.

940 See *S v Shaba and Another* 1998 (1) SACR 16 (T). The court in *Shaba* found that *S v Mathebula supra* was wrongly decided in so far as it held that the necessary warning and informing of constitutional rights was to be repeated to an accused at every pre-trial stage, and that failure to do so would render evidence obtained thereby inadmissible. *Shaba* was approved and followed in *S v Ngwenya and Others* 1999 (3) BCLR 308 (W), where the court held that the state is under no obligation to repeat the warning if some investigatory step occurs at the pre-trial stage involving the presence or the co-operation of the arrested person. Evidence obtained at the time of that investigatory step (identification parade in the particular case), will not be rendered inadmissible merely because it had not been preceded by a warning informing the arrested person of his right to assistance by a legal practitioner.

941 (1985) 44 CR (3d) 17. The court remarked that "while it is true that 'without delay' is not explicitly made applicable to the right to be informed, it is implicitly applicable in that the right to retain counsel on arrest without delay would be ineffective unless this implication is made".

942 See Gautier *op cit* 189.

943 See *R v Black* (1989) 50 CCC (3d) 1 (SCC) 12 and *R v Evans supra* at 306-307. In *R v Black*, the Supreme Court held that a person who is arrested on an initial charge and is informed of his right to counsel in relation to that charge, is entitled to be reinformed of the right to counsel if the charge changes and becomes more serious. Also see Gautier *op cit* 195.

detainee must be informed of the right to legal aid.[944] The police should inform the detainee not only of the existence of the right to legal aid, but how it can be accessed.[945] However, the duty of the police is merely to convey the necessary information about legal aid services and not to make any determination of who would be entitled to such assistance.[946] Thus, the emphasis should be on the accused understanding the right and how the state legal system can be readily accessed.[947]

Section 35(3)(f) also provides that an accused has the right to be informed promptly that he has the right to legal representation. Section 35(3)(f) requires that the presiding officer should inform an accused at his first court appearance of the right to legal representation.[948] The court considered the question whether the accused was informed of his right to legal representation in *S v Gasa*.[949] The court held that as a

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944 Section 35(3)(g) which refers to the accused, has similar wording. However, the court's duty to inform the accused about the existence of legal aid was recognised by the South African courts long before the inception of the Constitution. See *S v Radebe*; *S v Mbonani supra* at 191, where it was held that a duty rests upon judicial officers to inform an unrepresented accused of their legal rights, including the right to legal representation, and the right to apply for legal aid in appropriate cases. Therefore, s 35(2)(c) and s 35(3)(g) now constitutionalises this duty which is also reflected in s 73(2A) of the Act. Also see *Hlantlalala v Dyantyi NO* 1999 (2) SACR 541 (SCA), where it was held that an unrepresented accused should be told in appropriate cases that he is entitled to apply to the legal aid board for assistance.

945 See *R v Bartle* (1994) 118 DLR (4th) 83 (SCC) 102, where it was held that if there is toll-free legal advice service available on a 24-hour basis, detainees should be appraised of it and informed how to utilise the service. Also see s 73(2A) of the Act which provides that: "every accused shall (a) at the time of his arrest be informed ... if he cannot afford legal aid that he may apply for legal representation and of institutions which he may apply for legal assistance."

946 See Steytler *Constitutional criminal procedure* 170.

947 *Ibid* at 313.

948 Section 35(3)(f) reflects international standards and constitutionalises the common law rule which requires that the presiding officer should inform an accused at the first court appearance of the right to legal representation. See *R v Rudman supra* at 381 C; *S v Mthwana* 1992 (1) SA 343 (A); *S v Radebe; S v Mbonani supra* at 191 (T). Also see s 73(2A) of the Act which provides that at the time of arrest, the service of an indictment or summons, the handing of a written notice or at the first court appearance, an accused must be informed of the right to legal representation, and the right to apply for legal aid. Also see Bekker "The undefended accused/defendant: a brief overview of the development of the American, American Indian and South African positions" (1991) *The Comparative and International Law Journal of Southern Africa* 151 at 178-185, for a discussion about the duty to inform the accused of the right to legal representation, and the consequences of such failure. The writer states at 179, that the preferred view is that an undefended accused should always be informed that he is entitled to employ legal representation. The accused should also be informed of his right to apply for legal aid. See *S v Mthwana* 1989 (4) SA 361 (N) at 371C-E. According to the Appellate Division in *S v Mabaso* 1990 (3) SA 185 (A) at 204 C-D, the failure to inform an accused of his right to legal representation would amount to an irregularity only if he is shown to have been ignorant of that right. This gives rise to the inference that an accused can expressly or tacitly waive his right to legal representation.

949 1998 (1) SACR 446 (D). The accused was merely informed that if he was represented by an attorney, he could request that attorney to be present. This was immediately prior to a pointing-out exercise. The investigating officers also conceded that the accused had never been informed of his right to be provided with the services of a legal practitioner at state expense.

result of the investigating officers' failure to inform the accused of his right to legal representation, the accused had been denied his fundamental rights in the Constitution.[950] Similarly, in *S v Moos* [951] the court had to consider the question whether the accused had been properly informed of his right to legal representation. The court stressed the importance of advising the accused of their rights, and held that the fact that the accused's rights had been explained must appear from the record in such a manner and with sufficient particularity as to enable a judgment to be made regarding the adequacy of the explanation. The court found that the cursory manner in which the question of the advice of the right to legal representation had been recorded, did not clearly spell out that the accused had been advised of all his rights. Therefore, the accused should be given the benefit of the doubt.[952]

If the accused has not acted upon the advice given by the police officer, the court is obliged to reiterate the information at the first court appearance.[953] The presiding officer should execute this duty properly in each and every case.[954] However, failure to comply with this duty should not *per se* lead to the setting aside of the proceedings.[955] Where the accused proceeds without a lawyer in the mistaken belief that they had no such right, the setting aside of such proceedings is necessary as a

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950 It should be noted that the court looked at the contents of s 25(1)(c) of the Interim Constitution (200/1993), which is similar to s 35(3)(f) of the Constitution. Section 25(1)(c) conferred upon the accused the right to be provided with the services of a legal practitioner by the state in situations where substantial injustice would otherwise result. This includes the right to be informed of this right. Steytler also raises the question whether the right of access to care givers such as the spouse, partner and next of kin, contains an obligation to inform the accused of that right. He contends that the duty to inform should be discharged promptly when it becomes practicably possible to do so after arrest with the kind of the care giver and the surrounding circumstances determining the urgency of compliance. See Steytler *Constitutional criminal procedure* 203.

951 1998 (1) SACR 372 (C). The accused was informed by the magistrate prior to the trial of his right to legal representation in general terms. He informed the magistrate that he would make his own arrangements for legal representation. However, there was nothing to indicate that he had ever been advised of his right to a legal representative at state expense. The accused ended up conducting his own defence. Also see *S v Gouwe* 1995 (8) BCLR 968 (B), where the failure of the presiding officer to inform the accused of his right to legal representation amounted to an irregularity with the trial being unfair.

952 The court also found that the trial court magistrate should have queried why the accused, after initially having indicated that they would make their own arrangements for legal representation, ended up at the trial without any representation.

953 *Mgcina v Regional Magistrate, Lenasia* 1997 (2) SACR 711 (W) 723g. The presiding officer's failure to explain the accused's right to legal representation, had resulted in a failure on the part of the state to secure a legal representative for him. This constituted a breach of the accused's fundamental constitutional rights, with the result that the conviction and sentence were set aside.

954 See *S v Bulula* 1997 (2) SACR 267 (V) 270; *S v D* 1997 (2) SACR 671 (C)).

955 *S v Simanaga* 1998 (1) SACR 351 (CK) 353h; *S v Radebe; S v Mbonani supra*. Also see *S v Khan* 1997 (2) SACR 611 (SCA), where the court found that there was neither a statutory provision nor judicial pronouncement at the time of the appellant's arrest and confession which required that the appellant had to be advised of his right to legal representation in terms of s 73(1) of the Act. Also see *Hlantlalala v Dyantyi supra*.

fundamental principle of a fair trial has not been observed.[956] Where the accused are only informed of the right after they have pleaded and made an incriminating statement, they should not be burdened with the prejudice flowing from the omission.[957] However, the omission is not fatal to the proceedings where the accused knows about the right.[958]

However, the Canadian courts have taken a different view. The fact that an accused is aware of his rights does not dispense with the police informing him of these rights. In *R v Richards*[959] the police had omitted to remind the accused, who was a lawyer, of his right to counsel in terms of section 10(b) before making a breathalyzer demand. The court allowed the appeal from the conviction and noted that it was not the privilege of a peace officer to determine those cases in which compliance with his Charter duties is unnecessary.[960] However, a different view was taken in *R v Olson*[961] where the British Columbia Court of Appeal overturned an acquittal which had been granted subsequent to the exclusion of evidence obtained in violation of section 10(b). However, the Quebec Court of Appeal reaffirmed the view in *Miller,* when it rejected the crown's contention in *R v Gratton*[962] that the effect of an alleged infringement of an accused's section 10(b) rights should be examined with regard to the accused's particular status.

Thus, the above discussion demonstrates that the purpose of the right to legal representation is to allow an accused to be informed of his rights and obligations under the law, but equally if not more important, to obtain advice as to how to exercise those rights.[963] The right to be informed of the right to legal representation, is seen to form an integral part of the judicial system. Any denial of this right will lead to a violation of the accused's fundamental rights. The accused should also be informed of his right to legal representation in a language that he understands. The right to legal representation thus provides a continuing interplay between the rights of an

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956 See *S v Mgcina supra* at 735c.

957 See *S v Mabaso supra* at 185.

958 *S v Moseki* 1997 (2) SACR 325 (T) 331C.

959 (1986) 45 MVR 151.

960 Also see *R v Miller* (1988) 4 WCB (2d) 306, where the Ontario Court of Appeal refused to admit a statement in evidence because the accused was not informed of his right to counsel, even though he may have been aware of this protection.

961 (1988) 7 MVR (2d) 172. The accused had been employed as a security guard at a department store and knew his Charter rights. The court held on appeal that the accused should not benefit from a breach of s 10(b) in these circumstances, as the evidence would not bring the administration of justice into disrepute.

962 (1989) RJQ 1794.

963 See, *inter alia*, *R v Manninen* (1987) 34 CCC (3d) 385 at 392. Also see *DPP v Ara supra* at 559, where the court held that fundamental to the right to legal representation at the police station, is the right to be informed of legal advise. This impliedly necessitates sufficient disclosure.

accused and the corresponding obligations of the state.[964]

5.6 THE RIGHT TO BE INFORMED OF THE RIGHT TO REMAIN SILENT

Every accused person is entitled to be informed of the right to remain silent and the consequences of not remaining silent. This must be done irrespective of whether the accused is reasonably aware of the right.[965] When informing an accused of the right to remain silent, it "must be done in a language that the accused understands".[966] The rationale for not remaining silent is that any incriminating statement could be used as evidence against an accused. The aim of informing an accused of the consequences of not remaining silent is to ensure an informed and intelligent choice.[967] Whether the accused is represented or not, the court still has a duty to establish that the accused's rights have been properly explained to him. The court's failure to inform the accused of the consequences of testifying violate the accused's right to remain silent and the accused's right against self-incrimination in terms of section 35 of the Constitution.

Therefore, the presiding officer has a duty to establish that the accused has made an informed decision to testify.[968] The rights to remain silent, of access to a lawyer and to be informed of the reason for the arrest, have the common requirement that an accused or detainee must be informed promptly of these rights. The rationale is that an accused is in the most vulnerable position at the time of arrest, because police interrogation may immediately commence and incriminating answers may be furnished.[969] If it is impossible to inform an accused of the right to remain silent at the moment of arrest, then the duty should be discharged as soon as possible thereafter.[970] However, furnishing the appropriate warning promptly on arrest does not completely discharge the duty to inform. It is incumbent upon the police to inform an accused again of the right to silence before taking any steps to enlist him as a prosecution witness.[971]

Similarly, in **Germany**, a defendant has the right to be heard in the trial and cannot be

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964 See Gautier *op cit* 210.

965 See *Miranda v Arizona* 384 US 436 (1966) at 468.

966 See s 35(4) of the Constitution. The purpose of this provision is to ensure effective communication in a language that the accused understands, albeit imperfectly. See *Naidenhov v Minister of Home Affairs supra* at 898. Therefore, the right to information is linked to the right to understand.

967 See *Miranda v Arizona supra* at 469. Also see De Waal *et al op cit* 515.

968 See *S v Nzima* [2001] 2 All SA 122 (C).

969 Steytler *Constitutional criminal procedure* 118.

970 *Id*.

971 See *S v Mathebula supra* at 132 E-F and *S v Marx* 1996 (2) SACR 140 (W) 149 b.

forced to give evidence against himself.[972] The accused must also be informed that he does not have to give evidence and is free to remain silent.[973] His silence may not be taken as evidence against him. However, the accused having exercised the right to remain silent, can subsequently waive that right.

Therefore, the above discussion demonstrates that an accused must be informed of his right to remain silent in a language that he understands. This will enable him to make an informed choice.

5.7 CONCLUSION

The principle of "equality of arms" implies, *inter alia*, that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he be given adequate time to prepare his case; that he be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by his adversary, and that he be given access to all material evidence held by the prosecution authorities which relates to his guilt or innocence.[974] The principle of "equality of arms" between the prosecution and the defence, is implicit in the concept of a fair trial, and is entrenched in most jurisdictions.[975] There are many ways to justify the importance of access to information. The most basic need is linked to the human fascination to uncover secrets. As a device for uncovering secrets, access legislation fulfills this human need. Democratic principles also favour broad access to information so that the people can understand and judge the performances and actions of their governments. Access legislation also improves government decision-making. It is also seen as a response to the increasing significance of information in society.[976] The benefits of disclosure are also said to be fairness and efficiency. Early and full disclosure of the state's case is in the interest of the prosecution, because such a fully informed defendant can more easily be persuaded to plead guilty, and if made at an earlier stage, this will save court time and resources and the nation's legal aid bill.[977]

An accused was entitled to information about the infringement of his rights, and the options that he may take before the advent of the Constitution. Section 335 of the Act provides that an accused is entitled to a copy of any statement that he himself has made.[978] Section 144(3) provides that when an accused is arraigned for a summary trial in a superior court, he is entitled to the indictment and a summary of the

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[972] See s 136 of the German Criminal Procedural Code.

[973] See Foster *op cit* 223.

[974] See Leigh "The right to a fair trial" in Weissbrodt and Wolfrum (1998) *op cit* 664.

[975] See the comments of the European Court of Human Rights in *Rowe and Davis v UK supra* at para 60 in this regard.

[976] See Onyshko *op cit* 74-76 for a discussion about the need for access to information.

[977] See Doyle and Hodge *op cit* 96.

[978] Similarly, a summons or written notice informs the accused of the charge(s) against him and advises him about what options to take. See ss 54 and 57 of the Act respectively.

substantial facts of the case together with a list of witnesses and addresses. An accused is also entitled to request further particulars to clarify the charge and to enable him to prepare his defence.[979] However, the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts.[980] Section 39(2) of the Act also provides that an arrestee must be informed of the reasons for his arrest and be furnished with a copy of the warrant on demand.[981] Similarly, occupiers of properties must be furnished with a warrant informing them of the reason for the entry by police officers in terms of sections 26 and 27 of the Act. The police are also entitled to furnish persons whose rights are affected with a copy of the search warrant.

Most jurisdictions want to ensure that police investigation is not hampered by acceding to the accused's request for access to information in the police files. In a number of democratic societies, non-disclosure of certain categories of information is justifiable in that the public interest in the proper administration of justice overrides the right to disclosure.[982] This is understandable in the light of the fact that the possibility of a conviction is linked to the success of police investigation. Both the police and the prosecution work hand-in-hand to secure a conviction. However, this partnership needs to consider the rights of the accused. Both the accused and the state (represented by prosecution and police) must enjoy an equal footing in the court and neither should enjoy any substantial advantage over the other. It goes without saying that the accused requires entitlement of information in the state's possession in order to have a fair trial. The accused's rights to disclosure is therefore necessary for the protection and exercise of his rights. The accused is entitled to know what information the state has in order to know the case against him, and to enable him to make full answer and defence. This involves the disclosure of all relevant material in the prosecution's possession, with the exception of that which is subject to a claim of privilege.[983] Therefore, the obligation to disclose is only limited by relevance and privilege.

The relevant provisions affecting an accused's right to information in the Interim Constitution, were section 23 and section 25(3)(b). Section 23 provides for a right to information. Section 25(3)(b) guarantees the right to a fair trial, which includes the right to be informed with sufficient particularity of the charge concerned. Section 23 read with section 25(3)(b) was considered in various decisions of the Supreme Court resulting in accused persons being allowed access to police dockets. In some cases full access to the docket was granted,[984] whilst in other cases, the Supreme Court

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979 See, *inter alia*, *R v Mokgoetsi supra* at 622.

980 See *R v Heyne supra* at 617.

981 This requirement must be complied with in order for the arrest to be lawful. See, *inter alia*, *S v Ngidi supra*.

982 See Schwikkard *SACJ op cit* 337.

983 See, *inter alia*, *R v Stinchcombe supra.*

984 See, *inter alia*, S *v Majavu supra*.

formulated criteria to be applied in deciding the ambit of the right to information.[985] The principle of fairness requires that an accused should be properly informed of the case that the state intends to prove against him. This right to sufficient information to facilitate the proper preparation of an accused person's defence, has always enjoyed general recognition.[986] Section 35(3)(a) of the Constitution which stipulates that an accused's right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it, may thus be seen as an affirmation of the position which prevailed prior to the advent of the new constitutional dispensation. The Constitutional Court finally clarified the position in *Shabalala*.[987]

The *Shabalala* decision conforms with the right to a fair trial principle. Although there is no longer any "blanket docket privilege", this does not mean that the accused's rights of access are absolute. The result is that the state cannot make a unilateral claim of non-disclosure. However, the court retains a discretion to determine the legitimacy of the claim. Circumstances may arise where the accused's rights must be curtailed. However, this curtailment must be justified in such a manner that the accused's rights to a fair trial are not undermined. However, the decision is silent regarding the stage at which disclosure should be made. Disclosure should be made after completion of the investigation but before commencement of the trial.[988] Any disclosure of such information for other purposes is improper. *Shabalala* is also silent regarding the question of reciprocal access.[989] Although the court referred to the advantages of disclosure by the state, it does not mention disclosure by the defence. There will be added advantages if both parties disclose evidence simultaneously before commencement of trial. This would limit issues to be adjudicated by the court. The end result would be to increase the efficiency of the prosecutions, but this would not impede the fairness of proceedings.[990] The decision is also silent regarding the

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985 See, *inter alia*, S *v Fani supra*; *Phato v Attorney-General, Eastern Cape supra*.

986 See *S v Hugo supra* at 540 E; *S v Ismail supra* at 40C; s 84 - s 88 of the Act.

987 See *Shabalala v Attorney-General of the Transvaal supra*, which put an end to police docket privilege.

988 *R v Stinchombe supra* is instructive in this regard. Similarly, in **Germany**, access can be denied where the investigations are not complete, and where premature access would endanger the success of the investigation. See s 147 of the StPO.

989 The Criminal Procedure and Investigations Act 1996 in the United Kingdom *supra* encompasses reciprocal access and is instructive in this regard. So too are the Victorian legislation in Australia regarding reciprocal disclosure, and Federal Rule of Criminal Procedure 16(b) in the United States. Also see Senatle *op cit* 73, where he makes a very good case for reciprocal access. However, the South African Law Commission is not in favour of reciprocal disclosure by the defence. See *Project 73 Report* (August 2002) on a more inquisitorial approach to criminal procedure in this regard.

990 However, Dawkins disagrees. He maintains that an adequate case for mandatory reciprocal disclosure has yet to be made on the grounds of administrative efficiency and better case management. See Dawkins *op cit* 65.

absence of any evidence which has been in the prosecution's possession.[991]

Foreign jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right.[992] The accused's rights of access to material evidence is seen as an essential requirement of a fair trial.[993] However, the prevailing theme is that of the integrity of the judicial system. In Canada, the provisions of the Charter have been interpreted by the Supreme Court as providing a right of disclosure to accused persons. Indeed, the *Stinchcombe* case marked the dawn of a new era in disclosure to the defence, by holding that full and frank disclosure was a primary component of the right to make full answer and defence.[994] In England, defence counsel has access to evidence from an early stage. The English system provides for the disclosure of summaries of the case before committal proceedings, and the furnishing of witness depositions and reports as part of the committal proceedings.[995] The failure to disclose exculpatory evidence to the defence led to many miscarriage of justice cases. This led to the setting up of the Royal Warrant to the Royal Commission, which recommended the introduction of the CPIA of 1996.[996] In the United States, due process guarantees to the defence "access to certain information possessed by the prosecution",[997] and in order to prove a violation of due process rights, the defendant must show that the undisclosed evidence was material.[998] In New Zealand, the accused's right to a fair trial have been found to prevail over the interests of society.[999] Therefore, a survey of the foreign jurisdictions reveals that for the most part, the accused (or defence) is entitled to some rights of access.

Section 32 provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. This provision has implications, *inter alia*, for

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991 The decisions of the Canadian and American courts are instructive in this regard. See *inter alia*, *R v Stinchcombe supra*, where the state was required to furnish a satisfactory explanation regarding lost or destroyed evidence. Also see *Arizona v Youngblood supra*, where the accused was required to show bad faith on the part of the prosecution in order to succeed.

992 See *S v Majavu supra*.

993 Also see *Edwards v UK supra*, where the European Court of Human Rights stated that prosecution disclosure of all "material evidence for and against the accused" was a requirement of a fair trial under art 6.

994 See *R v Stinchcombe supra*, where the court stated that the general rule is that all relevant information must be disclosed, whether it is inculpatory or exculpatory.

995 See Leigh "Ensuring the right to effective counsel for the defense in English criminal procedure" 63 (1992) *International Review of Penal Law* 775 at 778.

996 See Sharpe *The Criminal Law Review op cit* 273.

997 See *Brady v Maryland supra*.

998 See *US v Bagley supra* at 682.

999 See *Commissioner of Police v Ombudsman supra*. In Germany, Australia and Islamic countries, the accused also has controlled rights of access to evidence in the prosecution's possession.

access to the basis for search warrants, the contents of police dockets and particulars relating to charge sheets. The Promotion of Access to Information Act is mandated by the constitutional right of access to information held by the state, and to information held by another person. It allows public parties to request records from private bodies. However, the Act does not apply to records required for criminal or civil proceedings already underway. Similarly, freedom of information laws in foreign jurisdictions are rarely used in the criminal context.[1000]

The right of an unrepresented accused to be informed of his right to legal representation was confirmed in many cases some time before the Interim Constitution took effect in 1994.[1001] The purpose of the right to legal representation, and its corollary to be informed of that right, was to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty.[1002] Thus, this protection ensures that an accused was treated fairly throughout the entire criminal process from arrest to trial. In order to give proper effect to an accused's rights in terms of the Constitution, he had to be informed of the right to consult with a legal representative in a manner so as to allow him to understand the content of that right.[1003] Similarly, an accused should be informed of the reason for his detention, and the right to remain silent in a language that he understands.[1004] It is also necessary that the accused is able to comprehend the meaning of the information.[1005] If an accused knows the reason for his detention, he can decide how best he can challenge his detention by exercising his right to remain silent or engaging legal representation.

The essential purpose of allowing an accused to engage in pre-trial discovery of the prosecution's case is to enhance the truth-finding process so as to minimise the danger that an innocent accused will be convicted.[1006] The Constitutional Court is to be commended for its bold and innovative approach in *Shababala*. Its rejection of the common law position on police docket privilege heralded a new era for access to documents. It drastically changed the scene regarding docket privilege and thereby the extent of information available to an accused. Similarly, the bold approach of the New Zealand courts towards right to information in *Commissioner of Police*, and that

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1000 See for example, the Federal Access to Information Act 1982 in Canada. In the United States, the FOIA is available as an alternative to conventional discovery as long as it does not exceed provisions of the Federal Rules. Similarly, in Australia, the courts have been hostile to freedom of information requests in aid of criminal discovery. See Taggart *op cit* 278-284.

1001 See *S v Radebe*; *S v Mbonani supra* and *S v Mabaso supra*.

1002 See *S v Melani supra* at 174 (E).

1003 *Id*.

1004 See s 35(4) of the Constitution. Also see *Naidenhov v Minister of Home Affairs supra*. A similar viewpoint is followed in Canada. See Gautier *op cit* 163-210.

1005 See *S v Melani supra*.

1006 See Brennan *op cit* 2.

of the Canadian courts in *Stinchcombe*, are welcomed.[1007] These progressive decisions illustrate the courts' enthusiasm for law reform. This bodes well for its citizens. It is hoped that other countries will benefit from this criminal reform experience. The courts should strive to maintain a well-defined balance between the rights of the accused and those of the public. If the system of criminal justice is to be marked by a search for truth then disclosure must be the starting point.[1008] The "right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[1009] Indeed, the quest for better justice is a ceaseless quest, and our profession should strive for continuous examination and re-examination of our premises as to what law should do to achieve better justice.[1010]

Therefore, the accused must be informed about his rights and the case against him in order for him to prepare for his case effectively. However, it is imperative that the accused also understands what the case is about before he starts preparing for his case. He must understand the proceedings to be instituted against him. This means that he must be able to follow and comprehend the proceedings. Thus, the accused must be "fit" to be tried or "mentally present". An informed accused can only participate in the proceedings if he "understands" the proceedings. Therefore, the next chapter will discuss the accused's right to understand the proceedings.

1007 So too the American decision in *Brady v Maryland supra*.

1008 See *R v Bourget* 1988 (41) DLR (4th) 756 at 757.

1009 See *R v Stinchcombe supra* at 9.

1010 See Brennan "The criminal prosecution: sporting event or quest for truth?" (1963) *Washington University Law Review* 279.

CHAPTER FIVE

THE RIGHT TO INFORMATION

5.1 INTRODUCTION

The word "information" is derived from the Latin word "informo", which was adopted as "inform" and "information" in English.[1011] Numerous definitions have been subscribed to the word "information", depending on the context in which it is used. The Merriam-Webster Online Dictionary defines "information", *inter alia*, as "the communication or reception of knowledge or intelligence, or knowledge obtained from an investigation or study".[1012] This definition of information is more relevant to the legal context. The right to information entails more than giving an individual access to documents compiled during an investigation. It also involves communication or reception of knowledge to enable an individual to exercise his rights.[1013] Man's interest in information stems from the fact that he is a social animal since his creation, and he needs to interact with other people and his surroundings in order to survive. Thus the collation, reception and communication of information is seen as an important part of man's existence, and the manner in which he conducts these activities will enhance his quality of life.

The law is constantly transforming to reflect the social realities of the time. An individual needs to be informed about these changes, especially where these changes would impact on his daily life. This knowledge is necessary for the exercise and protection of the individual's rights. The individual should receive sufficient notification of these changes and proper guidelines should be furnished to law enforcement officers. However, one also needs to protect information against misuse and abuse. Legal protection is not only accorded to information itself, but it is also

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1011 Geldenhuys *Die regsbeskerming van inligting* (unpublished doctoral thesis) Unisa (1993) at 40.

1012 Available at http://www.m-w.com/cgi-bin/dictionary 6 June 2000.

1013 To illustrate this, an individual should know why he is being arrested or detained in terms of s 39(2) of the Act. This will enable him to exercise a choice whether to remain silent or obtain legal representation.

accorded to those individual and community interests which are considered as being worthy of legal protection.[1014] Legal rules are formulated in the Act to prohibit the infringement of these interests.[1015]

The Constitution consolidates the position in the Act. The principle provisions which are relevant to the right to information are sections 32, 35(2)(a) and (b), 35(3)(a), (b) and (f) and section 35(4) of the Constitution.[1016] The above provisions have important implications for access to documents in the police docket, access to particulars relating to charge sheets, lawful arrest and the right to be informed about legal representation.
This chapter will first address the accused's right to information during the pre-trial stage. This discussion will focus on the accused's right to information in the summons, written notice, indictment and charge sheet, further particulars, arrest warrant, entry of premises for purpose of interrogation, search and seizure and statements to the police officer. Thereafter, it will address the pre-constitutional and constitutional position on an accused's right to information. To this end, police docket privilege, the Promotion of Access to Information Act 2 of 2000, the right to be informed of the reason for detention, the right to be informed of the right to legal representation and the right to be informed of the right to remain silent will be discussed respectively. Principles extracted from other countries will be applied to the relevant South African context. Finally, the conclusion will propose interim conclusions and recommendations drawn extensively from case law and legislation in South African law and foreign jurisdictions.

5.2 AN ACCUSED'S ACCESS TO INFORMATION DURING THE PRE-TRIAL STAGE

The notion that the accused in a criminal case should be informed in advance of the evidence against him is not foreign to South African criminal procedure. Under section 54 the Criminal Procedure Act 56 of 1955, the standard procedure in criminal trials in the High Court was for a preparatory examination to be held in the magistrate's court first, at which the state produced its evidence to establish a *prima*

1014 Individual interests relate to, for example, the rights of an arrested person to be informed of the reason for his arrest in terms of s 39(2) of the Act. Community interests relate to, for example, state security and the investigation and the solving of crime by the police.

1015 The ensuing discussion in para 5.2 below will focus on the arrestee's or accused's rights to information in the Act.

1016 Section 32 of the Constitution provides that everyone has the right of access to any information held by the state, and any information that is held by another person and that is required for the exercise of any rights. Section 35(2)(a) refers to the right of a detainee to be informed promptly of the reason for his detention whilst s 35(2)(b) refers to the right of a detainee to be informed of his right to legal representation. The latter right is similar to s 35(3)(f) which refers to the right of an accused to be informed of his right to legal representation. Section 35(3)(a) provides that an accused person has the right to be informed of the charge with sufficient detail to answer it. Section 35(3)(b) provides that an accused is entitled to adequate time and facilities to prepare a defence, whilst s 35(4) provides that information provided to a person must be given in a language that he understands. Please note that for future reference, the terms "accused" and or "detainee" will be interpreted in the masculine form for purposes of convenience. Nevertheless, this does not detract from the fact that the terms also apply to the feminine form as well.

facie case against the accused.[1017] The record of those proceedings was made available to the accused so that he had sufficient opportunity to prepare for the trial. However, since 1977, this procedure has in practice been substituted by the procedures under Chapter 19 of the Act.[1018] Although sections 123 to 143 of the Act make express provision for the holding of a preparatory examination in anticipation of a trial before the High Court, this procedure is seldom used nowadays.[1019]

A suspect or an accused has access to information during various stages of the criminal proceedings. The following discussion on pre-trial rights will illustrate this:

5.2.1 SUMMONS

A summons is used for summary trial in a lower court where the accused is not in custody or is about to be arrested.[1020] A summons can be described as a document containing details of the charge and personal information of the accused.[1021] The summons is issued by the clerk of the court and it specifies the place, date and time when the accused must appear in court.[1022] Where a summons is served upon an accused, this must take place at least 14 days before the date of the trial.[1023] However, if the accused finds that this period gives him insufficient time to prepare his defence, he may apply for, and the court will in appropriate cases grant a postponement for this purpose.[1024] The summons therefore informs the accused of the charge/s against him and instructs him to appear in court to answer the charge/s against him. If the person who is summoned to appear fails to appear at the designated time and place, he is guilty of an offence and is liable for a punishment of

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1017 A preparatory examination was also known as a "mini-trial". It involved proceedings before a magistrate which preceded the actual trial before the High Court. This gave the accused an opportunity to effectively prepare for his case.

1018 Chapter 19 refers to a plea in the magistrate's court on a charge justiciable in the High Court. It encompasses a plea of guilty in terms of s 121 and a plea of not guilty in terms of s 122.

1019 Section 143(1) expressly states that an accused may inspect the preparatory examination record and be furnished with a copy of such record.

1020 It is preferable to use a summons where there is no likelihood that the accused will abscond, attempt to hamper police investigation or attempt to influence state witnesses.

1021 This information pertains to the name, address, occupation and status of the accused. See s 54(1) of the Act.

1022 See s 54(1) of the Act. Also see *Joubert et al Criminal procedure handbook* Juta (2001) at 92, for a detailed discussion about service of the summons.

1023 This is in terms of s 54(3) of the Act. Sundays and public holidays are excluded.

1024 See *S v Thane* 1925 TPD 850 and *S v Van Niekerk* 1924 TPD 486.

a fine or imprisonment for a period not exceeding three months.[1025] A warrant will be issued if the accused either fails to pay an admission of guilt fine or fails to appear in court on the specified date. Therefore, the summons secures the accused's attendance at the trial. However, the summons makes provision for the accused to pay an admission of guilt fine without appearing in court.[1026]

The position in **Australia** is somewhat similar. A summons is issued by the court to the defendant to attend court to hear the information, complaint or charge.[1027] It is issued on application by the informant.[1028] The purpose of the summons is to notify the defendant of the proceedings so that he may answer the charge.[1029] The decision to issue a summons must be exercised judicially.[1030] The person issuing the summons should not be seen to have any interest in the subject matter of the information in order to exclude bias.[1031] Before the summons is issued, the person must satisfy himself that it is not vexatious, that the information is not out of time and that there is *prima facie* evidence of the offence which requires the alleged offender to answer the charge.[1032] The summons should also be issued within a reasonable time after the information is furnished.[1033] The Australian experience illustrates that great care should be exercised in issuing a summons to avoid bias or unfairness.

5.2.2 WRITTEN NOTICE

A written notice to appear is prepared, issued and handed directly to the accused by a peace officer. It is used when minor offences are committed such as traffic offences.[1034] The written notice specifies the name, residential address, occupation and status of the accused, and instructs the accused to appear at a designated time

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1025 See s 55(1) of the Act. The court may issue a warrant for his arrest if satisfied that the summons was duly served and that the accused has failed to appear or to remain in attendance. Also see *Minister van Polisie v Goldschagg* 1981 (1) SA 37(A).

1026 See s 55(2A) of the Act. Also see the proviso regarding s 55(2) which provides for instances when the accused need not be arrested in terms of the warrant. See *Joubert et al* (2001) *op cit* 93.

1027 It should be noted that in foreign jurisdictions, the term "defendant" is constantly used. This term is merely a synonym for the term "accused".

1028 See eg s 68(1) of the Judiciary Act 1903 (CTH), s 37 of the Magistrates' Court Act 1930 (ACT).

1029 See *Plenty v Dillon* (1991) 171 CLR 635 at 641-644, where it was held that the essential purpose of the summons is to afford natural justice, and not to coerce a defendant to appear.

1030 See for example, *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39. However, in Victoria, once the Registrar is satisfied that the charge discloses an offence, a summons must be issued. See s 28(4) of the Magistrates' Court Act 1989 (VIC).

1031 See *Electronic Rentals Pty Ltd v Anderson supra* at 45-46.

1032 See *Ex parte Qantas Airways Ltd*; *Re Horsington* (1969) 71 SR (NSW) 291 at 301.

1033 See *Metaxas v Ferguson* (1991) 4 WAR 272 at 274.

1034 This is to expedite the course of justice in minor offences.

and place to answer a charge of having committed the offence. It also contains an endorsement in terms of section 57 of the Act that the accused may admit his guilt and pay a stipulated fine without appearing in court. It also comprises a certificate signed by a peace officer, which states that the original notice was handed to the accused and that the significance of the notice was explained to the accused.[1035] If the accused fails to respond to the written notice, the provisions of section 55 with regard to the summons apply.[1036] Therefore, the written notice also informs the accused of the charges against him and the options available to him.

5.2.3 INDICTMENT AND CHARGE SHEET

Section 144 of the Act provides that an accused in the High Court must be served with an indictment which contains, *inter alia*, details of the crime and the accused's personal details.[1037] The indictment must be accompanied by a summary of the important facts of the case together with a list of witnesses and addresses, where no preparatory examination is held.[1038] According to Joubert *et al*, the indictment informs the accused of the allegations against him provided that this will not be prejudicial to the administration of justice or the security of the state.[1039] However, the state is not bound by this summary of facts, and can lead evidence to contradict it.[1040] Section 144(3) of the Act provides that an indictment must also contain a list of the names and addresses of witnesses. However, this may be withheld if the prosecution believes that this may lead to witness tampering or intimidation. The position is slightly different in the magistrate's court in that the accused is not served with a charge sheet, but it is presented in court. Rather, he is at liberty to examine the charge sheet at any stage of the criminal proceedings in terms of section 80 of the Act. The charge sheet should inform the accused of the case against him. Thus, both the indictment and the charge sheet inform the accused of the case that the state intends to prove against him.

Section 84(1) of the Act stipulates that a charge sheet "shall set forth the relevance offence in such a manner and with such particulars regarding the time and place at which the offence is alleged to have been committed". The relevant offence should also be set out in such a manner that the accused is sufficiently informed of the

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1035 See s 56(1) of the Act.

1036 See s 56(5) of the Act.

1037 The indictment is drawn up in the name of the Director of Public Prosecutions. The accused's personal details pertain to his name, address, sex, nationality and age. The term "indictment" refers to prosecutions in the superior court, whilst the term "charge" refers to a prosecution in the lower courts.

1038 Also see *S v Mpetha* (1) 1981 (3) SA 803 (C), where it was held that the purpose of the summary of substantial facts is to fill out the terse picture presented by the indictment.

1039 Joubert *et al* (2001) *op cit* 171.

1040 See *S v Kgoloko* 1991 (2) SACR 203 (A).

nature of the charge brought against him.[1041] The accused is also entitled to know exactly what the charge against him is.[1042] Charge sheets should also be simple and intelligible.[1043] Thus, section 84(1) prescribes the requirements with which a charge sheet should comply.[1044] The case in point is *S v Heugh*[1045] where the court concluded that section 84(1) emphasises the difference between a charge and an offence. The charge must set out the details of the offence as well as particulars regarding time and place where the offence is alleged to have been committed. The court concluded that section 84 does not require a charge to specify the district where the offence was committed for the purpose of establishing the court's jurisdiction, but merely to give particulars regarding the place where the offence was alleged to have been committed. Therefore, the intention of section 84 is to place an accused in possession of such information as would enable him to prepare his defence.[1046]

Section 81(1) of the Act provides that a number of charges may be joined in the same proceedings against the accused, but before any evidence is led in respect of the particular charge.[1047] The basic premise of the Act is that a person arraigned before a criminal court must know the exact extent of his potential exposure to conviction and

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1041 Also see s 35(3)(a) of the Constitution which provides that the accused has the right to be informed of the charge with sufficient details to answer it. Also see *S v Chauke* 1998 (1) SACR 354 (V), where the presiding magistrate failed to inform the accused, that he was in danger of being convicted of an offence which was a competent verdict on the original charge. This constituted a violation of the accused's right to be informed of the charge against him with sufficient details to be able to answer it in terms of s 35(3)(a) of the Constitution. Therefore, the trial was rendered unfair in terms of s 35(3) and the conviction was set aside. Also see *S v Singo* 2002 (4) SA 858 (CC). Similarly, it has been held in the **United Kingdom** that an individual who is likely to be directly affected by the outcome of a decision should be given prior notification of the action to be taken and be given sufficient particulars of the case against him so that he is able to prepare his case to meet them. See, *inter alia*, *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155.

1042 See *S v Hugo* 1976 (4) SA 536 (A), where it was held that an accused is entitled to be informed by the charge with precision, or with at least a reasonable degree of clarity, what the case is that he has to meet. This is especially true of an indictment in which fraud by misrepresentation is alleged. The court also held that once the charge is furnished, the prosecution can't deviate from the charge during the trial because it sets the framework of the trial.

1043 See *S v Rautenbach* 1991 (2) SACR 700 (T). Also see *S v Hugo supra* at 536.

1044 Also see Joubert *et al* (2001) *op cit* 172-173, for a detailed discussion of the necessary averments in the charge sheet.

1045 1997 (2) SACR 291 (E). The accused had pleaded guilty to a charge of dealing in dagga. However, the magistrate had failed to question the accused regarding the time and place of the offence during interrogation in terms of s 112(1)(b) of the Act. The issue was raised as to whether it had been proved that the offence was committed within the area of jurisdiction of the magistrate's court.

1046 See *S v Ismail* 1993 (1) SACR 33 (D) at 40 C.

1047 Section 81(1) also provides that where the provisions are not complied with in that further charges are added after evidence had already been led, such proceedings are void. See *S v Thipe* 1988 (3) SA 346 (T).

sentence in the case before the trial proceeds.[1048] A detailed charge also binds the prosecution to a specified offence and particularised factual allegations. The information obtained is thus of a more limited nature and does not include the disclosure of evidence.[1049]

It should be noted that in the **United States of America**, the accused has a constitutional right in terms of the 6th Amendment, to be informed of the nature and cause of the accusation against him.[1050] This right entitles the accused to insist that the indictment inform him of the crime charged with such reasonable certainty that he can prepare his defence and protect himself after judgment against such prosecution on the same charge.[1051] In order for an indictment to be sufficient, it must allege all the elements that constitute the crime. An indictment in general language is regarded to be good if it describes the unlawful conduct in such a manner so as to reasonable inform the accused of the charges against him.[1052] The Constitution does not require the Government to furnish the accused with a copy of the indictment.[1053] However, the right to notice of accusation is regarded as such a fundamental part of the procedural due process, that the states are required to observe it.[1054]

In **English law**, if the custody officer determines on arrival at the police station, that there is sufficient evidence to charge the person arrested with the offence for which he was arrested, he must be charged or released without charge.[1055] Where a person is charged, he must be given a written notice showing the particulars of the offences. This must be "stated in simple terms" but also show "the precise offence in law with which he is charged".[1056] Regarding a trial on indictment, each offence charged should be set out in a separate count, and each count must include a statement of

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1048 *Id*.

1049 *S v Thobejane* 1995 (2) SACR 339 (T).

1050 Also see s 11(a) of the Canadian Charter of Rights and Freedoms, which provides that any person charged with an offence has the right "to be informed without unreasonable delay of the specific offence".

1051 See *United States v Cruikshank* 92 US 542, 544, 558 (1876); *Bartel v United States* 227 US 427 (1913). Thus, the right to be informed is linked to the right to be prepared.

1052 *Rosen v United States* 161 US 29, 40 (1896).

1053 See *United States v Van Duzee* 140 US 169, 173 (1891). The American position is similar to that in the magistrate's court, where the accused is not served with a charge sheet.

1054 *Rabe v Washington* 405 US 313 (1972). The constitutional requirement of due process is said to be violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that his contemplated conduct is prohibited, or the statute is so worded that he could not reasonably understand his conduct to be unlawful. Thus, statutes or ordinances have been held to be "void for vagueness". See *Papachristou v Jacksonville* 405 US 156 (1972). Thus, similarly, in the **United States**, the accused is entitled to be informed with a reasonable degree of clarity about the case against him.

1055 See s 37 of the Police and Criminal Evidence Act of 1984 (PACE).

1056 See para 16.3 of the Code of Practice (Code C) for the detention, treatment and questioning of persons by police officers.

the offence and such particulars as may be necessary to give reasonable information regarding the nature of the charge.[1057] Similar principles apply to information which forms the basis of summary trials.

In **Scotland**, a solemn procedure takes place, whereby the crown must frame a relevant indictment, setting forth with sufficient specification the time of the alleged crime, the place where it occurred, and the modus by which it was committed.[1058] In summary proceedings, the prosecutor must frame a complaint stating the substance of the charge. The indictment or complaint must be served on the accused.[1059]

Section 9(2) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") provides that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Article 14(3)(a) of the European Convention for the Protection of Human Rights (hereinafter referred to as the "ECHR") refers to the right to be informed of the charge. It is expressly required that this right must be exercised in a language that the accused understands. The right is said to apply in all cases, and the information may be oral or written. However, the information must indicate both the law and the alleged facts on which it is based. The information must be given as soon as the charge is first made by a competent authority. Therefore, article 9(2) applies where a person is in custody "pending the result of police investigations", whilst article 14(3)(a) applies "once the individual has been formally charged".[1060]

In **Canada**, section 11(a) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be informed without unreasonable delay of the specific offence. Section 11(a) therefore guarantees that a person charged with an offence will be informed of the precise offence forming the charge. The purpose of the right guaranteed by section 11(a) is to ensure that the accused knows whether the offence is one known to law and what case must be met. Thus, this provision gives constitutional basis to the requirement at common law and under the Criminal Code that the charge must be one known to law and be sufficiently precise that the accused can defend himself effectively.[1061] The appropriate and just

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1057 See s 3(1) of the Indictments Act.

1058 Harris and Joseph *The international covenant on civil and political rights and United Kingdom law* Clarendon Press Oxford (1995) at 222.

1059 *Id*.

1060 See *Kelly v Jamaica* 253/1987. *Id*.

1061 See *Cotroni v Quebec Police Commissioner* (1978) 38 CCC (2d) 56 at 63 (SCC). Also see *R v Côté* [1978] 1 SCR 8 at 13, where the majority of the Supreme Court of Canada stated that:

> "The golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."

It should be noted that s 11(a) does not apply until the charge is laid. See *R v Heit* (1984) 11 CCC (3d) 97 (Tallis JA). However, the court pointed out that the accused might successfully invoke s 11(d) or s 7 of the Charter, or possibly establish an abuse of process, if it could be shown that an injustice was caused by the pre-charge delay on the police's part or the crown for

remedy for a violation of section 11(a) is not a judicial stay of the proceedings, but an order squashing the indictment.[1062]

A count must contain a statement that the accused has committed an indictable offence.[1063] The statement that the accused has committed an indictable offence may be found in the words of the enactment that describes the offence or declares it to be an indictable offence.[1064] A count must contain sufficient details of the circumstances of the alleged offence to provide the accused with reasonable information as to the act or omission of the offence and to identify the transaction referred to so as to enable him to prepare a defence accordingly.[1065] The lack of certain allegations is not fatal provided the count satisfies the requirements of the Code in terms of reasonably informing the accused of the charge to be met.[1066] Therefore, a charge is acceptable even if it does not name the person injured; the person who owns or has special interest in the property; or the person intended to be defrauded or it does not name or describe with precision, any person, place or thing.[1067] It is also not necessary that the charge describe the means by which the alleged offence was committed.[1068] The nature of the offence charged frequently determines the assessment of whether the standard of reasonable notice to the accused has being met.[1069] An indictment which

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an ulterior motive. A delay of 5 days from the date that the charge was laid until the accused was informed of the specific offence in the charge has been held not to violate s 11(a). See *Re Lamberti* (1983) 26 Sask R 213 (QB McIntyre J). Section 11(a) also does not require notice to be given in writing. See *R v McGregor* (1983) 2 CRD 725.120-02 (Ont HC, Callon J) in this regard.

1062 See *R v Dennis* (1983) 8 CCC (3d) 411.

1063 See s 581(1) of the Criminal Code. Also see *R v Brodie* [1936] SCR 188 (SCC) [Que] where it was stated that statements must be specified.

1064 See s 581(2)(b) and s 581(5) of the Criminal Code.

1065 See s 581(2)(c) of the Criminal Code. Also see *R v Goldstein* (1986) 70 AR 324 (Alta CA) where it was held that the original count in the information does not have to contain all the material required so that the accused is reasonably informed. Also see *R v Pretly* (1984) 31 Man. R (2d) 56 (Man QB), where it was held that multiple counts fail to provide sufficient particularity to enable the accused to plead *autrefois acquit* or rely on defence of *res judicata*. Consequently, the indictment was squashed. Also see *R v Dennis supra* where the information and indictment did not particularise the alleged offence sufficiently to allow preparation of the defence. There was thus a breach of the accused's right to be informed of the specific offence without reasonable delay.

1066 See s 581 of the Criminal Code.

1067 See s 583 of the Criminal Code.

1068 See s 583(f) of the Criminal Code. Also see *R v B (AJ)* (1990) 80 Nfld and PEIR 76 (Nfld Prov Ct), where the information did not describe the manner in which indecent assaults occurred. However, the information contained sufficient information to avoid being squashed.

1069 This especially applies in conspiracy charges, where it is insufficient to charge conspiracy in the abstract. See s 583 of the Criminal Code.

reasonably informs the accused of the case to be met will be upheld.[1070]

In **Australia**, it is necessary that the information, complaint or charge must describe an offence known to law, including all the necessary elements of the offence.[1071] It suffices if it sets out the offence in the words of the provision creating the offence.[1072] The position at common law was that an information, complaint or charge which fails to disclose an offence known to law is null and void and does not give the court jurisdiction.[1073]

The above discussion demonstrates that a charge or indictment should contain sufficient particulars so as to inform the accused of the case against him. A violation of this right will lead to the trial being rendered unfair.

5.2.3.1 THE REQUEST FOR FURTHER PARTICULARS

If the accused feels that the particulars in the indictment or the charge sheet are insufficient and do not inform him properly about the charges against him, the accused or his lawyer may request further particulars from the prosecutor in terms of section 87 of the Act.[1074] Section 87 forms the basis of the procedural avenue available to an accused to enforce his right to be sufficiently informed of the charge against him.[1075] The purpose of further particulars is to clarify the charge and to

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1070 Where it is necessary, the court will order amendments or particulars or squash duplicate counts. See s 601 (regarding amendments)and s 587 (regarding particulars).

1071 See, *inter alia*, *Reedy v O' Sullivan* [1953] SASR 114 at 129.

1072 See for example, *Gabriel v Williamson* (1979) 1 NTR 6.

1073 See for example, *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508. However, an amendment will not fail because it contains an error or omission in the factual particulars. See for example, s 182 of the Justice Act 1928 (NT), s 31 of the Justices Act 1959 (TAS), s 50 of the Magistrates' Court Act 1989 (VIC).

1074 The accused could obtain the particulars in the following two ways: Firstly, he can object against the charges in terms of s 85(1)(d) because they contain too little particularity. This will lead to the public prosecutor providing the particulars. If the prosecutor fails to furnish the particulars, the court can make an order if the objection is justified. If the state does not comply with the order, the court can declare the charge null and void. Secondly, the accused can ask for particulars before evidence is led.

1075 However, see Plasket "The right to further particulars and to object to a charge: the constitutionality of the provisos to ss 85 and 87 of the Criminal Procedure Act when applied to ss 119 and 122A proceedings" (1995) *South African Journal on Human Rights* 303-310, where the writer argues that these amendments are challengeable against the equality before the law and fair trial provisions of the Bill of Rights contained in Chapter 3 of the Interim Constitution. He also states, (at 305), that these amendments give prosecutors a free hand to draft sloppy and inadequate charge sheets in the most serious of cases, and protects them from the normal consequences of their failure to do their work properly. It should be noted that s 119 refers to the appearance of an accused in a magistrate's court on an offence that may be tried in the High Court, whilst s 122A refers to pleas in the magistrate's court in which the offence may be tried in the regional court.

enable the accused to prepare his defence.[1076] The further particulars should also clear up the points in dispute but should not encumber the dispute further with excessive alternatives.[1077] The purpose of the particulars is also to promote justice and equity for both the state and the defence.[1078] The trial proceeds as if the charge has been amended in accordance with the particulars provided. The charge sheet can only be supplemented by the further particulars. There is no principle in the Act which justifies the state to refuse essential information simply because the provision of such information will disclose evidence. The accused is entitled to ask which facts will be proved, but **not how** they will be proved.[1079] Therefore, the duty to furnish further particulars does not mean that the prosecution is obliged to disclose the evidence it intends using to prove the facts.[1080]

Where the accused requires particulars of the substantive allegations against him to ascertain the true nature of the case he has to meet, the court will order the prosecution to furnish such particulars unless this is shown to be impracticable.[1081] If a charge sufficiently discloses an offence, but contains inadequate particulars, the accused must apply for such particulars at the trial. His failure to do so will mean that he has waived his right to apply for particulars and he cannot set up such defect on appeal if he has failed to apply for such particulars at the trial.[1082] In *S v Adams*[1083] it was held that where further particulars are applied for the state may not merely refer to the record of the preparatory examination if such record is voluminous. The state

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1076 Also see *S v Cooper and Others supra*, where the court stated that the object of asking for further particulars is to enable the accused to know the case which is proposed to be made against him and thus to enable him to prepare his defence. Also see *R v Mokgoetsi* 1943 AD 622.

1077 See *S v Sadeke* 1964 (2) SA 674 (T).

1078 See *S v Cooper and Others supra* at 875, where the court held that the use of particulars is intended to meet a requirement imposed in fairness and justice to both the accused and the prosecution. Also see Watney "Particulars to a charge in cases where the state relies on the doctrine of common purpose: easy answers to difficult questions?" (1999) *Tydskrif vir die Suid-Afrikaanse Reg* 323 at 337, where the writer states that if proper regard is not paid to the purpose of a request for further particulars, a situation may develop in which a factual or legal argument is conducted on paper whereby the defence sets out to attack the strength of the state case and the decision to prosecute under the guise of a request for further particulars.

1079 See *Behrman v Regional Magistrate* 1956 (1) SA 318 (T) at 321. Also see *S v National High Command* 1964 (1) SA 1 (T), where it has been held that in a summary trial, the accused is not entitled to be supplied with the evidence which the state proposes to lead, for example statements of witnesses, documents and so on.

1080 See *R v Heyne* (1) 1958 (1) SA 617 (W). However, Schwikkard maintains that the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts. See Schwikkard "Access to police-dockets – confusion reigns" (1994) *South African Journal of Criminal Justice* 323. Also see *S v Cooper and Others supra* at 885, where the court held that the prosecution must furnish further particulars of the relevant or material facts which it proposes to prove, but is under no obligation to disclose its evidence by which it proposes to prove the facts.

1081 *S v Abbass* 1916 AD 233.

1082 *S v Lotzoff* 1937 AD 196.

1083 1959 (1) SA 646 (P).

may not reply to a request for particulars by stating simply that the particulars sought "are matters peculiarly within the knowledge of the accused", as such reply may lead to the indictment being squashed.[1084] Where there is more than one count, the particulars applicable to each count must be set out.[1085] Where particulars are given, the state must prove the charge as particularised,[1086] and where a conviction is based on evidence not covered by the particulars supplied, the conviction may be set aside on review.[1087]

If the state fails to provide the particulars, the accused can approach the court for an order to compel the state to grant the particulars. If the magistrate refuses to grant the order, the accused can apply for a *mandamus* against the magistrate in the High Court, in terms of which the magistrate can be ordered to direct that the particulars should be furnished.[1088] In *Nangutuuala*[1089] the High Court rejected the proposition that post-ponements and recalling of witnesses could serve as a substitute for the right of an accused to be sufficiently informed of the charges before he pleads and before he presents his defence. Courts are extremely reluctant to issue a *mandamus* directing the furnishing of further particulars.[1090] However, if the trial court has refused an application for particulars and it appears on appeal that the accused has been prejudiced by such refusal and that it cannot be said that no failure of justice has resulted, the court will set aside the accused's conviction.[1091]

In the **United States**, another conventional discovery tool is a Rule 7(f) motion for a bill of particulars. When the defendant is confronted with a vague or confusing indictment, a motion for a bill of particulars should be made.[1092] The purpose of the bill is to supply sufficient details to enable the defence to prepare for trial and to minimise the danger of surprise at the trial.[1093] Similarly, in **Australia**, an information need not

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1084 *S v National High Command supra*. The prosecution must supply information in its possession which is reasonably necessary to enable an accused to properly prepare his defence.

1085 *S v Nkiwani* 1970 (2) SA 165 (R).

1086 *S v Anthony* 1938 TPD 602.

1087 *S v Kroukamp* 1927 TPD 412.

1088 In *Weber v Regional Magistrate Windhoek* 1969 (4) SA 394 (SWA), the court granted a *mandamus* directing that the magistrate order the prosecutor to deliver to the applicants further particulars regarding the charges against them.

1089 1973 (4) SA 640 (SWA).

1090 See *Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T).

1091 See *S v De Coning* 1954 (2) SA 647 (N), *S v C* 1955 (1) SA 464 (T).

1092 See *US v Salazar* 415 US 985 (1974).

1093 See, *inter alia*, *US v Schemban* 484 F 2d 931 (4th Cir 1973).

contain all the particulars necessary for the defendant to defend the charge.[1094] However, the court can request the prosecution to furnish further particulars and if the prosecution refuses, the charge should be dismissed.[1095]

The above discussion illustrates that obtaining further particulars to the charge is regarded as an essential part of the preparation for trial. Not only does further particulars clarify the charge, but it also enables the accused to prepare his defence.

5.2.3.2 AMENDMENT OF CHARGE SHEET/INDICTMENT

Section 86(1) of the Act refers to the instances when an indictment may be amended.[1096] Section 86(1) further provides that the court may order an amendment only if it considers that the making of an amendment will not prejudice the accused in his defence.[1097] The test for prejudice is whether the accused will be worse off after amendment of the charge.[1098] However, the question of prejudice is said to depend upon an examination of the facts and circumstances in each particular case.[1099] The prosecution is also bound by particulars of the charge and may not substitute another

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1094 See for example, *Lafitte v Samuels* 1972 (3) SASR 1 at 17. Nevertheless, where the prosecution is relying upon an aggravating matter, it should furnish particulars of it to the defendant before a plea is made. See *Blair v Miller* [1988] WAR 19.

1095 See for example, *Lafitte v Samuels supra* at 17. The information should disclose where possible, the manner in which the defendant is liable for the offence. See *inter alia*, *King v R* (1986) 16 CLR 423 at 425-6.

1096 Section 86(1) provides that an indictment may be amended where it is defective for want of an essential averment; where there is a variance between the averment in the charge and the evidence offered in proof of such averment; and where words have been omitted or unnecessarily inserted or any other error is made. The object behind s 86 is said to facilitate the rectification of charge sheets by way of amendment in order to ensure that accused persons do not escape conviction on a mere technicality arising from a defective charge.

1097 *S v Taitz* 1970 (3) SA 342 (N). Also see *S v Kariko* 1998 (2) SACR 531 (NmHC), where the issue concerned the amendment on appeal of a defective charge sheet. The accused was charged with stock theft, and although the charge sheet alleged that such stock was stolen from a named complainant, the evidence failed to establish any person from whom the stock was stolen. The state tried to amend the charge sheet on appeal, by substituting "persons unknown" for the complainant's name originally specified in the charge sheet as the person from whom the stock had been stolen. An objection was lodged against the amendment on the basis that it would prejudice the accused in his defence. The court noted that throughout the trial in the lower court, the accused had raised the defence that the stock belonged to another person. Therefore, the amendment did not affect his defence, and he did not suffer prejudice.

1098 See *S v Kuse* 1990 (1) SACR 191 (E).

1099 *S v Pillay* 1975 (1) SA 919 (N). Also see *S v Coetzer* 1976 (2) SA 769 (A) at 772, where it was held that if an amendment would not have prejudiced the accused in his defence, the failure to effect an amendment will not invalidate the proceedings except where the court refused to allow an amendment. In **Canada**, the court has held in *R v McDougall* (1984) 50 Nfld and PEIR 275 (Nfld Dist Ct), that the amendment was possible at any time before judgment. However, in *R v Campbell* [1986] 2 SCR 376 (SCC) [Ont], the crown's motion to amend the indictment was dismissed where the amendment would cause irreparable prejudice to the accused's conduct of the case.

offence for the original one where the evidence supports the former.[1100] Thus, section 86 makes provision for amendment of the charge and not for replacement thereof by a new charge.[1101] The accepted approach is to establish whether the proposed amendment differs from the original charge in such a way that it is in essence an another charge.[1102] If a new charge is framed during the course of the trial, then the possibility of prejudice to the accused is strong.[1103]

Section 88 was introduced to overcome technical errors made by persons drawing up the charges.[1104] Section 88 provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. This means that the accused can now be found guilty, even though the indictment does not disclose an offence as long as the evidence proves the offence. This reduces the burden on the prosecution. The language of the section indicates that the offence with which the accused is charged should be named in the indictment.[1105] The prosecutor should exercise caution by framing the indictment in such a way that it does disclose an offence. If he fails to do so, the accused can raise an exception to the charge before pleading to the charge. If the accused brings the defective charge sheet to the court's notice before the judgment, and the court refuses to order the amendment, then the accused may rely upon the defect on appeal, if he has been convicted by the trial court.[1106] The defect can only be cured by proper evidence.[1107] However, section 88 does not authorise replacement of one offence by another offence proved by evidence.[1108]

The position in **Australia** is that the magistrate or justice has power to amend the

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1100 See *S v Kuse supra, S v Sarjoo* 1978 (4) SA 520 (N).

1101 See *Barkett's Transport (Edms) Bpk* 1988 (1) SA 157 (A).

1102 See Joubert (2001) *et al op cit* 177.

1103 See *S v Slabbert* 1968 (3) SA 318 (O).

1104 Prior to 1959 our courts have held that an indictment could not be amended unless it disclosed an offence. See *S v Desai* 1959 (2) SA 589 (A).

1105 See *S v Mcwera* 1960 (1) PH H 43 (N). Thus, the charge must contain some recognisable offence, even though no offence is, technically speaking, disclosed. See *S v Dhludhla* 1968 (1) SA 459 (N). Also see *S v Mayongo* 1968 (1) SA 443 (E), where the court was asked to consider when s 179 bis of Act 56 of 1955 should be invoked. The section should not be invoked when a charge is framed in an embarrassing fashion under the statutory enactments without clearly indicating which offence is intended to be charged. The section cures an indictment lacking essential averments, and not a poorly drawn indictment which leaves the person to whom it is addressed to in doubt as to the substantive offence which he is alleged to have committed.

1106 See *S v Gaba* 1981 (3) SA 745 (O).

1107 *S v AR Wholesalers* 1975 (1) SA 551 (NC).

1108 See *S v Sarjoo supra*.

information or complaint in some jurisdictions.[1109] It has been held that an amendment can only be made where an objection has been raised against the information.[1110] An amendment may be made at any time during the trial unless it would cause injustice.[1111]

The above discussion demonstrates that the court will order an amendment unless it will cause prejudice or injustice to the accused.

5.2.4 ARREST

The Act has prescribed strict rules concerning the arrest of a person. This is due to the fact that an arrest infringes an individual's right to freedom and security of the person and the individual's freedom of movement.[1112] An arrest is preferably effected only after a warrant has been obtained in terms of the Act. However, in exceptional circumstances a private individual or the police may execute an arrest without a warrant. One of the requirements for a lawful arrest is that the arrestee must be informed of the reason for his arrest in terms of section 39(2) of the Act.[1113] The arrestee's custody will be unlawful if this requirement is not complied with.[1114] Joubert *et al* submit that the question of whether the arrestee was given an adequate reason for his arrest depends on the circumstances of each case, particularly the arrested person's knowledge concerning the reason for his arrest.[1115] However, the exact

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1109 See for example, *Australian Federation of Air Pilots v Australia Airlines Ltd* (1991) 28 FCR 360, s 48 Justices Act 1886 (QLD) and s 31(3) of Justices Act 1959 (TAS).

1110 See *R v Du* 1990 Tas R (NC 10) 257.

1111 See for example, s 15c of the Crimes Act 1914 (CTH), s 365(1) of the Crimes Act 1900 (ACT). Also see *Maher v R* (1987) 163 CLR 221.

1112 See s 12(1)(a) and s 21(1) of the Constitution respectively.

1113 Section 39(2) provides that the arrestor must inform the arrestee of the reason for his arrest at the time of effecting the arrest or immediately thereafter or if the arrest occurred by means of a warrant, hand the arrestee a copy of the warrant upon demand. This requirement is also entrenched in s 35(2)(a) of the Constitution, which provides that the detainee must be informed promptly of the reason for his detention.

1114 See *S v Kleyn* 1937 CPD 288 and *S v Ngidi* 1972 (1) SA 733 (N) respectively. Also see *Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A), where it was held that if the person effecting the arrest is not in possession of the warrant, and realises that he will not be able to comply with a demand made in terms of s 39(2), the arrest will be unlawful. The debate has recently arisen whether traffic and metropolitan police officers are legally able to execute warrants of arrest. According to the Automobile Association, an original warrant had to be produced by the officer concerned in arresting a motorist. However, a spokesperson for the Institute of Traffic and Municipal Police Officers has stated that s 39(2) of the Act clearly stated that in the event of an arrest being effected in terms of a warrant of arrest, a copy of the warrant had to be shown to the arrested person upon his request. He said that a certified copy need not be shown, but a copy was sufficient. Available at http:// legalbrief.co.za on 24-04-2003. Also see *Saturday Star* "Legal opinion on roadblock arrests" 10 May 2003: 5.

1115 Joubert (2001) *et al op cit* 95.

wording of the charge need not be conveyed at the time of the arrest.[1116] The detention will also be lawful if the arrestee is later informed of the reason for his arrest.[1117] However, the procedure differs when the arrestee is caught in the act, in that detailed information need not be given.[1118]

Section 43(2) of the Act provides that a warrant for the arrest of a person is a written order directing that a person described in the warrant be arrested by a peace officer, in respect of the offence set out in the warrant. The arrested person must be brought before a lower court in terms of section 50 of the Act.[1119] It is recommended that a warrant should be obtained before the liberty of a person is infringed, unless exceptional circumstances call for the summary arrest of the offender.[1120] A charge of resisting an arrest made in terms of a warrant will fail provided it appears that the warrant was shown and explained to the arrestee, and that he knew or was informed that it was being executed by the police.[1121]

It should be noted that in the **United States of America**, arrested suspects are often informed of reasons for their arrest when they are first taken into custody. They are usually so informed when they arrive at the police station for "booking". However, there does not seem to be any legal requirement for such notice.[1122] Article 9(2) of the ICCPR, requires that there must be prompt notice of charges.[1123] However, the

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1116 See *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) and *Brand v Minister of Justice* 1959 (4) SA 712 (A).

1117 See *Nqumba v State President* 1987 (1) SA 456 (E).

1118 See *Macu v Du Toit* 1982 (1) SA 272 (C) and *Minister of Law and Order v Parker* 1989 (2) SA 633 (A). It is a trite fact that where the reason for arrest is known to the arrestee as when he is caught red-handed, the purpose of notification falls away and with it the duty to inform.

1119 This relates to procedure after arrest.

1120 For a detailed discussion about arrest with a warrant, see Joubert (2001) *et al op cit* 97.

1121 *Id*.

1122 Frase in "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 42.

1123 *Ibid* at 76. It should be noted that art 9(2) of the ICCPR provides that:

"Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

The latter obligation is said to be confined to arrests in criminal cases. The provision contemplates that a general description of the reasons for arrest must be given at the time and that the specific allegations must enable the persons to challenge the detention. Indeed, the United Nations Human Rights Committee has found breaches of these obligations in circumstances where reasons have been withheld altogether. See *Portorreal v Dominican Republic* (188/1984); *Carballal v Uruguay* (33/1978) in this regard. Where reasons were given after a delay of a week or more, see *Fillastre v Bolivia* (336/1988), where there was detention in custody for 10 days before being informed of the charges. Also see *Kelly v Jamaica* (253/1987), where details of the reasons for the arrest were not given for "several weeks" or where the reasons were insufficiently detailed in *Drescher Caldas v Uruguay* (43/1979), where mere references to the legal basis of prompt security measures without indication of the substance of

United States does not comply with the Covenant in that after arrest, there is no established legal right to such notice prior to appearance in court. Even during custodial interrogation, police need not disclose all crimes they suspect.[1124] Therefore, the South African position appears to be more progressive than the United States in that legal right to notice of arrest is entrenched in section 39(2) of the Act.

In **Canada**, anyone who arrests a person, whether with or without a warrant, must give notice to that person, where feasible, of the warrant or the reason for the arrest.[1125] Section 10(a) is said to reflect the common law rule that, apart from special circumstances, an arrest without a warrant can be justified only if at the time of the arrest the reason for the arrest is made known to the accused.[1126] Section 10(a) is said to be similar to article 9.2 of the ICCPR and article 5(2) of the European Convention, which require that everyone arrested must be informed promptly of the reasons for his arrest and of any charges against him.[1127] A breach of section 10(a) has occurred when the accused was not told of the reason for his arrest for three hours.[1128] It has also been held that the word "promptly" does not require a police officer to give the arrestee reasons for his arrest until after the police officer has searched the arrestee incidental to the arrest.[1129]

The position in **England and Wales** is that a requirement to give reasons on arrest was imposed at common law, and is now found in section 28 of PACE.[1130] However,

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the complaint was found to be inadequate. Also see Harris and Joseph *op cit* 202.

1124 *Id*.

1125 See s 10(a) of the Charter and s 29 of the Criminal Code respectively. Section 10(a) provides that: "Everyone has the right on arrest or detention ... to be informed promptly of the reasons therefore." Section 29(2) of the Criminal Code of Canada RSC 1970, CC-34 requires anyone arresting a person with or without a warrant "to give notice to that person, where it is feasible to do so of (a) the process or warrant under which he makes the arrest or (b) the reason for the arrest." Also see *R v Gamracy* [1974] SCR 640 (SCC) [Ont] where it was held that the existence of a warrant is sufficient reason. However, the Canadian courts have also held that it is not necessary to inform the arrested person where the circumstances are obvious. See, *inter alia, Eccles v Bourque* (1974) 27 CRNS, 325 (SCC) [BC]; *Garthus v Van Caeseele* (1959) 30 CR 67 (BCSC). In *R v Leemhuis* (1984) 11 CRR 337 (BC Co Ct) it was held that the right to be informed of the reason for detention arises upon being taken to the police station for a breathalyser test. It was further held that the questions regarding the accused's drinking and taking him to a breathalyser machine, sufficiently informed the accused.

1126 See *Pedro v Diss* [1981] 2 All ER 59 (Div Ct).

1127 The European Convention requires further that the person arrested must be so informed "in a language he understands". Thus, the right to be informed of the reason for one's arrest is linked to the right to understand.

1128 See *R v Mason* (1983), 9 WCB 384 (BCSC Berger J). However, the court found that the violation of s 10(a) had no causal relationship to the answers being given to questions by the police after the accused had been told of the reason for his arrest. Therefore, the evidence was not excluded under s 24(2).

1129 See *R v Maitland* (1984) 4 CRD 850.60-15 (NWTSC, De Weerdt J).

1130 See the common law – *Christie v Leachinsky* [1947] AC 573 (HL).

the requirement did not apply where the circumstances were such that the person must have known the general nature of the alleged offence for which he was arrested or made it practically impossible for him to be informed, for example by running away.[1131] The requirement to give reasons also applies to stop searches in terms of section 2(2) of PACE. Therefore, a person arrested must be informed of both the fact and the reason for arrest at the time of the arrest or as soon as practicable thereafter. Where a person is arrested by a constable, these obligations apply regardless of whether these matters are obvious. A stop search may not commence until the constable has taken reasonable steps to inform the person of the proposed search and the grounds for making it. These requirements do "not mean that technical or precise language need to be used but that the person is entitled to know what ... are the facts which are said to constitute a crime on his part".[1132] It has been held in *Geldberg v Miller*[1133] that an arrest for "obstructing the arresting officer in the execution of his duty by refusing to move his car and refusing to furnish his name and address" was sufficient for an arrest for "obstructing the thoroughfare". Where no reason for arrest is given, the arrest is unlawful although the defect can be corrected, rendering the arrest valid prospectively.[1134] According to Harris and Joseph, there is also a duty to give reasons at the time of arrest in Scotland.[1135] A person detained in terms of section 2 of the Criminal Justice (Scotland) Act 1980 must be informed of the constable's suspicion, of the general nature of the offence, and of the reason for the detention.[1136] There is also a general rule that an arrest must be accompanied by a charge.[1137]

Therefore, an arrestee is entitled to be informed of the reasons for his arrest so that he can challenge his detention.

5.2.5 ENTRY OF PREMISES FOR PURPOSE OF INTERROGATION

Police officials may not enter private premises to interrogate the occupiers **without informing them of the reason for such entry** in terms of sections 26 and 27 of the Act respectively. Section 26 of the Act provides that a police official may whilst investigating an offence or alleged offence where he reasonably suspects that a person who may furnish information with regard to the offence, is on any premises, **not enter such premises without a warrant** to interrogate such person, and obtain

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1131 See Harris and Joseph *op cit* 202.

1132 See *Christie v Leachinsky supra* at 588-593.

1133 [1961] 1 WLR 153. Also see *R v Telfer* [1976] Crim LR 562, where it has been held that the arrest "on suspicion of burglary" was insufficient as the person should have been told of the particular burglary in question.

1134 See *Lewis v Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206.

1135 See *Forbes v HM Advocate* 1990 JC 215. Also see Harris and Joseph *op cit* 204.

1136 See s 2(4) of the 1980 Act.

1137 See *Chalmers v HM Advocate* 1954 JC 66, 78.

a statement from him.[1138] Thus the occupier must be furnished with a warrant informing him of the reason for such entry. Section 27(1) of the Act provides that a police official who may lawfully enter any premises in terms of section 26 may use such force as may be reasonably necessary to overcome any resistance against such entry including the breaking down of any door or window of such premises. However, a proviso to this subsection provides that such police official must first **audibly demand** admission to the premises and **notify** the occupier of the **purpose** for which he seeks entry into such premises. Therefore, the occupier must be informed of the reason for such entry.

5.2.6 SEARCH AND SEIZURE

Section 21 provides that searches and seizures should be conducted only in terms of a search warrant issued by a judicial officer such as a magistrate or judge. Even though section 21 does not require that the suspected offence be described in the warrant, it is desirable to do so to facilitate the interpretation of the warrant.[1139] It is also desirable that when law enforcement officials act in terms of a warrant, that the subject involved has access to the document which infringes upon his private rights. Section 21(4) provides that a police official who executes a warrant in terms of section 21 or section 25 must, once the warrant has been executed, and upon the request of the other party whose rights are effected by the search or seizure of an object in terms of the warrant, provide such person with a **copy** of the warrant. According to *Joubert et al,* two objections may be raised against this subsection, namely, that if the subject is present at the time of the execution of the warrant, he should be provided with a copy of the warrant before the search and or seizure. Secondly, the delivery of the copy of the warrant should not depend on the subject requesting it, as many subjects won't be aware of this as a result of a lack of knowledge of the law.[1140]

Section 48 provides that a peace officer or private person who is authorised by law to arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises, may if he **first audibly demands** entry into such premises and states the **purpose** for which he seeks entry and fails to gain entry, break open and enter and search such premises for the purpose of effecting an arrest. In *R v Jackelson*[1141] certain people had ejected a police official who had entered the premises without first demanding permission and being refused permission. The court held that they could not be convicted of obstructing such police

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1138 Section 26 was enacted to prevent private property owners from hindering police from questioning them regarding an offence that is being investigated.

1139 *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W) 581. In **Canada**, the offence in respect of which a search is to be conducted must be set out in the search warrant, and its omission renders the warrant invalid. See for example, *R v Dombrowski* (1985) 44 CR (3d) 1 (Sask CA), where the search warrant failed to disclose an offence; so the warrant was invalid.

1140 Joubert (2001) *et al op cit* 127.

1141 1926 TPD 685.

official in the execution of his duty. In *R v Rudolf*[1142] a police official wanted to arrest a man who he had seen drinking wine in a public place. The man ran into the house followed by the constable and was arrested. The two accused tried to rescue the "wine drinker" from the custody of the police official. The defence contended that the police official had made an unlawful entry when he entered the premises without first demanding admission. However, the court found that the constable was justified in the circumstances of the case of entering the house to arrest the "wine drinker", and the arrest was lawful.[1143]

Section 198 of the Summary Proceedings Act 1957 furnishes the search warrant authority in **New Zealand**. The relevant section provides that if the district court judge or the issuing judge has reasonable ground for believing that the fruits, instrument or evidence of a crime punishable by imprisonment is in particular premises, the justice may issue a search warrant to any constable.[1144] However, section 198 differs from section 21 of the Criminal Procedure Act in that the executing constable must have the warrant in his possession and must show it, but not give it to the occupier on demand. Section 317 of the Crimes Act 1961 gives a police officer the power to enter premises for the purpose of arresting a person without a warrant.[1145] If the police officer has found the person at some place off the premises committing an offence punishable by imprisonment and the officer is pursuing the offender, then the officer can enter the premises, using force if necessary to make the arrest.[1146] The officer also has power to enter any premises by force where there are reasonable and probable grounds to believe that an offence likely to cause immediate and serious harm to any person or property is being committed inside. Therefore, the purpose of section 317 is to confer a right of entry to the police officer in an emergency situation where it is not practicable or desirable to obtain a warrant first from the District Court.[1147] The power to enter premises in "hot pursuit" or to prevent a crime from occurring or continuing on those premises is a recognition of the common law authority applied in *Thomas v Sawkins*.[1148]

Section 8 of the Canadian Charter provides that: "Everyone has the right to be secure against unreasonable search or seizure". The meaning of section 8 has been

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1142 1950 (2) SA 522 (C).

1143 The court distinguished *Rudolf* from *Jackelson* in that the accused in *Jackelson* had ejected the constable before he had effected the arrest while in *Rudolf*, the arrest had been effected when the accused tried to rescue the "wine drinker".

1144 See Doyle and Hodge *Criminal procedure in New Zealand* 3rd ed The Law Book Limited (1991) at 55.

1145 *Ibid* at 57-58.

1146 The same principles apply if the police officer has good cause to suspect that a person has committed an imprisonable offence on the premises.

1147 Doyle and Hodge *op cit* 58.

1148 [1935] 2 KB 249. It was held that a constable could enter and remain on private premises if he had reasonable grounds to believe that an offence is imminent.

examined in a number of cases.[1149] In *Collins v The Queen*[1150] the Crown had failed to prove that the police officer had reasonable grounds for his search. Similarly, in *R v Dyment*[1151] a medical doctor treating a victim of a motor accident, handed over the patient's blood sample to a police officer. The blood analysis showed a blood alcohol level exceeding the permissible limit. The Supreme Court held that the taking of the blood sample by the police officer was an unreasonable seizure. The doctor only had authority to take blood for medical purposes.

In the **United States**, Rule 41(d) refers to search warrants, and requires an officer to prepare an inventory of the items seized and, upon completion of the search to give the person from whom the property was taken a copy of the warrant and a receipt that the property was taken.[1152] Several appeal courts have interpreted Rule 41(d) to require federal officers to serve warrants at the outset of a search, absent exigent circumstances. However, only the Ninth Circuit has found a violation of this interpretation sufficient to warrant suppression.[1153] In the absence of a constitutional violation, however, courts generally will not exclude evidence seized in violation of Rule 41.[1154]

5.2.7 STATEMENT TO POLICE OFFICER

Section 335 of the Criminal Procedure Act provides that an accused is entitled to a copy of a written statement made by him to a peace officer (including a police official and a magistrate) concerning any matter in connection with which criminal

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1149 See *inter alia*, *Hunter v Southam Inc* [1984] 2 SCR 145; 11 DLR (4th) 641, where the issue concerned the execution of an authority issued under s 10 of the Combines Investigation Act authorising named officers of the Combines Investigation Branch to enter the respondent's premises and to search for, and take away, documents. The respondents contended that the seizure was illegal because s 10 breached s 8 of the Charter. The Supreme Court agreed. The court considered the competing interests, namely the individual's right to privacy and the government's interest in intruding on that privacy, in order to advance its goals of law enforcement. The court found that the purpose of s 8 is to protect individuals from unjustified state intrusions upon their privacy. A system of prior authorisation as a pre-condition for a valid search and seizure is needed to achieve this. The court also stated that reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard. This is consistent with s 8 of the Charter, for authorising search and seizure, which was not the case in the present situation.

1150 [1987] 1 SCR 265 at 278; 38 DLR (4th) 508 at 521.

1151 [1988] 2 SCR 417; 55 DLR (4th) 503.

1152 See Fed Rule Crim P 41 (d).

1153 See *US v Gantt* 194 F3d 987, 1004 (9th Cir 1999), where evidence was suppressed because police intentionally violated Rule 41(d) by refusing to provide a copy of the search warrant at the outset of the search, but rather left the warrant at the apartment after the suspect was arrested and removed.

1154 See for example, *US v Burke* 517 F 2d 377, 386-87 (2d Cir 1975).

proceedings are instituted against him.[1155] If the state decides not to institute criminal proceedings against a person, such a person will not be entitled to a copy of the statement that he made to the police. In *S v Mphetha*[1156] it was held that a statement will relate to a matter in connection with which criminal proceedings are instituted if the contents of the statement are **relevant and admissible** at the person's trial, or if the state will be entitled to refer to it during the accused's cross-examination. However, in *S v Mogale*[1157] it was held that an oral statement to the police that was recorded and later transcribed does not constitute a written statement for the purposes of section 335.

Thus the above discussion on pre-trial rights indicate that the accused had access to information in terms of the Act prior to the inception of the Constitution.

5.3 POLICE DOCKET PRIVILEGE

5.3.1 POSITION BEFORE THE CONSTITUTION: THE *STEYN* ERA

Prior to the inception of the Interim Constitution, the law had recognised two kinds of communications which had to be protected from disclosure in order to promote the efficient detection of crime. The first related to communications between government officials in the course of an investigation. The public interest would be prejudiced if the methods to investigate crimes contained in a police docket, were generally known. A police docket is a file containing information that is assimilated or collated during the investigation into an alleged offence. It contains, *inter alia*, statements by people who are potential witnesses to the case and also a diary setting out the progress made by the investigating officer during the investigation. This privilege was extended later to include the notes made by a state witness; notes made by the investigating officer and the advice and instructions of checking officers; the contents of police pocket books and all relevant communications and notes for litigation purposes. These notes were privileged in that they were "part of the prosecution brief".[1158]

The second category of communications which needed protection, comprised statements which would tend to reveal the identity of a private individual who has given information concerning the commission of an offence. This is known as "informer privilege" in terms of which the state could refuse to disclose the identity of informers on grounds of public policy. This privilege was regarded as necessary to encourage people to provide the police with information. The police may depend upon the services of informers in some cases. These informers would be unwilling to

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1155 A confession is also a statement to a peace officer, and is therefore also a statement to which the accused is entitled in terms of s 335.

1156 1982 (2) SA 253 (C).

1157 1980 (1) SA 457 (T).

1158 In *R v Abelson* 1933 TPD 277, for instance, the court upheld an objection by a senior police officer to the disclosure of reports which he had received from detectives who had been investigating a liquor offence.

give assistance if their identities were disclosed. In *Marks v Beyfuss*[1159] it was held that no evidence should be admitted if it would tend to reveal the identity of a person who had given information leading to the institution of a public prosecution. The rule in *Marks v Beyfuss* is confined to public prosecutions. The only exception is that the informer's identity is disclosed if it was necessary to enable the accused to establish his innocence. In *Marais v Lombard*[1160] the court referred to the practice of the South African Police which is to claim privilege for statements made to them during investigations but to leave the decision to the court. However, it has been said that both in South Africa and in England, the court may overrule the privilege to establish the accused's innocence.[1161]

Thus the common law privilege to refuse discovery of documents in the possession of the prosecution was well established, and save for certain exceptions, this privilege was jealously enforced by the prosecution. The classic case of *R v Steyn*[1162] upheld the common law privilege in respect of police dockets. The court held that this protection against disclosure applies in both civil and criminal trials. The court also noted that where there is a serious discrepancy between the statement of a state witness and what he says on oath at the trial, the prosecutor must direct attention to that fact. The prosecutor must make the statement available for cross-examination unless there is special and cogent reason to the contrary. Therefore, the Supreme Court of Appeal (formerly known as the Appellate Division) laid down the rule in *Steyn* that a prosecutor must bring contradictions to the court's attention and must make the earlier statement available for cross-examination. In such a case the state also loses the privilege in respect of the statement.

When *Steyn* was decided, an accused was relatively well informed prior to the trial of the identity of the prospective state witnesses who could be called and the contents of their testimony. This was so because the trial was usually preceded by a preparatory examination and the record of this examination was made available to the accused.[1163] However, various developments thereafter led to the erosion or falling away of such full disclosure. The practice of holding preparatory examinations

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1159 (1890) 25 QBD 494.

1160 1958 (4) SA 224 (E).

1161 Zeffertt *et al The South African law of evidence* Butterworths (2003) at 659.

1162 1954 (1) SA 324 (A). This case involved an appeal against a magistrate's refusal to allow the state to provide statements of witnesses to the defence. The court held that when statements are obtained from witnesses for the purpose of being used in a contemplated lawsuit, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal or similar step after the decision in the court of first instance.

1163 The court in *Steyn* also drew a distinction between the record of evidence given at a preparatory examination and the statements made by witnesses to the police in the course of an investigation of a crime and preparation for a prosecution. Numerous precautions were taken at preparatory examinations such as interpreters were used; evidence was taken by the prosecutor under the magistrate's supervision in the accused's presence, and the accused can cross-examine such evidence; and evidence was carefully recorded and read to the witness so that errors may be corrected. This leads to an accurate representation of the witness's views. However, statements made to police are made in different circumstances and may not constitute an accurate representation.

fell away when the regional court was given jurisdiction to try offences such as treason and murder, which was previously only tried in the High Court.[1164] The preparatory examination was therefore deemed unnecessary in such cases. The Director of Public Prosecutions could also dispense with the preparatory examination where he felt that the administration of justice could be endangered. Although the preparatory examination is still part of criminal procedure,[1165] it has in practice been substituted by "plea proceedings".[1166] Therefore, all that remained to inform the accused of the allegations against him, was merely the right to be furnished with particulars of any matter alleged in the charge in terms of section 87 of the Act.

However, the *Steyn* case did not decide the question whether the privilege continued after the conclusion of proceedings. However, many provincial divisions of the High Court applied the "once privileged always privileged rule" to police dockets and held that the privilege persists after the conclusion of proceedings. The court in *Mazele v Minister of Law and Order*[1167] upheld the rule, but recognised that its application leads to unfair treatment of the accused.

5.3.2 THE ISSUE OF INCONSISTENT STATEMENTS AND THE PROSECUTION'S DUTY

The court in *S v Hassim and Others*[1168] held that if a witness gives evidence which reveals a serious departure from or contradicts matters contained in the police statement which is in the prosecutor's possession, then the prosecutor is fully entitled to put the witness's previous inconsistent statement to him in order to discredit him in terms of section 286 of Act 56 of 1955.[1169] If he decides not to do this at this stage, then he should, in the interests of fairness, make this statement available to cross-examining counsel in accordance with the finding in *Steyn*.[1170]

When a state witness gives evidence which differs from a statement in the prosecution's possession, the prosecutor must consider the question whether or not

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1164 See s 89 of the Magistrates' Courts Act 32 of 1944 as amended by s 7 of the Lower Courts Amendment Act 91 of 1977.

1165 See ch 20 of the Act.

1166 See s 119 of the Act.

1167 1994 (1) SACR 406 (E). The court remarked that it is unfair that the prosecution (state) has the entire record of the police investigation including sworn statements of potential witnesses at its disposal, whilst the accused cannot consult with state witnesses once the prosecution has commenced. This is a subtle reference to the principle of "equality of arms", which implies that both the defence and prosecution must come to court on an equal footing.

1168 (2) 1971 (4) NPD 493.

1169 However, the court remarked that the state prosecutor is still entitled to use s 286 of the Act after the defence counsel has completed cross-examination, irrespective of whether the defence has made use of the statement which has been handed to him by the state prosecutor.

1170 See *R v Steyn supra*.

the discrepancy is of a serious nature.[1171] The prosecutor is not required to do anything if the discrepancy is of a minor nature. However, if the discrepancy is clearly a serious one, the prosecutor must as soon as possible make the statement available to the defence. If the accused is unrepresented, the prosecutor must disclose the discrepancy to the court.[1172] The court held that the rationale of the rule requiring disclosure of a previous inconsistent statement is to provide a safeguard against the danger of an accused being convicted on the evidence of a witness who is not a credible and reliable witness. The prosecutor may not ignore an averment in a statement which is *prima facie* in conflict with the witness's evidence. If the prosecutor is in doubt, he must disclose it to the defence. If he fails to disclose the discrepancy which is indeed serious, that might well result in a failure of justice.

The prosecutor's duty was to make the original statement of the witness available to the defence in order that the credibility of the witness can be properly tested by cross-examination with the aid of that statement.[1173] Where there are two conflicting statements, it is the prosecutor's duty to disclose and make available both statements to the defence. The absence of a request by the defence for the deviating statement to be made available (and, where such is the case, of mutually conflicting statements) does not relieve a prosecutor of this aforementioned duty unless the defence has been made aware of the existence of such statements and has indicated that it does not require them.[1174] Thus, the dictum in *S v Xaba* was approved.

In *S v Jija and Others*[1175] the court was asked to make an order that a copy of the identification parade record be furnished to the defence. The court held that the duty to disclose could embrace documents relating to fingerprint evidence and the holding of identification parades.[1176] However, the disclosure is subject to the documents not being privileged. The court's decision to grant the order led to the evidence of a witness identifying one of the accused being rejected because the report (now

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1171 See *S v Xaba* 1983 (3) SA 717 (A).

1172 The court noted that a prosecutor's duty of disclosure in these circumstances is one of the rules or principles of prosecutors which must be adhered to in a criminal trial in order to ensure that the accused has a fair trial and that justice is done. The failure of a prosecutor to observe this duty is an irregularity in the proceedings for the purposes of s 317(1) of the Act.

1173 See *S v Ncaphayi en Andere* 1990 (1) SACR 472 (A), where the court had to entertain an application where the state prosecutor had failed to make the police statements of two state witnesses available to the defence when it appeared that their evidence differed materially from certain further particulars to the indictment. Further particulars were based on their police statements.

1174 The court found no suggestion of any special circumstances which could justify non-disclosure of the statements in question. The court held that failure of the prosecutor to make the original and later statements of the two witnesses available to the defence was therefore a material irregularity in the proceedings.

1175 1991(2) SA 52 (E).

1176 The court noted that the defence was entitled to a postponement if it was taken by surprise at the trial. This places a duty on the prosecutor to disclose documents. However, this is not a general duty to disclose, nor does it have the same application as discovery of documents in a civil trial.

available to the court and the defence), showed that she had failed to point him out at the identification parade. This case illustrates the danger inherent in the state's refusal to disclose documents which favour the accused in a material way.[1177] An accused cannot compel a prosecutor to do his duty in making disclosure. However, it should be pointed out that if the court becomes aware of the existence of such a document and the prosecutor succeeds in preventing its disclosure, an adverse inference can be drawn against the state.[1178]

Similarly, in the **United States**, Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor in a criminal trial to disclose evidence that is favourable to the defendant. This requirement is said to be similar to the constitutional disclosure requirements established by the Supreme Court in *Brady v Maryland*,[1179] where the court held that a prosecutor commits a due process violation, requiring reversal of a conviction, when it is shown that the prosecutor withheld favourable, material evidence. Nevertheless, there are important differences between the ethical requirements of the Model Rule and the legal requirements of the *Brady* rule.[1180]

The above case law also emphasises the prosecution's duty. Prosecutors have the benefit of the police that investigates their cases and gathers evidence for them. This access puts the accused (especially the indigent accused) at a great disadvantage in preparing their cases. Thus, the increased ethical obligations of the prosecutor are meant to ensure a fair process and minimise the disparity of resources between the prosecution and the defence in the criminal justice system.[1181] The prosecution's duty is two-fold in that it must provide a detailed charge to the accused so that he has adequate time to prepare for his defence and to begin his trial without unreasonable delay. The prosecution must also disclose previous inconsistent statements for

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1177 See Du Plessis JR "The accusatorial system – too much a game" (1991) *South African Law Journal* at 580. Also see *S v Van Rensburg* 1963 (2) SA 343 (N), where the prosecutor had neglected to produce letters during the trial indicating that the accused had been confined in a mental institution. This raised the question of whether the accused should have been sent to a mental institution for observation. This also raised the inference of whether the accused was not criminally responsible for the offence for which he was charged, namely, theft.

1178 *S v Jija and Others supra* at 59. Also see *R v M* 1959 (1) SA 343 (A), where a conviction was set aside because a judge told a jury that they could assume that a witness's evidence was consistent with her previous statement since the prosecutor had not drawn attention to the discrepancy.

1179 373 US 83 (1963). Since *Brady*, the court has continued to expand the prosecutor's constitutional duty to disclose exculpatory evidence. Thus, *Brady* and the following case law have established a prosecutor's constitutional duty to disclose exculpatory and impeachment evidence when it is in his possession or in the possession of the police. See, *inter alia*, *United States v Agurs* 427 US 97 (1976), *United States v Bagley* 473 US 667 (1985) and *Kyles v Whitley* 514 US 419 (1995).

1180 To illustrate this, the ethics rule does not limit the prosecution's disclosure obligation only to evidence that is material to the case. On the other hand, the *Brady* rule, unlike the ethics rule, dictates that the prosecution must disclose evidence that could be used to impeach a prosecution witness. For a detailed discussion about the Model Rule, the *Brady* rule, and the prosecutor's duty, see Kurcias "Prosecutor's duty to disclose exculpatory evidence" 69 (2000) *Fordham Law Review* 1205-1229.

1181 *Ibid* at 1209.

example, where a state witness's evidence in court deviates materially from statements to the police. The prosecutor has an ethical duty to disclose previous inconsistent statements and to make it available to the defence in order to enable the defence to test the credibility of witnesses by cross-examination on the contents of the statement[1182] and to ensure that the accused has a fair trial.[1183] Similarly, the prosecution is also obliged to bring to the court's notice information in its possession which may be favourable to the accused.[1184] However, the prosecutor is not obliged to hand a statement by the witness to the defence where the inconsistency is of a minor or irrelevant nature.

5.3.3 RIGHT OF ACCESS TO INFORMATION IN THE CONSTITUTION

5.3.3.1 THE PRE-*SHABALALA* INTERPRETATION

With the advent of the Interim Constitution Act 200 of 1993, police docket privilege became the focus of the court's attention. Numerous applications requesting access to
police dockets have followed the enactment of the Interim Constitution. These applications have evoked different responses from the High Courts.[1185] The Criminal Procedure Act provides that the accused has the right to be informed with sufficient particularity of the charges against him.[1186] In the past, the accused had no right to obtain information on evidence against him,[1187] nor was there any law which required the prosecution to disclose any evidence that was in favour of the accused.[1188] However, the Interim Constitution provides that everyone has a right to receive all information which is in their interest. The two provisions in the Interim Constitution which affect police docket privilege were section 23 and section 25(3)(b).[1189] The inclusion of section 23 reflects the concern generally in the Constitution with the openness of government. The right to be informed with sufficient particularity of a charge raises the issue of discovering police dockets and witness statements in

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1182 See *S v Ncaphayi en Andere supra* at 472. Similarly, it has been held in a **New Zealand** case, *Mahadeo v The Queen* [1936] 2 All ER 813, that prior contradictory statements, from a witness who has been called at deposition and who is to be called at trial, must be given to the defence.

1183 See *S v Xaba supra* at 717.

1184 See *S v Van Rensburg supra* at 343.

1185 Some decisions are conservative whilst others are progressive. The ensuing discussion will illustrate this.

1186 See ss 80 and 144 respectively.

1187 See *R v Steyn supra*.

1188 However, see *S v Van Rensburg supra* where the court held that the prosecution was obliged to furnish the accused with favourable evidence.

1189 Section 23 reads as follows: "Every person has a right of access to all information held by the state or any of it organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." Section 25(3)(b) provides that the accused's right to be "informed with sufficient particularity of the charge" is part of his or her right to a fair trial.

criminal trials.

According to Du Plessis and Corder, a finding that accused persons have a right of access to witness statements and police dockets will not necessarily entail a "free for all" or unlicensed exercise of this right.[1190] This right can be circumscribed by determining specific conditions for and the mode of *de facto* access. O Hollamby maintains that the accused and the state must approach the court on the same footing and neither should enjoy any substantial advantage over his opponent.[1191] The right to a fair trial must go hand-in-hand with the right to equal protection of the law, the entitlement to information in the possession of an organ of the state goes hand-in-hand with the right to a fair trial.

Some of the first constitutional litigation dealt with the question of whether an accused had a right of access to information contained in the police docket. In *S v Fani*[1192] Jones J held that if the accused is not sufficiently informed about the case against him, he will not be able to properly prepare his case and cannot be said to have had a fair trial. Therefore, the court held that the accused was entitled before plea to certain evidential information from the docket.[1193] However, the court found that the state is not compelled by the Interim Constitution to allow the defence access to the whole docket. The guidelines proposed in *Fani* have been commended by du Plessis.[1194]

The court considered the question whether section 23 of the Interim Constitution intended to have any application to criminal trials in *S v James*,[1195] but left the question open. The court concluded that section 23 does not require that witness statements or summaries of them be furnished to the accused. The court held that the requirement in section 25(3) that an accused be informed sufficiently of the

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1190 Du Plessis and Corder *op cit* 176.

1191 This brings the "equality of arms" principle into play. See O Hollamby "s 23 of the Interim Constitution and access to information in police dockets" (1994) *Consultus* 140 at 142.

1192 1994 (1) SACR 635 (E).

1193 The accused was entitled to the following information:

(1) copy of any statement by the accused or co-accused;
(2) copy of all relevant medical evidence;
(3) copy of any report of a technical expert nature such as blood alcohol reports, fingerprints and so on;
(4) copies of relevant documents such as the report on an identification parade, a plan of an accident scene and so on;
(5) a list of potential state witnesses;
(6) a summary of the witnesses' statements;
(7) a copy of the accused's previous convictions.

1194 See Du Plessis "Toegang tot polisiedossiere" (1994) *South African Journal of Criminal Justice* at 307, where she proposes that the guidelines in *Fani* be followed keeping in mind the *desideratum* of a well-defined balance between the interests of the individual and those of the public.

1195 1994 (2) SACR 141 (E). The accused had applied for an order compelling the state to furnish the defence with a summary of the intended evidence of each of the state witnesses.

charges against him required that he be given adequate information to enable him to understand precisely what the allegations against him are, in order to plead to the charge and to prepare his defence. However, the court refused to order that the whole police docket should be handed to the defence.[1196]

It has been held that police docket privilege is not the same as legal professional privilege, and the court has a discretion to override such privilege.[1197] The court in *Smith*, approved the finding in *Fani* that witness statement privilege is not inconsistent with the Interim Constitution. It held that the effect of section 25(3)(b) and section 23 was that an accused person is entitled to full particularity of the charge as to enable him to adduce and challenge evidence except where such information is protected by privilege.[1198] The court held that as the summary of the substantial facts in the case had failed to inform the accused adequately of the charges he had to meet, and the state had assured the court that handing over of the statements would not compromise any police informers or other interests of state security, the most expeditious method of conveying the necessary information to inform the accused fully of the charges would be to order the
state to hand over copies of statements to the defence. The state was ordered to provide the defence with copies of all the witness statements of the key witnesses.

A two-stage enquiry was followed in *Qozeleni v Minister of Law and Order and Another*[1199] namely, whether a fundamental right had been infringed and if so, whether that infringement constituted permissible limitation in terms of section 33. The court held that the fundamental right contained in section 23 should be considered with section 8(1), because the basis of the right to disclosure can also be founded on the notion that a fair trial envisages an "equality of arms".[1200] Therefore, all parties must have access to the same documents. It followed that disclosure of the police docket was necessary for the protection and exercise of plaintiff's rights during the civil trial. Therefore, the section 23 right had been infringed. The respondent had to justify non-disclosure in terms of section 33, which he had failed to do so. Therefore, the court concluded that the applicant was entitled to discovery of the police docket.

1196 Judge President Zietsmann stated that in the circumstances of the case, the summary together with the documents and other information provided to the accused, constituted sufficient detail, and even if it did not, the defence was at liberty to make another application for further particulars in terms of s 87 of the Act.

1197 See *S v Smith and Another* 1994 (2) SACR 116 (E). The court was asked to make an order that the state furnish the defence with copies of statements of witnesses or summaries of evidences of such witnesses.

1198 This protection must also be justified in terms of s 33. The court also criticised the system of informing an accused of the charges against him in terms of s 144 of the Act where an accused is arraigned for summary trial in a superior court in that it falls far short of the standard applied in progressive jurisdictions such as the United Kingdom, United States of America and Canada.

1199 1994 (1) BCLR 75 (E). In this case the plaintiff in an action for damages for unlawful arrest and detention and assault by members of the police force, brought an application for an order compelling the police to disclose the relevant police docket.

1200 Section 23 refers to access to information, whilst s 8(1) refers to equality before the law.

The issue arose in *S v Sefadi*[1201] whether the state could rely on the common law privilege attached to police dockets in terms of sections 23 and 25(3) of the Interim Constitution. The court concluded that the privilege constitutes an unjustifiable limitation on the right of access to information and negates the right. The privilege also limits the rights contained in section 25(3) unjustifiably. The court also remarked that a trial is not fair when only one of the parties (state) has access to statements taken by the police. The court concluded that the privilege is in conflict with sections 23 and 25(3) of the Interim Constitution. Therefore, it held that the state is compelled to allow the defence access to the docket. The state was ordered to provide the summaries which had been requested by accused's counsel.

In *S v Majavu*[1202] the court concluded from a survey of foreign jurisdictions such as Canada, the United States of America and the United Kingdom, that generally other jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right. The court held that while section 23 is not a discovery measure, it applies equally to the prosecution and the right of access of information has to be considered in conjunction with the rights contained in section 25(3). This means that in order to have a fair hearing, the need may arise to have access to information in the possession of the prosecution or police in order to prepare the defence of an accused properly. The court also noted that the words chosen in framing section 23 indicate the wide ambit of the intention and this is in keeping with the transparency and openness sought by the framers of the Constitution. The court therefore concluded that an accused is generally entitled to the information contained in the police docket at any stage of the investigation or prosecution in order to protect his rights. The onus rested on the state to establish that the limitation on that right was justifiable in terms of section 33. However, the state had failed to do this in the particular case. The court also remarked that the prosecution is obliged to inform an undefended accused of his rights to discovery and to supply him with the relevant documentation and information.

The above discussion demonstrates that in *James*, *Fani* and *Smith*, the court found that the common law privilege was not inconsistent with the provisions of the Constitution. According to Schwikkard, this conclusion arose as a result of the failure to distinguish between establishing the existence of a right, and the justification of the limitation of an existing right in terms of section 33(1).[1203] On the other hand, in those cases such as *Majavu* and *Qozeleni*, where a clear distinction was made between these two enquiries, the courts found that the privilege of non-disclosure was inconsistent with the provisions of the Constitution. However, a refusal to disclose some or all of the information contained in the police docket might, depending on the

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1201 1994 (2) BCLR 23 (D). Counsel for an accused arraigned in the High Court, had applied for a ruling that he was entitled to access to the statements or summaries of potential witnesses contained in the police docket.

1202 1994 (2) BCLR 56 (Ck). The court was asked to make an order that the state furnish the accused with copies of all documentation and information in its possession relating to an intended prosecution.

1203 See Schwikkard (1994) *SACJ op cit* 333.

circumstances, be justified in terms of section 33(1).[1204]

The issue arose in *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others*[1205] whether an accused person should be given access to witness statements and other information prior to his prosecution. The court concluded that on a proper interpretation, section 23 gives an accused person the right of access to information contained in the police docket. However, it is not an absolute right and remains subject to section 33(1) qualification. The court compared the position of an accused under our constitution with his position in other democratic countries and noted that our practice of criminal discovery should be brought in line with the international trend towards greater openness. The court concluded that the blanket docket privilege of common law is *prima facie* inconsistent with the Interim Constitution. Docket privilege *per se* was regarded as a limitation on the right which is not reasonable and justifiable in terms of section 33(1).[1206]

A purposive approach was followed by the court in *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal*.[1207] The court held that section 23 provided for a purposive approach in that the purpose for which it was being invoked had to be considered. The court noted that there were sound reasons for not making available copies of the statements of state witnesses namely; the risk of perjury and intimidation of witnesses. The court also noted that the public interest in ensuring that the accused was given a fair trial could be served without allowing the accused access to the police docket and thereby weakening the position of the prosecutor. The court concluded that the applicants in the present case had not shown that they were entitled to access to statements in the police docket. The court therefore found that no such duty exists and dismissed the application. However, the court referred the issue of constitutionality of the following rules to the Constitutional Court namely:

(1) Whether the common law rules of privilege precluded an accused person from having access to the contents of a police docket in all circumstances and,

(2) Whether an accused was precluded by the common law rule of practice from

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1204 *Id*.

1205 1994 (5) BCLR 99 (E). The first applicant had sought an order that the prosecution furnish him with statements contained in the police docket relating to charges on which he was arraigned. The second applicant, the Commissioner of the South African Police Services sought a declaratory order that the common law relating to docket privilege which was in force prior to the commencement of the Constitution remained in force and was consistent with ss 23 and 25 of the Constitution.

1206 Therefore, the court declined to grant the declaratory order sought by the Commissioner. The court also considered the question of who is entitled to claim privilege in respect of those contents of the docket which are subject to privilege proper or who could justify refusal to make disclosure. The court held that in each case it will be the Attorney-General (now known as Director of Public Prosecutions), until the stage when the prosecution is complete, and thereafter the police. The court thus granted the first applicant an order that the information in the docket be disclosed to him.

1207 1995 (1) SACR 88 (T).

consulting with state witnesses without first obtaining the consent of the prosecution which was entitled to refuse consent in its sole and absolute discretion.

The court examined the right in section 23 in *Nortje and Another v Attorney-General of the Cape and Another*[1208] and noted that statements in the police docket would ordinarily be reasonably required by an accused to exercise his right to defend himself. The court noted the benefits of disclosure to the accused such as assisting an innocent person in obtaining his acquittal. The court also noted that the risks of "tailoring" and other adverse consequences to the administration of justice could not be eliminated without simultaneously negating the essential content of the right. The enactment of section 23 would eventually lead to the demise of general docket privilege in *Steyn's* case. The court concluded that in the absence of some specific reason found to be good and sufficient, an accused is entitled to pre-trial disclosure of statements of both the witnesses the state intends to call and those of persons whom it does not intend to call. Therefore, the applicants were entitled to the statements they sought.[1209]

The above cases illustrate a gradual shift in the courts' thinking towards granting the accused greater access to police dockets on the basis of a fair trial. The above discussion also illustrates that the right of access to information contained in section 23 of the Interim Constitution, has been considered and enforced in a number of cases relating to access to information in police dockets.[1210] These cases demonstrate that it was essential for the applicant to show that the information sought was required to protect a right. Where this could not be shown, the applicant was unable to enforce any constitutional right to the information sought.

5.3.3.2 THE *SHABALALA* DECISION AND THE RIGHT TO A FAIR TRIAL

The Constitutional Court finally clarified the situation in *Shabalala v Attorney-General of the Transvaal*.[1211] The Constitutional Court was required in *Shababala* to

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1208 1995 (2) BCLR 236 (C).

1209 Also see *S v Thobejane* 1995 (1) SACR 329 (T) where the court stated that an accused has a right of access to police docket as a matter of course. If s 23 was applicable as a matter of course, then the privilege was a justifiable limitation. However, the court found that it had not been shown that the information in the docket was required by the accused in terms of s 23 for the protection of his rights. The information given to the accused such as copies of post-mortem reports, medical examination reports, notes and photographs pertaining to pointing out, ballistic and identification parade forms were found to be adequate for the purpose of meaningful consultation and for the accused to plead to the charge.

1210 According to Schwikkard, the cases favour the view that s 23 provides the accused with a right to disclosure of the contents of the police docket. A pre-requisite for the exercise of such right is that the information is required to enable the accused to exercise or protect any of his rights. The existence of such a right will be established if the information in the docket is relevant to any issue before the court. The state will have to discharge its onus of proving that non-disclosure of any information contained in the docket is reasonable and justifiable in an open and democratic society. See Schwikkard (1994) *SACJ op cit* 337.

1211 See *Shabalala and Others v Attorney-General of the Transvaal supra* at 1593. Please note that this case will also be discussed in subsection 7.4.2.2 below.

determine *inter alia,* whether or nor the common law privilege pertaining to the contents of police dockets, defined in *R v Steyn*[1212] is consistent with the Constitution. The question thus arose whether an accused was entitled, in addition to the particulars in the indictment read with the summary of substantial facts and any particulars obtained under section 87 of the Criminal Procedure Act, to access to the contents of the police docket itself and whether such access was required to ensure a fair trial.[1213]

The Constitutional Court in *Shabalala* found that the answer to the question actually lay in section 25(3), namely that the accused has a right to a fair trial. The court found that the police docket privilege is unconstitutional because it protects all the documents in a police docket from disclosure whether or not the accused requires those documents for a fair trial. However, the court held that if the state can show that the accused does not need access to the docket for purposes of a fair trial, disclosure will not be necessary. The state could also justify refusal of access in terms of section 33, for example, where there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or of state secrets, intimidation of witnesses or prejudice the proper ends of justice. However, the trial court retains a discretion to order disclosure even where such disclosure prejudices the state and the ends of justice because the right to a fair trial is a fundamental right of the accused.[1214]

Denying the accused access to state witness statements in the police docket is said to violate the accused's right to a fair trial in that the accused is not fully informed of the case he has to meet and is unable to prepare an adequate plea or defence. Without prior access to such statements the defence cannot adequately challenge or assess the evidence for the prosecution.[1215] In *Shabalala* it was held that "details of how the court should exercise its discretion in all these matters must be developed by the Supreme Court from case to case but it is always subject to the right of an accused to contend that the decision made by the court is not inconsistent with the

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1212 See *R v Steyn supra* at 324.

1213 The three constitutional provisions which were relevant, were s 23 which pertains to the fundamental right of access to all information held by the state, s 25(3) which pertains to the fundamental right to a fair trial, and the limitation clause in s 33.

1214 *Shabalala* approaches the issue from the fair trial angle and conforms with the position in the United States, United Kingdom, Germany and New Zealand. The basis for furnishing the accused with material in the United States is the accused's right to a fair trial. See *S v Majavu op cit* 67. Similarly, the accused's right to a fair trial is used to grant the accused access to evidence in the United Kingdom, Germany and New Zealand. For a detailed discussion about this, see the discussion in 5.3.6.

1215 See *S v Nortje supra*. Also see *S v Nassar* 1995 (1) SACR 212 (Nm), where the court held that to do justice to a fundamental right that the accused was presumed innocent until proven guilty in terms of art 12(1)(d) of the Namibian Constitution, was the prerequisite that an accused be placed in the position whereby he knew what case he had to face so that he could properly and fully prepare his defence. The court stated further that the accused was entitled to be provided with all reasonable practicable time and facilities to ensure that the trial was fair. "Facilities" in terms of art 12(1)(e) of the Constitution was interpreted to include providing an accused with all relevant information in the state's possession including copies of witness statements and relevant evidential documents.

Constitution".[1216] *Shabalala* illustrates that the accused has in principle the right of access to all witnesses statements in the police docket. Those statements which are least contested are those which are exculpatory from the accused's perspective.[1217] There is a general duty to disclose as far as all other witness's statements are concerned.

The right to a fair trial also means that information in the possession of third parties could be necessary for the adequate preparation of a defence. The principle of "equality of arms" should also apply during the preparation for trial and should entail the compulsory process of obtaining documentary evidence from third parties, such as private therapeutic records of sexual assault complainants held by psychiatrists or psychologists.[1218] However, an accused's claim to a fair trial may conflict with a third party's right to privacy. The Supreme Court of Canada has tried to balance these rights by requiring an accused to first approach the trial court to obtain a court order by convincing the court that there are reasonable grounds to believe that a specified document is in the third party's possession and that it is "likely to be relevant" for the preparation of the defence.[1219]

The defence's ability to competently challenge expert evidence depends on the extent of information available to it. The timing of disclosure relating to expert evidence could be crucial to the proper preparation of the defence case. This is because access to comprehensive expert reports and pre-trial meetings between experts can contribute to delineating the issues in the dispute.[1220] According to *Shabalala*, the timing of disclosure will depend on the circumstances of the case. Disclosure can occur at a later stage provided the accused has sufficient time to prepare the defence.[1221] The Constitutional Court stated in *Shabalala*, that the primary

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1216 See *Shabalala and Others v Attorney-General of the Transvaal supra* at s 58.

1217 The accused is entitled to documents which are "exculpatory" (documents which are helpful to the defence) unless the state can justify refusal.

1218 See Meintjies-Van der Walt "Expert evidence and the right to a fair trial: a comparative perspective" 17 (2001) *South African Journal on Human Rights* 301 at 314.

1219 Thus, it has also been held in Canada that information in the hands of third parties may in certain circumstances be necessary for the adequate preparation of a defence. See *R v O'Connor* (1995) 103 CCC (3d) 1 SCC at 15, where it was held that there must be reasonable grounds for disclosure and disclosure must be relevant for preparation of the defence. Also see *R v Beharreill* (1995) 103 CCC (3d) 92 SCC. This two stage enquiry is now regulated by legislation, namely, Bill - C 46 Production of Records in Sexual Offence Prosecutions, which became law on 12/5/97. The aim of these amendments is to improve the protection and equality rights of complainants while recognising the rights of the accused. Also see Meintjies-Van der Walt (2001) *SAJHR op cit* 314.

1220 See Meintjies-Van der Walt (2001) *SAJHR op cit* 313.

1221 See *S v Scholtz* 1997 1 BCLR 103 (NmS). Also see *S v Smile* 1998 (1) SACR 688 (SCA), where the accused had initially been denied access to statements of state witnesses. However, once it had been ascertained that they were entitled to such statements as a constitutional right the latter were made available to the accused. However, this was during the trial and after some of the witnesses had already testified. The court held that although the initial refusal to furnish the statements was a constitutional irregularity, this in itself was not a ground for setting aside the convictions. The subsequent availability of the statements remedied the defect which, was not

reason for disclosure is that an accused may prepare a defence by being fully informed of the case that he has to meet, and that disclosure should take place at a time "when the accused is acquainted with the charge or indictment or immediately thereafter".[1222] However, the duty to disclose is said to be a continuing one.[1223]

The *Shabalala* decision has been endorsed in a number of decisions.[1224] The *Shabalala* decision also led to the perception that the defence had extensive rights of access even at the bail stage. Consequently, the need arose for necessary legislation.[1225] Section 60(14) empowers a prosecutor to deny a bail applicant access to the contents of the police docket. The constitutional validity of section 60(14) was attacked in *S v Dhlamini*; *S v Dladla*; *S v Joubert; S v Schietekat*[1226] where the Constitutional Court confirmed the
constitutional validity of this provision. However, the *Shabalala* decision has been the butt of some critical comment.[1227]

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of such a nature as to immediately warrant the vitiating of the trial.

1222 See *Shabalala v Attorney-General of the Transvaal supra* at s 56.

1223 See *R v Stinchcombe* (1991) 68 CCC (3d) 1 at 14 (SCC) where the Canadian court held that the duty to disclose is also a continuing one.

1224 The decision was favourably referred to in *S v Kandovazu* 1998 (9) BCLR 1148 (NmS), where the court held that the order refusing disclosure of the witness statements to the defence was tantamount to a denial of the right to a fair trial to an accused person. Also see *S v Makiti* 1997 (1) All SA 291 (B), where the court held that although *Shabalala* does not require witness statements to be handed over to the defence in all cases, if the matter appeared not to be trivial and there was no prejudice to the state, the statements should be made available to the defence in order to give effect to the spirit and tenor of the Constitution.

1225 See s 60(14) of the Act, which provides that "notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket ... unless the prosecutor otherwise directs". It also contains a proviso that this subsection "shall not be construed as denying an accused access to any information, record or document to which he ... may be entitled for purposes of his trial". Thus, this proviso ensured that s 60(14) would not be in conflict with the decision in *Shabalala*.

1226 1999 (2) SACR 51 (CC). Also see Van der Merwe "Borgverrigtinge en toegang tot die polisiedossier: het die staat 'n regsetiese beskikbaar stellingsverpligting?" 12 (2001) *Stellenbosch Law Review* at 215-221, where the writer argues that there is at least one special situation where a prosecutor who has decided to rely on s 60 (14) in withholding the contents of the police docket from a bail applicant, will on the grounds of legal ethics be compelled to reserve his decision. This situation will arise where there is a material discrepancy between the oral evidence of a state witness at the bail proceedings and his written statement contained in the police docket. Also see Van der Merwe "Artikels 60(14) en 335 van die Strafproseswet: het 'n borgapplikant 'n reg van toegang tot sy eie verklaring in die polisiedossier?" 14 (2001) *South African Journal of Criminal Justice* 297, where the writer argues that despite the fact that s 60(14) applies "notwithstanding anything to the contrary contained in any law", a prosecutor should as a rule permit a bail applicant to have access to a copy of a statement falling within the ambit of s 335 of the Act.

1227 See Senatle "Access to information in the police docket" (1999) *The Judicial Officer* 55 at 72-73, where the writer states that the *Shabalala* decision has not taken the position regarding police docket privilege any further. The effect of the case is that the state can no longer make a unilateral claim of non-disclosure. The decision is also silent regarding the stage at which the

5.3.4 RIGHT OF ACCESS TO INFORMATION IN THE FINAL CONSTITUTION

Section 35(3)(a) of Constitution 108 of 1996 provides that the accused has a right to be informed of the charge with sufficient details to answer it.[1228] This right is linked to the right to have adequate time and facilities for the preparation of his defence. The accused's rights to have adequate time and facilities to prepare a defence is linked to his right of access to information.[1229] Section 35(3)(b) provides that every accused has a right to a fair trial which includes the right to have adequate time and facilities to prepare a defence.[1230]

The right of access to adequate facilities also imposes a positive duty on the state to furnish the accused with such facilities which include allowing an accused access to results of the police investigation.[1231] In *Edwards v UK*[1232] the European Court held that it is a requirement of a fair trial that "the prosecution authorities disclose to the defence all material evidence against the accused". The HRC also held in *Harvard v*

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disclosure should be made. The writer proposes that disclosure should be made after the completion of investigation, but before commencement of the trial. The decision is also silent regarding reciprocal disclosure which requires the defence to disclose to the prosecution certain elements of the case that it plans to present at the trial, such as names of defence witnesses, their addresses and their statements. However, the South African Law Commission does not support reciprocal disclosure by the defence. It sees no scope for any duties upon the accused during the course of the trial which do not already exist at common law and in the rules and practices of cross-examination. See the *South African Law Commission (Project 73) Report* "A more inquisitorial approach to criminal procedure – police questioning, defence disclosure, the role of judicial officers and judicial management of trials" (August 2002) at 109.

1228 See *S v Lavhengwa* 1996 (2) SACR 453 (W) 482 at 484, where the court examined whether the nature of the statutory offence of contempt of court was sufficiently clear and unambigious to comply with the constitutional right to be informed with sufficient particularity of the charge. The court held that if the definition of an offence is so vague about the prohibited act, it not only allows the unfair prosecution of an unwitting person but it also grants the state a widespread prosecuting discretion which it may abuse. Thus, there should be a fair notification to those citizens subjected to the law and adequate guidance for law enforcement agencies. The South African Law Commission also prefers the *Lavhengwa* approach, as the offence and field of prohibition is clear. See *South African Law Commission Discussion Paper 90* "The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing" (31 March 2000) at 64.

1229 See chapter 7 on "The Right to be Prepared" for a more detailed discussion about the accused's right to adequate time and facilities to prepare a defence.

1230 Article 14(3)(b) of the ICCPR and art 6(3)(b) of the ECHR have similar provisions. The United Nations Human Rights Committee (hereinafter referred to as the "HRC") defines "adequate time" as depending on the circumstances of each case while the word "facilities" means that an accused should be granted access to documents and records necessary for the preparation of the defence, but it does not include an entitlement to be furnished with copies of all relevant documents.

1231 Steytler *Constitutional criminal procedure* 232.

1232 (1992) 15 EHRR 417. Also see *Bendenoun v France* (1994) 18 EHRR 54, where the principle was applied to an administration court; certain documents or even the whole file may have to be supplied, but then the applicant has to give specific reasons, even briefly for the request to have access.

Norway[1233] that it is important for the guarantee of a fair trial that the defence has the opportunity to familiarise itself with the documentary evidence against the accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel.[1234]

The information must also be given to the accused in a language that he understands.[1235] The ICCPR provides that the accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.[1236] The ECHR has a similar provision in terms of article 6(3)(a).[1237] In *Kamasinski v Austria*[1238] the court accepted that information could be given orally as long as the accused is adequately informed. The court also noted that an accused who is "not conversant in the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a language that he understands".[1239] However, there is compliance with the right if the defence counsel understands the language in which the information is given.[1240]

Section 32 provides that everyone has the right of access to any information that is held by the state and another person and that is required for the exercise or protection of any rights. The ratio for section 32 is to produce an open and accountable government. The following case law refers to the interpretation of section 32 of the Constitution:

1233 Case no 451/1991.

1234 See De Zayas "The United Nations and the guarantees of a fair trial in the International Covenant on Civil and Political Rights and the Convention against torture, and other cruel, inhuman or degrading treatment or punishment" in Weissbrodt and Wolfrum (1998) *op cit* 684.

1235 See s 35(4) of the Constitution. Section 35(4) should also apply when the summons or indictment is served on the accused outside the courtroom. Where the accused is represented, communication is effective if the lawyer understands the language of the documents. Where notification is in court, the right to an interpreter in terms of s 35(3)(k) applies. The charge sheet need not be translated into language other than the court language as long as it has been competently interpreted to the accused. It is acceptable if the accused is represented provided that the defence lawyer understands the language in which the document is written. See Steytler *Constitutional criminal procedure* 226. Also see chapter 6 on "The Right to Understand" for a more detailed discussion.

1236 See art 14(3)(a).

1237 Article 6(3)(a) provides that a person charged with a criminal offence must be informed of the nature and cause of the accusation against him.

1238 (1991) 13 EHRR 36.

1239 Steytler *Constitutional criminal procedure* 226.

1240 *Id.*

In *Leech and Others v Farber NO and Others*[1241] the question involved the extent to which the examinee at such enquiries was entitled to access to information in the possession of the Commissioner as a creditor. The court found generally it would not be "unfair" to require the witnesses to be examined without first being given access to the information in the possession of the Commissioner or a creditor who intended to participate in the enquiry. The mere fact that the enquiry was under the control of the commissioner did not have the consequence that documents in the possession of a creditor who desired to participate were *ipso facto* held by the creditor as agent on behalf of the commissioner. Such documents were not documents in the state's possession as contemplated by section 32 of the Constitution. Documents to which applicants sought access were the documents of the creditor and were not held by the commissioner. The reliance upon section 32 was therefore found to have been misconceived.[1242]

The court held in *Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council*[1243] that the respondent had established that the information was confidential. The tenderers and particularly the successful tenderer had a direct and substantial interest in not having the contents of their tender documents revealed to the applicant who was their competitor.[1244] The court noted that the framers of the Constitution had clearly not intended to confer a right of unrestricted access. They would have been conscious of the fact that unscrupulous persons would exploit such a position for selfish reasons. A balance had to be struck between the right of access to documents and the right of third parties to privacy.[1245] Therefore, the application

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1241 1999 (9) BCLR 971(W). Here, enquiries were held in terms of ss 417 and 418 of the Companies Act 61 of 1973.

1242 The court held that fairness did not dictate that in general the questioner should disclose to witnesses all information which was already in his possession or any suspicions that may be held in relation to the particular witness as a pre-condition to questioning him. If circumstances arose in which a witness required an opportunity to consider an aspect more fully in order to place himself in a position to provide a meaningful reply, that was a matter which could and should be dealt with by the Commissioner if and when it arose.

1243 1999 (9) BCLR 1052 (W). The issue involved an application for access to documents which was sought by an unsuccessful tenderer. The facts were that the applicant relied upon the provisions of s 32 and s 33 read with items 23(2)(a) and 23(2)(b) of Schedule 6 to the Final Constitution and s 217 of the Constitution. Section 32 guarantees to every person the right of access to any information held by the state where such is required for the exercise or protection of any rights. Section 33 guarantees to every person the right to administrative action that is lawful, reasonable and procedurally fair. Section 217 provides that when a state organ contracts for business, it must ensure that the system is fair, equitable, transparent, competitive and cost-effective.

1244 If each tenderer was able to obtain access to its competitors' confidential information, this would have a chilling effect causing prospective tenderers to withhold important information and possibly even refraining from submitting a tender. The commercial implications of such a state of affairs were obvious.

1245 Also see the Canadian case of *R v O'Connor supra* which is also instructive regarding the maintenance of a balance between the accused's right of access to information and the third party's right to privacy.

was dismissed. Similarly, in *Goodman Brothers (Pty) Ltd v Transnet Ltd*[1246] the court found that a party seeking access had to show a reasonable basis for believing that a disclosure of documents in the state's possession would assist him to protect or exercise a right. The court found that no *prima facie* basis had been made out for the infringement of a right which the applicant had sought to exercise or protect.

In the case of *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*[1247] the court held that the content of the right of access of information should be examined within the context within which it is claimed. The court also held that the purpose of section 32 is, *inter alia*, to provide a framework for a statute guaranteeing freedom of information, and to enable courts to examine whether a denial of information would undermine the notions of fairness, openness and transparency.[1248] Similarly, a medical practitioner relied on the constitutional right of access to information, when he sought an order against the Health Professions Council of South Africa, to compel it to grant access to certain hospital records.[1249] The professional body was conducting an enquiry into a complaint of negligence laid against the medical practitioner, and it possessed hospital records relating to the complaint. The court held that such relief was not competent against the council because the council was not an organ of the state. The complainant was, however, entitled to access to those documents in the possession of the council emanating directly or indirectly from the hospital records. The respondent was therefore ordered to allow the applicant to inspect and make copies of all such documentation. It has also been held that whilst the information to which access is sought in terms of section 32 does not have to be essential, it certainly has to be more than useful to a party who alleges that he requires the information.[1250]

The above discussion demonstrates that the case law does not deal with criminal matters *per se*. However, the principles extracted from these cases clearly apply to the realm of criminal discovery. The above cases illustrate that a witness must be given access to information in the other party's possession according to the dictates of fairness. However, this right of access is not absolute, and a balance must be

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1246 1998 (8) BCLR 1024 (W). Here, an unsuccessful tenderer had sought an order compelling the respondent to furnish reasons for the rejection of the applicant's tender as well as the furnishing of information in the possession of the respondent relating to the evaluation of the tenders, including copies of tenders received. The court found that the applicant was entitled to an order compelling the respondent to furnish reasons for the rejection of the applicant's tender. However, it was not entitled to the relief it sought in respect of access to documents in the respondent's possession.

1247 2000 (5) BCLR 534 (C). Here, the applicants had sought an order compelling the first respondent to furnish a wide range of information, including a transcript of all the evidence presented to the first respondent's committee on Human Rights Violations, upon which the findings complained of were investigated.

1248 However, the application was dismissed with costs, because the applicants had not made out a case why the information was needed immediately to exercise their right to launch a claim for defamation.

1249 See *Korf v Health Professions Council of South Africa* 2000 (3) BCLR 309 (T).

1250 See *Ngubane v Meisch NO* 2001 (1) SA 425 (N).

struck between one party's right of access and the other party's right to withhold such access. This view conforms with the Constitutional Court's finding in *Shababala*.[1251]

5.3.5 CURRENT POSITION: PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

The **aim** of the Information Act is to give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights, and to provide for incidental matters.[1252] The object of the Information Act is to foster a culture of transparency and accountability in public and private bodies, thus giving effect to the right of access to information. Similarly, it seeks to promote a society in which the people of South Africa have access to information so as to enable them to more fully exercise and protect all of their rights. However, the right of access to any information held by a public or a private body may be limited to the extent that the limitations are reasonable and justifiable in terms of section 36 of the Constitution.

When a court interprets the provision of the Information Act, it must prefer any reasonable interpretation of that provision which is consistent with the objects of the act over any alternative interpretation that is inconsistent with those objects. The Information Act applies to a record of a public body and a record of a private body. However, the Information Act does not apply to records required for criminal or civil proceedings after commencement of proceedings.[1253] The Information Act is said to apply despite the provisions of any other legislation.

The information officer (chief executive officer of a public or private body) has a right to refuse a request of access to a record of the body in the following circumstances:

(1) for the protection of the privacy of a third party who is a natural person (s 34). This means that the information officer must refuse a request for access to the record of the body if its disclosure would invoke the unreasonable disclosure of personal information about a third party including a deceased individual (s 34(1));

(2) . . . . . (s 35);

(3) . . . . . (s 36);

(4) . . . . . (s 37);

1251 See *Shabalala v Attorney-General of the Transvaal supra*.

1252 See Government Gazette No 20852. Sections of the Promotion of Access to Information Act of 2000, formerly known as the Open Democracy Bill, are modelled on Freedom of Information Acts in Australia, New Zealand, Canada and the US. For a detailed discussion about this Act, see *The Star* "Promotion Of Access to Information Act of 2000" 23 March 2001:16.

1253 See s 7(1) of the Act. However, any record obtained in contravention of s 7(1) is admissible as evidence in the criminal or civil proceedings referred to in s 7(1), unless the exclusion of such record by the court in question would be detrimental to the interests of justice.

(5) . . . . . (s 38);

(6) for the protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings (s 39). This means that the information officer may refuse a request for access to a record if

(a) the record contains methods, techniques, procedures or guidelines for the prevention, detection, suppression or investigation of offences or the prosecution of alleged offenders and the disclosure of those methods, techniques, procedures or guidelines would prejudice the effectiveness of
those methods or lead to the circumvention of the law or facilitate the commission of an offence;

(b) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record would impede that prosecution or result in a miscarriage of justice in that prosecution;

(c) if the disclosure of the record would prejudice the investigation of any possible offence, reveal or enable a person to ascertain the identity of a confidential source of information in respect of a law enforcement matter, resulting in the intimidation or coercion of a witness or endangering the life or physical safety of that witness; resulting in the commission of an offence facilitating escape from lawful detention, depriving a person of a right to a fair trial or an impartial adjudication;

(d) if the disclosure facilitates the commission of a contravention of a law including escape from lawful detention, or prejudices or impairs the fairness of a trial or the impartiality of an adjudication.

(7) for the protection of records privileged from production in legal proceedings (s 40). This means that the information officer must refuse a request for access to record if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.

(8) . . . . . (s 41);

(9) . . . . . (s 42);

(10) . . . . . (s 43).

However, the information officer must grant a request for access to a record if the public interest in the disclosure of the record outweighs the harm (s 46).

It is apparent from the above that sections 34, 39 and 40 have a bearing on criminal discovery practice. The exclusion of the Information Act for records required for criminal and civil proceedings is harsh. This clearly restricts the accused's rights to obtain access to information in police dockets. The Information Act clearly places emphasis on law enforcement which is understandable in the light of the violent times

we live in. However, the rights of accused persons should also be protected. It is noteworthy that the Information Act stipulates that any limitation on the right of access must be justified in terms of section 36 of the Constitution. This would certainly ensure that a fair and equitable balance is maintained between the accused's rights of access to information and the law enforcement's right to refuse disclosure. The effect of this justification requirement and section 46 above, is that the Information Act requires the information officer to use great care in exercising his right of refusal. This is indeed commendable. The Information Act is heralded as a milestone for public sector accountability.[1254] South Africa was a closed and secretive society before the advent of the Constitution. Therefore, it was impossible for interested parties to obtain access to sensitive information. However, the Constitution brought with it transformation and a welcome shift from the secretive authoritarianism of the past towards a democracy based on openness and transparency.[1255]

5.3.6 ACCESS TO INFORMATION IN FOREIGN JURISDICTIONS

The position in international law varies from country to country.[1256] In some instances discovery is virtually non-existent, whilst in other countries discovery is generally applied and is very extensive. This comparative study is also relevant in terms of section 39(1) of the Constitution which requires consideration of international law and foreign law.[1257] Many foreign jurisdictions have also taken a progressive approach towards the right of access to information as the ensuing discussion will demonstrate.

5.3.6.1 CANADA

There was virtually no discovery in criminal cases in Canada. However, that situation changed as a practice of voluntary disclosure by the prosecution developed. Efforts to make discovery mandatory were initially resisted. An "experiment" in Montreal had

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1254 See *The Star op cit* 16.

1255 The Promotion of Access to Information Act illustrates this transformation. Also see Williams "Access to information in the new South Africa" (1997) *De Rebus* at 563-565.

1256 Roger Traynor, former Chief Justice of the Supreme Court of California, made the following appropriate comments regarding the use of comparative law:

> "Such differences do more than elucidate the stuff of comparative law. They also serve to remind us, in any advance upon its dusky area, how apt are the uses of diversity. It is no flat world, this world of law, and we need as many views as are envisaged how much of it still awaits discovery."

See Traynor "Ground lost and found in criminal discovery in England" 39 (1964) *New York University Law Review* 749 at 770.

1257 Section 39(1) states that when interpreting the bill of rights, a court, tribunal or forum:

> "(a) .....
> (b) must consider international law; and
> (c) may consider foreign law."

However, care must be adopted when foreign law is taken into consideration. See *inter alia*, *Shabalala v Attorney-General of the Transvaal supra*.

revealed that greater discovery led to an increase in guilty pleas.[1258] Rules have developed through precedent as courts have been required to balance the interests of the state with the right of an accused under the Canadian Charter to make "full answer and defence". Any rule of evidentiary privilege or non-disclosure which prevents relevant material from coming into the hands of parties or the court "acts as an exception to the truth-finding process".[1259] It may conflict with the defendant's right to make full answer and defence, a right described by the Supreme Court in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[1260] The court noted that "the principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material".[1261] The court in *Stinchcombe* also reaffirmed the principle that "there is a general duty on the crown's part to disclose all material it proposes to use at the trial and especially all evidence which may assist the accused even if the crown does not propose to use it".[1262]
However, the obligation to disclose is not absolute and it is subject to the discretion of counsel for the crown (prosecution).[1263] The general principle applied is that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the accused's right to make full answer and defence, unless non-disclosure is justified by the law of privilege.[1264] The crown's counsel must disclose all relevant information. Initial disclosure should occur before the accused is called upon to choose the mode of trial or to plead. Nevertheless the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.[1265] It has also been stated that the crown has a duty to make timely disclosure to the defence of all evidence supporting innocence of

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1258 *S v Majavu supra* at 63.

1259 See *R v Beharreill supra*.

1260 See *R v Stinchcombe supra* at 68. The extent of the Crown obligation is to produce the fruits of the police investigation to the accused, including statements made by witnesses and notes of interviews. Thus, the Court of Appeal accepted the principle that an accused is entitled to discovery of documentation in the prosecution's possession.

1261 *Ibid* at 74. The court stated that if the system of criminal justice is to be marked by search for truth, then disclosure and discovery of relevant materials rather than suppression must be the starting point.

1262 It was so stated in *R v C* (MH) 1988 46 CCC (3 d) 142 at 155.

1263 This discretion extends both to the withholding of information in the following instances for example, to protect the identity of informer, to prevent prejudice and harm to an informer and to the timing of disclosure. The discretion of the Crown counsel is reviewable by the trial judge. This view conforms with *Shabalala supra*.

1264 See *R v Stinchcombe supra* at 77.

1265 This conforms with the finding in *Shabalala*. It should be noted that defence counsel who become aware of any failure by the Crown to comply with the duty to disclose must bring it to the court's attention at the earliest opportunity, in order to avoid a new trial. Any failure to comply with this obligation will be an important factor in determining on appeal whether a new trial should be ordered. See *R v Stinchcombe supra* at 12-13, 68.

the accused or mitigating the offence. However, the obligation is not reciprocal.[1266] The Law Reform Commission of Canada has also adopted the view that it would be inconsistent with the principles of the adversarial process to compel the defence to make pre-trial disclosure.[1267] However, Maude favours the introduction of reciprocal disclosure in Canada.[1268]

The Supreme Court decided in *Stinchcombe* that the test for relevance is one of potential usefulness in making a full answer to the allegations, in terms of assisting the case for the defence or damaging the prosecution. The onus rests on the prosecution to justify non-disclosure of information in its possession. However, relevance is defined differently when the information is in the hands of third parties, who are not in the same position as the crown.[1269] According to the Supreme Court, parties may only be ordered to produce material that is likely to be used for evidential purposes, and not merely for strategic or tactical reasons. Thus, the test is one of probative value. The defence may use the material for limited purposes only. To illustrate this, in *Mandeville*, the court directed that "the defence be restricted from reproducing or releasing this material except for the purpose of instructing its expert witnesses" and that the "material should not be disclosed to the accused except for the necessary soliticor-client communications".[1270] There will usually be a duty to disclose medical information to the defendant when "the right to make full answer and defence is implicated by information contained in the records".[1271] It was determined by the majority in *O'Connor* that "information in the crown's possession which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege which might arise".[1272] Compelled disclosure is necessary to satisfy these defence interests only if the information cannot reasonably be obtained by other means.

1266 See *R v Stinchcombe supra*. Also see *R v Stone* [1999] 2 SCR 290.

1267 See Law Reform Commission of Canada *Criminal Procedure: Discovery* (Working Paper No 4 1974) 29, para 64. A current proposal is being put forth for reciprocal disclosure of expert evidence in terms of the Criminal Code Amendment Bill 2001. Also see Dawkins "Defence disclosure in criminal cases" (2001) *New Zealand Law Review* 35 at 56-57.

1268 See Maude "Reciprocal disclosure in criminal trials: stacking the deck against the accused, or calling defence counsel's bluff?" (1999) *Alberta Law Review* 715, where the writer examines if there is room to incorporate defence disclosure into Canada's criminal trial proceedings. He concludes that the introduction of reciprocal disclosure would be a moderate expansion of already existing notice requirements, and that defence counsel should start to introduce their own guidelines regarding defence disclosure.

1269 See *R v O'Connor supra*.

1270 See *R v Mandeville* (1993) [1994] NWTR 126 (SC) 21 CR (4th) 272. Also see *R v Ross* (1991) 119 NSR (2d) 177 at 180 (SC AD), where it was determined that any order for production should be "as restrictive as possible".

1271 See *R v O'Connor supra* at 411. Also see Dawson "Compelled production of medical records" 43 (1998) *McGill Law Journal* 25- 65, for a discussion of the form of analysis that a court is likely to adopt in resolving a dispute concerning the compelled production of medical and psychiatric records in legal proceedings, when the defendant seeks access to the records.

1272 See *R v O'Connor supra* at 431.

The crown (state) is only entitled to produce what is in its possession or control. However, the crown is entitled to explain the absence of evidence which has been in its possession, and is no longer available. A satisfactory explanation will lead to the crown discharging its obligation, unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Charter.[1273]

The Federal Access to Information Act of 1982 (hereinafter referred to as the "AIA") covers the major agencies for the administration of justice, including the federal police (RCMP), the Department of Solicitor General, and the Department of Justice. However, the law enforcement exemptions are "distressingly broad".[1274] To illustrate this, section 16(1)(c) permits withholding of information if disclosure "could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations".[1275] Indications are that the AIA is rarely used in the criminal discovery context. The reason for the lack of impact of the federal and provincial Freedom of Information legislation on criminal discovery practice is that these law exemptions are too broad. This nullifies the practical use of the Federal Access to Information Act by criminal defendants.

In Canadian criminal proceedings, the defendant's information rights are protected by legislation governing criminal procedure and by the inherent powers of courts to ensure fairness in trials. *Stinchcombe* set out the general principle that an accused's ability to access the necessary information to make full answer and defence is now constitutionally protected under section 7 of the Canadian Charter of Rights and Freedoms. The *Stinchcombe* case also "marked the dawn of a new era in disclosure to the defence, by transforming a professional courtesy into a formal obligation".[1276] The innovation of *Stinchcombe* is in the creation of an avenue of judicial review in which the crown will have to justify non-disclosure on the basis that the material sought is clearly irrelevant or privileged.[1277]

1273 See *R v Stinchcombe supra* at 96, where the loss of relevant evidence due to the death of the investigating officer did not require a stay of proceedings. However, in *R v Carosella* (1997) 112 CCC (3d) 289 (SCC) [Ont], a deliberate shredding by a rape crisis centre, of notes compiled during an interview with the complainant required a stay of proceedings.

1274 Rankin "The new Access to Information and Privacy Act: a critical annotation" 15 (1983) *Ottawa Law Review* 1. Also see Onyshko "The Federal Court and the *Access to Information Act*" 22 (1993) *Manitoba Law Journal* 73-144 for a more detailed discussion about how the Federal Court of Canada has treated the Federal Access to Information Act in Canada. Onyshko criticises the Federal Court for not treating the Access to Information Act on the same level as the Charter.

1275 Taggart "The impact of freedom of information legislation on criminal discovery in comparative common law perspective" (1990) *Vanderbilt Journal of Transnational Law* 235 at 266.

1276 See *R v O'Connor supra*. Also see *R v Mills* [1999] 3 SCR 668 at 671-673, where the Supreme Court of Canada stated that the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. On the other hand, the accused will have no right to the records if they contain information that is either irrelevant or distorts the search for truth.

1277 However, see Young "Adversarial justice and the Charter of rights: stunting the growth of the 'living tree' Part II" (1997) *Criminal Law Quarterly* 419 at 421. The writer contends that the *Stinchcombe* requirements are being enforced without the creation of any new pre-trial mechanism to give practical effect to its sweeping theoretical principles.

5.3.6.2 UNITED STATES OF AMERICA

In the United States of America, discovery is more limited. The history of discovery illustrates that the common law of England prior to the Revolution made no provision for discovery by a criminal defendant. Indeed, the first effort at discovery occurred after the Revolution, when a motion was made for an order requiring the prosecution to make a report available for inspection by the defendant.[1278] However, a different position was taken up by the English courts in 1833, when the prosecution was ordered to allow the defendant to examine a threatening letter allegedly written by him, in order to give his witness an opportunity to study the handwriting.[1279] Nowadays, discovery is regulated by federal and state laws of criminal procedure.[1280] Many states have recognised that a defendant has a right to discovery in criminal cases.[1281] In federal criminal cases and in some states, the names and pretrial statements of prosecution witnesses are not disclosed prior to trial. In other states, felony prosecutors disclose everything in their files unless justification for a protective order for certain items is made. However, a court has a discretion to assist an accused who makes out a case for the discovery of particular documents. The basis for requiring the production of such material is the accused's right to a fair trial.[1282]

1278 The motion was denied as the court found "no principle to warrant it". See *King v Holland* 4 TR 691, 100 Eng Rep 1248 (KB 1792). Also see Perkins and Boyce *Criminal law and procedure: cases and materials* The Foundation Press Inc (1977) at 970-975.

1279 See *Rex v Harrie* 6 Car and P 105, 172 Eng Rep 1165 (1833). Similarly, in 1861, a defendant charged with false pretenses was given permission to inspect letters written by him to the alleged victim. See *Regina v Colucci* 3 F and F 103, 176 Eng Rep 46 (1861).

1280 Where discovery in a criminal case is recognised it has included not only confessions but such subjects as guns and bullets, reports of scientific analyses, autopsies and photographs of persons and places. See *inter alia*, *State v ex rel Mahoney v Superior Court* 78 Ariz 74, 275 P2d 887 (1954), *State v Thompson* 54 Wash 2d 100, 338 P 2d 319 (1959) and *Norton v Superior Court In and For San Diego County* 173 Cal App 2d 133, 343 P 2d 139 (1959). Also see DelRosso and Ernst "Discovery" (2001) *The Georgetown Law Journal* at 1343-1376 for a detailed discussion about criminal discovery in the United States.

1281 In 1927, the Missouri court had recognised that the defendant in a criminal case has a right to discovery when circumstances make this important for the proper preparation of his defence. See *S v Tippet* 317 Mo 319, 296 SW 132 (1927). An Iowa statute had also permitted such discovery, but this was held not to be mandatory. See *S v Howard* 191 Iowa 728, 183 NW 482 (1921). The state of California had also recognised the defendant's right to pre-trial inspection of evidence in the possession of the prosecution. The leading California case is *Powell v Superior Court In and For Los Angeles County* 48 Calif 2d 704, 312 P 2d (698) (1957), where the defendant Powell was granted an order of inspection of his signed statement to the police and a type written script of a tape recording, with the right to make copies as requested. Thus, in *Powell v Superior Court*, the Supreme Court established the basic right of the accused in a criminal case to obtain discovery before trial as well as during the trial itself.

1282 See *S v Majavu supra* at 67. Also see *Cash v Superior Court* 53 Calif 2d 72, 75, 346 P 2d 407, 408 (1959), where the court stated that "the basis for requiring pre-trial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." Also see Brennan "The criminal prosecution: sporting event or quest for truth? A progress report" 68 (1990) *Washington University Law Quarterly* 1, where the writer discusses the advances in criminal discovery in the United States over the last quarter-century. The writer concludes (at 18) that considerable more discovery to the defence is required than is now permitted if one wants

Although most of the rules regarding defence discovery of prosecution evidence are based on statutes and procedural rules, some disclosures to the defence are constitutionally required.

Due process requires the prosecution to turn over exculpatory[1283] or other pro-defence evidence in its possession whenever such evidence is "material" to either the determination of guilt or to sentencing.[1284] Thus, a prosecutor's suppression of material evidence favourable to the defendant, following a defendant's request, violates due process.[1285] This applies "irrespective of the good faith or bad faith of the prosecution".[1286] The government obligation has been extended to include a duty to seek out evidence favourable to the accused not in government possession or control.[1287] In the post- conviction context, evidence is "material" if there is a "reasonable probability" that the result as to guilt or sentencing would have been different had the evidence been disclosed.[1288]

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to ensure the fairness of criminal trials. However, see Dennis "The discovery process in criminal prosecutions: towards fair trials and just verdicts" 68 (1990) *Washington University Law Quarterly* 63, which is a critical response to Justice Brennan's arguments. Dennis contends that not only is broader discovery not needed, but it might diminish fairness in criminal trials, by promoting and facilitating the defendants' attempts to subvert justice.

1283 The term "exculpatory" comes from the word "exculpate", which means to free from blame or to prove guiltless. Thus, exculpatory evidence may include such evidence that will prove the accused's innocence or would create such doubt as to prevent the prosecution from establishing the guilt of the accused beyond a reasonable doubt. See Webster's *New World Dictionary* World Publication (1971) at 262. Also see Balbastro "Due process right of the accused to be informed before trial of exculpatory evidence: proceedings of symposium on the rights of the accused" 11 (1996) *Institute of Human Rights University of Phillipines Law Centre* 311, for a discussion about the relevant American jurisprudence.

1284 See Frase "Fair trial standards in the United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 43. Also see *Brady v Maryland supra*, which held that due process of law required that the Government disclose, upon request "evidence favourable to an accused which is material either to guilt or to punishment". This is known as the *Brady* rule. According to Robert Clinton, *Brady* provides a broad constitutional right of the accused to discover upon request any evidence in the prosecution's possession useful to the accused's prosecution of a defence. Another important issue which arises under *Brady* is the timing of the required disclosure of evidence favourable to the accused. Once the courts recognise that the *Brady* decision rests not on an effort to prevent "suppression" of favourable evidence, as its language suggests, but on the right to present a defence, it is clear that disclosure must be made sufficiently early to facilitate effective defence use of the favourable material. See Clinton "The right to present a defence: an emergent constitutional guarantee in criminal trials" (1976) *Indiana Law Review* 713 at 842-843.

1285 See *Brady v Maryland supra* at 87.

1286 *Id*. Also see *United States v Bagley supra* at 682, where it was held that the suppression of material evidence is a constitutional violation regardless of whether there has been a specific or general request, or no request at all.

1287 See *Kyles v Whitley supra* at 434.

1288 See *US v Bagley supra* at 682.

The government is required to preserve evidence only in certain circumstances.[1289] Courts have held that the failure to produce evidence requires dismissal of the prosecution in order to protect the accused's right to defend.[1290] "Lost evidence" cases involve situations in which the government has been in possession of physical evidence such as bullets, weapons, drugs, blood samples or written statements which are material to the defence, and is unable or unwilling to produce the evidence at trial.[1291] When alleged exculpatory evidence is lost or destroyed by the prosecution and is therefore not available for assessment and use at trial or retrial, the defendants must show that comparable evidence is not reasonably available and that the evidence was lost or destroyed in bad faith.[1292] Unless the defendant can show bad faith on the police's part, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.[1293]

At the Federal level, Rule 16 of the Federal Rules of Criminal Procedure provides for pre-trial discovery of certain information and material in the prosecution's possession. Thus, the inherent power of the trial court to allow discovery in criminal cases in the interests of justice may be exercised with regard to matters not explicitly authorised under the limited discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure or state counterpart.[1294] This rule allows the accused to inspect and copy any statement made by himself, but it does not require the prosecution to disclose the names and addresses of any prosecution witnesses, nor does it oblige the prosecutor to furnish the accused with copies of statements made by prospective witnesses.[1295] The defendant is thus given access to material which the government has in its possession, but which is not available to him. Nevertheless, the defendant is given a

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1289 See *California v Trombetta* 467 US 479, 488-489 (1984).

1290 See *US v Perry* 471 F 2d 1057, 1063 (DC Cir 1972). Also see Clinton *op cit* 847.

1291 This problem has often arisen in connection with statements required to be produced under the Jencks Act. Courts have also dismissed prosecutions or reversed convictions because of the prosecution's failure or inability to supply exculpatory evidence previously in its possession. See, *inter alia*, *Johnson v State* 249 So 2d 470 (Fla Ct App 197), 280 So 2d 673 (Fla 1973). These cases demonstrate that the courts are safeguarding the accused's right to defend by presuming that the lost or destroyed evidence would be exculpatory and therefore vital to the accused. Therefore, the government cannot constitutionally act in such a way as to physically deprive the accused of evidence which is material to the defence case. See Clinton *op cit* 848.

1292 See *California v Trombetta supra*.

1293 See *Arizona v Youngblood* 488 US 51, 58 (1988).

1294 The following is open to discovery and inspection in terms of Rule 16:

"(i) Any statement by defendant whether oral or in writing
(ii) Documents and tangible objects
(iii) Reports of examination and tests such as results or reports of physical or mental examinations and of scientific tests or experiments or copies thereof
(iv) However, statements by other state witnesses and evidence before a Grand jury are excluded except evidence of the defendant himself."

See Rule 16 of the Federal Rules of Criminal Procedure. Also *S v Majavu supra* at 67.

1295 See Taggart *op cit* 238.

substantial right of pre-trial discovery under Rule 16. An important aspect of Rule 16 discovery is the continuing duty to disclose.[1296] Most of a defendant's reciprocal discovery obligations under Rule 16 arise only after the government has complied with defence requests for disclosure.[1297] The fifth amendment is also not an absolute bar to criminal discovery in favour of the prosecution.[1298] It has been assumed that the prosecution would have no right to pre-trial discovery in a criminal case. However, a Californian court has held that where important, it is entitled to such discovery as will violate neither the defendant's privilege against self-incrimination nor the attorney-client privilege.[1299]

The leading case of *Jencks v United States*[1300] established the defendant's right in a criminal case to inspect written reports such as FBI records, after the witness has testified in court, to aid in cross-examination. This led to the advent of the so-called Jencks Act, 18 USCA s 3500, which relates to the production of statements and reports of witnesses.[1301] The Jencks Act narrowly defined which statements were

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1296 See Rule 16(c) which provides that the Government must "promptly notify" the defendant of additional discoverable material which has been the subject of a previous discovery request, upon receiving knowledge of the existence of the material. See *US v James* 495 F 2d 434 (5th Cir) 419 US 899 (1974).

1297 See Rule 16(b)(1)(A)-(B) of the Federal Rules of Criminal Procedure. Rule 16(b)(1) allows reciprocal discovery by the government of documents, tangible objects, and results or reports of examinations and tests within the possession of the defence, if the government has already complied with a defence request for discovery of similar items under R 16, or the defence intends to present the requested material as evidence, or the defence witnesses who prepared a report will testify regarding its contents. The only exception is Rule 16(b)(1)(c) which requires a defendant to disclose a summary of expert testimony where he has filed a notice under Rule 12(2)(b) of intent to present expert testimony regarding his mental condition. See Jordan, Kehoe and Schechter "The Freedom of Information Act – a potential alternative to conventional criminal discovery" 14 (1976) *The American Criminal Law Review* 73 at 92-96 for a detailed discussion about Rule 16 discovery.

1298 See *Williams v Florida* 399 US 78, 85 (1970) where it was stated that "Nothing in the Fifth amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defence." Here, the Supreme Court upheld the requirement under Federal Rule of Criminal Procedure 12.1 that the defendant give notice of an alibi defence. This decision is said to be the turning point in the development of compulsory defence disclosure in the United States. Also see Beckler *et al* "Protecting defence evidence from prosecutorial discovery" 68 (1990) *Washington University Law Quarterly* 71. Also see Williams "Sidestepping *Scott*: modifying criminal discovery in Alaska" (1998) *Alaska Law Review* 33, where the writer examines the possibility of instituting reciprocal criminal discovery in Alaska. The writer makes out a case for reciprocal discovery, by contending (at 34) that without reciprocal discovery, the defence has access to more information than does the prosecution from putting on a strong case as possible. Reciprocal discovery systems thus aim to rectify this imbalance by providing the prosecution with greater discovery access to the defendant's information.

1299 See *Jones v Superior Court of Nevada County* 58 Cal 2d 56, 22 Cal Rptr 879, 372 P 2d 919 (1962).

1300 353 US 657, 77 S Ct 1007, 1 L ed 2d 1103 (1957).

1301 The Jencks Act provides that : "In any criminal prosecution ... no statement or report ... made by a Government witness or prospective Government witness (other than the defendant) ... shall be the subject of subpoena, discovery or inspection until said witness has testified on direct

discoverable and prohibited courts from ordering disclosure before the witness testified at trial.[1302] If the government does not turn over the requested documents, the testimony of the witness will be stricken and the trial will continue, unless the court determines that the interests of justice call for a mistrial.[1303]

Criminal discovery at the federal level falls far short of the American Bar Association Standards for Criminal Procedure which require the prosecution to provide, upon request, names and addresses of witnesses together with any relevant witness statements.[1304] The experience at the state level varies a great deal. Defence counsel are using the federal Freedom of Information Act (hereinafter referred to as the "FOIA") and state open record laws as substitutes for, or aids to criminal discovery, due to the restrictiveness and complexity of federal criminal regime and the diversity of state criminal discovery practice.[1305] Indeed, FOIA access has a number of advantages over conventional criminal discovery.[1306]

The courts in the United States have generally resisted attempts by criminal defendants to gain access to a wider range of material under the FOIA than is available by conventional discovery. However, some judges have indicated their

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examination in the trial of the case." Thus, the Jencks Act provides for defence access to statements made by a Government witness which relate to the subject matter of his testimony at trial.

1302 See Douglass "Balancing hearsay and criminal discovery" 68 (2000) *Fordham Law Review* 2097 at 2135. This article discusses how the process of criminal discovery can and should adapt to correct the hearsay-discovery balance when the government relies on hearsay.

1303 See 18 USC s 3500(d).

1304 See Taggart *op cit* 239.

1305 Three general types of countervailing interests are said to be recognised in the FOIA, namely:

(1) the nation's interest in self-preservation;
(2) the agency's interest in maintaining the secrecy of its decisional processes and information sources; and
(3) the individual's interest in remaining secure from invasions of privacy.

See Jordan *et al op cit* 75.

1306 These include the following: although a potential defendant can't seek discovery before charges are laid or after the time provided for by the court rule, the defendant can make the FOIA request before charges are brought, during conventional discovery period or after the period expires; some records that would not be discoverable under the rules or that would be the subject of privilege are available under the FOIA such as witness lists, prosecution guidelines and instructions to prosecutors; FOIA also requires no showing of reasonableness or relevance unlike the discovery motion. See Taggart *op cit* 239-240. Jordan *et al* also describe the advantages of FOIA discovery to be the absence of any timing or standing requirements in an FOIA action, and the fact that the Government rather than the FOIA plaintiff carries the burden of proof regarding the applicability of a disclosure exemption. See Jordan *et al op cit* 131-134 for a detailed discussion.

willingness to use the FOIA as a criminal discovery tool.[1307] Nevertheless, the FOIA has had little impact on federal criminal discovery practice. The major factor is that most judges are unwilling or reluctant to allow the FOIA to supplement and amend the partial code of pre-trial discovery in the Federal Rules of Criminal Procedure.[1308] In those courts that have taken a restrictive approach, the FOIA remains available as an alternative to conventional discovery as long as FOIA disclosure would not exceed the provisions in the Federal Rules.[1309]

The above discussion demonstrates that the Federal Rule of Criminal Procedure 16, the Jencks Act and the *Brady* rule govern discovery in criminal proceedings in the United States. The general trend over the past two decades is to expand the scope of pre-trial discovery permitted to defendants. Thus in American Law, the accused not only has the right to interview all witnesses, even those held in custody by the state, but also the right through the discovery process, of gaining access to all the material available to the prosecutor, which would include statements made by witnesses, exhibits, forensic reports and the like. The American experience illustrates that the accused is not entitled to discovery as of right but the court has a discretion to come to his assistance on application by him to the extent that the court is satisfied that he has made out a case for discovery of certain documents.[1310]

5.3.6.3 UNITED KINGDOM

In the **United Kingdom**, the disclosure of evidence against the accused is a major element of a fair hearing. Article 6(3)(a) of the European Convention on Human Rights requires that a person charged with a criminal offence be informed of the nature and cause of the accusation against him.[1311] The need for the accused to have access to information necessary for the proper preparation of the defence arose as a result of several cases in England involving miscarriages of justice.[1312] This led to

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1307 In the case of *United States v Wahlin* 384 F Supp (WD Wis) (1974) 43, the accused who was charged with excise tax evasion filed a discovery motion under Rule 16, seeking access to Internal Revenue Service private letter rulings which were necessary for the preparation for his defence. The court found that the Government's contention that the defendant can't rely on the FOIA to obtain discovery in a criminal action is "preposterous".

1308 The FOIA also has disadvantages. Jordan *et al* set out the disadvantages of using the FOIA such as delay, expense and inadequate remedies. See Jordan *et al op cit* 134-138.

1309 See Taggart *op cit* 242. Also see Jordan *et al op cit* 91, where the writer examines ways that the FOIA can assist the criminal lawyer during pre-trial discovery.

1310 Also see Louisell "Criminal discovery: dilemma real or apparent?" (1961) *California Law Review* 56-103, for a detailed discussion about criminal discovery in the United States. The writer concludes that when criminal discovery genuinely promotes the ascertainment of facts, it cannot arbitrarily be withheld in the name of protecting the balance between the state and the accused. He also states that the long-term path for discovery is one of development, that focusses on the difficulties that inhibit growth such as tackling organised, professional or conspirational crime and their intelligent resolution. Also see *Powell v Supreme Court supra*.

1311 The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law.

1312 Cheney D *et al Criminal justice and Human Rights Act 1998* Jordans (1999) at 91.

changes to prosecution disclosure by precedent and statute.

5.3.6.3.1 THE POSITION BEFORE 1996

It was suggested in *Marks v Beyfus*[1313] that material which assists the defence should always be disclosed. However, in *R v Keane*,[1314] the Court of Appeal favoured a balancing exercise between public interest in the non-disclosure of the documents and the public interest in the proper administration of justice. Disclosure should always be ordered if the withholding of the information "may prove the defendant's innocence or avoid a miscarriage of justice".[1315]

Prior to the Criminal Procedure and Investigations Act 1996 (hereinafter referred to as the "CPIA"), the matter was governed by guidelines issued by the Attorney-General in 1981 supplemented by court cases.[1316] These guidelines demonstrate that an accused who is tried in the English High Court is given access well before the trial. The information made available to the accused by means of the procedures set out in the Attorney-General's guidelines is additional to the information the accused receives in the form of the "committal bundle", the indictment and further particulars. The accused's access to the prosecution's statements is curtailed only in special circumstances for which there are detailed guidelines to ensure that there is no abuse of the access given.[1317]

A prosecutor is obliged to inform an accused of his rights to request advance information.[1318] If the prosecutor receives such a request, he must furnish the accused with a copy of those written statements which he proposes to use in the proceedings, or a summary of the evidence of which he proposes to use in the proceedings. However, if the prosecutor believes that the disclosure of any evidence might lead to a witness being intimidated or the course of justice being interfered with, he is not obliged to comply with the request. The prosecution must however indicate in writing that he refuses to give such advance information. However, the court can compel the prosecutor to provide such information.[1319] The prosecutor's failure to disclose to the defence statements of witnesses which might help the defence case amounts to a denial of natural justice, and any conviction obtained in such

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1313 (1890) 25 QBD 494, 488. Also see *R v Governor of Brixton Prison, ex p Osman* [1991] 1 WLR 281, 290.

1314 [1994] 1 WLR 746.

1315 See *R v Turner* (Paul) [1995] 1 WLR 264.

1316 In practice the most extensive access to information is given to an accused charged in the High Court on an indictment, in terms of guidelines laid down by the Attorney-General.

1317 *S v Sefadi supra* at 29-33.

1318 *Halsbury's Laws of England* Vol 11(2) 1990 at 692. Also see *S v Majavu supra* at 69.

1319 These rules originate from the Magistrates' Courts (Advance Information) Rules of 1985.

circumstances is liable to be squashed by the Divisional Court.[1320] This principle also applies to the disclosure of witness statements when a material discrepancy exists between evidence given on oath and the contents of written statements in a trial of a summary offence.

The prosecution thus owes a duty to the courts to ensure that all relevant evidence which assists an accused is either led by them or made available to the defence.[1321] This right is said to be part of the general right to a fair trial.[1322] If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness requires that the rules of natural justice must be observed. Under the common law, the prosecution was obliged to provide material which had or might have some bearing on the offences charged. This meant that all "material" evidence was discloseable.[1323] There was a duty to provide all statements which have been taken, whether or not the witnesses were apparently credible.[1324] This includes material relevant to the credibility of prosecution witnesses, but not material which relates only to the credibility of defence witnesses.[1325]

Therefore, the position prevailing before 1996 was that full disclosure of prosecution material before trial was regarded as an essential element of a fair trial. The position regarding trials on indictment was that the defendant is entitled to advance disclosure not only of the evidence on which the prosecution is intending to rely but also of "unused material".[1326] The position prevailing in the magistrate's courts was that there was no obligation on the prosecution to disclose evidence regarding summary offences. However, there is a statutory obligation in the magistrate's court regarding triable-either-way offences which are being tried summarily.[1327] In *R v Liverpool Crown Court ex p Robinson,*[1328] it was held that a general duty rests on the court to ensure a fair trial which would require the prosecution to produce all the material

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1320 See *R v Leyland Justices ex parte Hawthorne* (1979) 1 QE 2(3).

1321 See *R v Ward* (Judith) [1993] 1 WLR 619, 645;[1993] 2 All ER 577.

1322 See *R v Brown* (Winston) [1998] AC 367, 374 F, where the learned judge Lord Hope stated that "the rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial."

1323 See *R v Keane supra* at 746.

1324 See *R v Mills* [1998] AC 382.

1325 See *Wilson v Police* [1992] 2 NZLR 533.

1326 In *R v Maguire* [1992] 94 Cr App R 133 and *R v Ward supra*, the courts ruled that "unused material" applied to almost all material collected during the prosecution. The prosecution also had to disclose any matters which might be used against prosecution witnesses for example, that the witness had been subject to police disciplinary hearings.

1327 See s 48 of the Criminal Law Act 1977 and Magistrates' Courts (Advance Information) Rules 1985, SI 1985/601.

1328 [1986] Crim LR 622.

evidence.[1329] The prosecution had to determine what was relevant, though the defence could ask the court to rule on this if there was a dispute. The police and prosecution resented these developments because they were now faced with the dilemma of either having to disclose sensitive and confidential material, especially in relation to informants, or having to discontinue prosecution.[1330]

There was no common-law obligation on the defence to disclose the nature of the defence before 1996. However, it was introduced by statute in the following circumstances: for alibi defences under the Criminal Justice Act 1967; for expert evidence in terms of section 81 of the PACE 1984 and for preparatory hearings in serious fraud cases in terms of section 9 of the Criminal Justice Act 1987.[1331] This was done to facilitate the jury's function to arrive at the truth.

The prosecutor may also seek immunity from disclosure on the grounds of public interest immunity because the information would reveal the identity of informants or details of police operational practices. If the prosecutor believes that the disclosure would not be in the public interest he can apply to the court for an order to that effect.[1332] If after a conviction, it becomes clear that the material does exist which, if disclosed, would have influenced the way in which the defence was conducted, then the non-disclosure by the prosecution amounts to a material irregularity which entitles an appeal against conviction to succeed. Usually the defence would be aware of an application to decide on a public interest immunity claim and could make representations in court. However, the courts have now approved an *ex parte* procedure whereby the prosecution can approach the court for an order for immunity from disclosure without informing the defence at all.[1333] These procedures limit the access of the defence to sensitive material.

5.3.6.3.2 POSITION IN TERMS OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 ("CPIA")

The position in the United Kingdom has been modified by the Criminal Procedure and Investigations Act 1996 (the "CPIA") and the Code of Practice issued under it. These

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1329 The following definition of "material" has been made by the judges:

(a) anything which was possibly relevant to an issue in the case
(b) anything which possibly raised a new issue not already apparent and
(c) anything which held out a real prospect of providing a lead on evidence concerning the material in (a) or (b).

See *R v Liverpool Crown Court ex p Robinson supra*.

1330 See Cheney *et al op cit* 91.

1331 *Ibid* at 92.

1332 The court will consider the issue by balancing the public interest in non-disclosure against the interests of justice as far as the defendant is concerned. After making an order of non-disclosure, the court must consider under review, whether it remains contrary to the public interest to disclose the material. *Ibid* at 93.

1333 It was so held in *R v Keane supra* and *R v Davis* [1993] 2 All ER 643.

replace the common law rules regarding prosecution disclosure.[1334] The CPIA has had
a major impact on the procedure for disclosure.[1335] The 1996 Act involves a three-stage process namely, primary disclosure by the prosecution which is automatic, submission of a statement by the defence and secondary disclosure by the prosecution. The prosecution is required to disclose to the defence any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused ("primary disclosure").[1336] The prosecution is obliged to furnish the defence with copies of all relevant material to the offence, details about the offender and the circumstances of the case, as well as evidence of expert scientific witnesses. The second stage involves a statement by the defence setting out the material basis of its case. The defence must give a "defence statement" to both the court and the prosecutor setting out in general terms the nature of the accused's defence and indicating why he disagrees with the prosecution.[1337] Flaws in the defence statement may lead to adverse consequences for the accused as the jury may draw adverse inferences.[1338] According to Sharpe, this reciprocal disclosure provision weakens the privilege against self-incrimination, and may be challenged under article 6(2) as infringing the presumption of innocence.[1339]

The prosecutor must respond to the defence statement and disclose to the defence any prosecution material which has not previously been disclosed and which might be reasonably expected to assist the accused's defence ("secondary disclosure").[1340] Thereafter the prosecutor must consider whether at any time there is prosecution material which ought to be disclosed. Where the accused has given a statement to

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1334 See s 21(1) of the CPIA.

1335 See Sharpe "Disclosure, immunity and fair trials" 63 (1999) *The Journal of Criminal Law* 67-82, for a detailed discussion about the Criminal Procedure and Investigations Act 1996. Also see Sprack "The Criminal Procedure and Investigations Act 1996: (1) The duty of disclosure" (1997) *The Criminal Law Review* 308.

1336 See s 3(1) of the CPIA.

1337 See s 5 of the CPIA. It should be noted that Scotland also has a scheme of defence disclosure. The defence is entitled to disclose any pleas of special defence such as insanity or alibi 10 days before the trial. The defence is also entitled to furnish the prosecution with a list of their witnesses before the trial. A quasi-inquisitorial procedure is also held in advance of the trial, whereby the defendant is examined regarding the nature and particulars of his defence. For a more detailed discussion about the Scottish scheme, see Dawkins *op cit* 58.

1338 According to Sharpe, s 11 of the CPIA imposes a penalty by allowing the court to draw adverse inferences at trial for "faults in disclosure" by the accused, but a failure by the police or prosecutors to divulge information required under the act is not penalised. This clearly demonstrates inequalities of structure and treatment. See Sharpe *The Journal of Criminal Law op cit* 71.

1339 See Sharpe "Article 6 and the disclosure of evidence in criminal trials" (1999) *The Criminal Law Review* 273 at 277.

1340 See s 7 of the CPIA. The prosecutor is said to be under a continuing duty to review questions of disclosure. See s 9 of the CPIA. The prosecutor's continuing duty to disclose conforms with the viewpoints in *Shabalala* and *Stinchcombe supra*.

the prosecution, the prosecutor is obliged to make any additional disclosures that may be necessary. Where the prosecution comes across material which might undermine the prosecution case and which has not been disclosed to the accused, such material should be disclosed to the accused as soon as possible.[1341] The duty to disclose under article 6, extends to any material for and against the accused. This includes material which may undermine the credibility of defence witnesses, as well as those appearing for the prosecution.[1342] The disclosure provisions do not apply until after committal.[1343] It is envisaged that some disclosure may be required before then, although this would not normally exceed primary disclosure.[1344] The aim of these new rules is to make prosecutions more efficient but to maintain fairness.

The Criminal Procedure and Investigation Act of 1996 has not changed the procedures regarding disclosure on public interest immunity much. Section 8 of the Act requires the prosecutor on application to the trial court, not to disclose information where it would not be in the public interest to do so. Where material has not been disclosed on the grounds of public interest immunity, an accused person can apply to court for a review of this decision during the trial.[1345] The common law rules regarding whether disclosure is in the public interest will still apply.[1346]

1341 The CPIA 1996 now requires the prosecutor to share with the defence the evidence that he does not intend to use, that is, "unused material". This not only applies to proceedings on indictment but also to all forms of summary trial. See Spencer "Procedural anomalies" (2000) *Cambridge Law Journal* 51.

1342 In *R v Brown* [1997] 3 All ER 780, the prosecution did not disclose statements by a potential defence witness which the prosecution did not consider credible. The Court of Appeal held that informing the defence of the name and address of the witness was sufficient. However, the House of Lords concluded that the non-disclosure was a material irregularity. Although the failure to disclose material to the defence is a breach under art 6, the Commission has accepted that the late introduction of previously undisclosed evidence by the prosecution under the *ex improviso* rules does not infringe the Convention.

1343 See Azzopardi "Disclosure at the police station, the right to silence and *DPP v Ara*" (2002) *Criminal Law Review* 295-300, where he states that the guidelines contemplate that disclosure should sometimes occur before the duty arises under the CPIA. For example, when disclosure is given prior to a bail decision or before committal proceedings.

1344 See *R v Director of Public Prosecutions*, *ex p Lee* [1999] 2 All ER 737.

1345 However, a different view is taken of police disclosure of information obtained at interviews. See *Woolgar Chief Constable of Sussex* [1999] 3 All ER 604, where the appeal court stated that information obtained from the police from interviews with suspects is *prima facie* confidential and is normally to be used in the course of ensuing criminal proceedings. However, when a regulatory body in the course of its statutory duty is holding an inquiry, the police are entitled to release information in their possession to it for the purpose of that inquiry (but for no other purpose), whether or not the person affected consents and whether or not the information has been requested by the regulatory body.

1346 See s 21(2) of the CPIA. A number of categories of documents fall under public interest, namely documents which would tend to disclose the identity of informers (see *Savage v Chief Constable of Hampshire* [1997], WLR 1061); documents which might reveal the location of police observation posts (for example, *R v Rankine* [1986] QB 861); police reports (see *Taylor v Anderton* (Police Complaints Authority Intervening) [1995] 1 WLR 447 or manuals. Regarding third party disclosure in England and Wales, see Temkin "Digging the dirt: disclosure of records in sexual assault cases" (2002) *The Cambridge Law Journal* 126, where the writer calls for

The obligation to make pre-trial disclosure does not apply to trials in the magistrate's court. The absence of such disclosure does not affect the fairness of any trial. However, justices must grant reasonable adjournments to enable the defendant to deal with the evidence.[1347] Such disclosure ought to be given if requested unless there are good reasons for the refusal, such as protection of a witness.[1348] However, the provisions of the CPIA do not affect the disclosure position.[1349] This approach is said to be consistent with article 6 of the Convention.[1350]

According to Sharpe, the CPIA has restricted the availability of information to the defence, placed new disclosure obligations on an accused prior to trial and has, through the Code expanded the scope of public interest immunity.[1351] It has also been suggested that the provisions of the CPIA may be in breach of article 6 of the Convention.[1352] Thus, the CPIA has been subjected to criticism. Indeed, the statutory disclosure regime imposed by the CPIA is said to increase the structural imbalance that exists between the
state and the defence.[1353] According to Sprack, the courts should interpret the CPIA in such a way as to ensure that material relevant to the question of the accused's guilt is made available.[1354] Therefore, UK courts must ensure that the use which is made of the defence statement, does not infringe the principle enshrined in article 6(2) of the

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amendments to the present law. It should be noted that the existing regime under the Criminal Procedure (Attendance of Witnesses) Act 1965 as amended by s 66 of the CPIA, has a two-stage process requiring the defence first to demonstrate materiality and the court to perform a balancing act required by public interest immunity.

1347 See *R v Kingston-upon-Hull Justices*, *ex p McCann* (1991) 155 JP 569.

1348 See *R v Kingston supra* at 573E-574B; *R v Stratford Justices*, *ex p Imbert* (1999) 2 Cr App R 276.

1349 See *R v Stratford Justices exp Imbert supra* at 376.

1350 *Ibid*. Also see Clayton and Tomlinson *The law of human rights* Oxford University Press (2000) 592-595.

1351 See Sharpe *The Journal of Criminal Law op cit* 67.

1352 This is because there is no independent assessment of the relevance of material; disclosure is "conditional" on the services of a "defence statement"; there is no obligation to disclose material obtained in other investigations or held by other people, and there is no obligation to provide disclosure in the case of summary trials. For a more detailed discussion see Clayton and Tomlinson *op cit* 707-709. Also see Sharpe *The Criminal Law Review op cit* 273, where the writer examines the possible impact of the Human Rights Act 1998 on the law relating to the disclosure of unused material in criminal cases. The writer concludes that despite a reduction in the prosecution obligation of disclosure in terms of the CPIA, it is unlikely that the Act, as a whole, will be impugned by the direct application of art 6.

1353 Sharpe *The Journal of Criminal Law op cit* 80-82, where the writer concludes that the crown has been given greater control of information and greater scope to seek immunity from disclosure of matters that may be relevant to the defence case. She advocates a random review by an independent disclosure Commissioner to discourage investigators and prosecutors from non-compliance with the minimum criteria of the Act.

1354 This trend will conform with the UK's obligations under art 6 of the European Convention on Human Rights which deals with the right to a fair trial. See Sprack *op cit* 319.

European Convention.[1355]

Therefore, in the United Kingdom, the accused is given relatively extensive rights of access to information in order to prepare his defence properly. This is in line with Convention case-law which suggests a broader obligation to disclose any material which may "assist the accused in exonerating himself" to ensure "equality of arms".[1356]

5.3.6.4 GERMANY

German Law recognises the right of an accused to have access to the contents of the prosecution's documents. Article 147 of the German Criminal Procedure Act (better known as "StPO") provides that the defendant or his legal representative can see all the documents from the outset.[1357] The defence lawyer has the right to examine all the files
and evidence of the prosecution and to make photocopies of them.[1358] This right to examine the files represents a necessary element of the "equality of arms" principle derived from the principle of a fair trial. However, the accused's right of access is not unlimited, and it may be curtailed in cases where the investigation has not been completed and access to the documents may prejudice the investigation.[1359] Thus, the prosecution may deny defence counsel an inspection before the conclusion of investigations, if the inspection will endanger the purpose of the investigation.[1360]

Therefore, if the prosecutor refuses to allow the defence to examine the files, his

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1355 Article 6(2) of the European Convention states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law". *Ibid* at 320.

1356 See Cheney *et al op cit* 94. However, Sharpe maintains that it would be naïve to assume that the incorporation of the European Convention on Human Rights will necessarily lead to a "declaration of incompatibility" in respect of the CPIA statute. See Sharpe *The Journal of Criminal Law op cit* 80. According to Azzopardi, the issue of inequality of arms need to be addressed. In *DPP v Ara* [2001] 4 All ER 559, common sense and good practice dictated that disclosure should have been forthcoming from the outset. This will assist both sides to come to a fuller understanding of all documents at an early stage and possibly obviate a costly trial and avoid the emotional and financial losses to the accused and his family. See Azzopardi *op cit* 295-300.

1357 In Germany, the accused also has the right of access to read all the files of the state attorney and the court, including the recordings of the interrogations of the police and state attorney. This amounts to full pre-trial discovery. See s 147 of the German Criminal Procedural Code or StPO. Also see Foster *German legal systems and laws* Blackstone Press Ltd (1996) 220.

1358 In the German Federal CCP, only the defence lawyer, and not the accused, is given the opportunity to inspect the files.

1359 See s 147 II of StPO.

1360 However, this does not apply to the following inspections, namely, the records of the investigation of the accused, examination hearings before the judge for which the defence lawyer was granted the right to be present or should have been granted such a right, or of expert witnesses' testimonies. In such cases, the defence lawyer may not be fully denied access to documents at any stage in the proceedings. See Eser "The acceleration of criminal proceedings and the rights of the accused: comparative observations as to reform of criminal procedure in Europe" 3 (1996) *Maastricht Journal of European and Comparative Law* 341 at 360.

decision can't be appealed against.[1361] No violation of the fair trial principle in this regulation was found by the Federal Constitutional Court, because the restriction only applies as long as the prosecutor is still investigating.[1362] When the investigation phase is concluded, the right of access to the documents is revived and the defence counsel has unrestricted sight of the documents and an unlimited right to inspect the files.[1363] The right to examination of files explicitly extends not over all files brought before the court but does only exist in so far as the accused needs the information they contain.

Thus, the experience in Germany illustrates that an accused is allowed extensive albeit controlled rights of access to information in the police files.

5.3.6.5 THE DECISIONS OF INTERNATIONAL INSTRUMENTS

In criminal cases, every party to the proceedings must have a reasonable opportunity of presenting his case to court under conditions which do not place him at substantial disadvantage *vis-á-vis* his opponent.[1364] The right to "equality of arms" means that all parties must have access to records and documents which are relied on by the court.[1365] The parties should have the opportunity to make copies of the relevant documents from the court file. The prosecution is obliged to disclose to the defence all the material evidence for and against the accused.[1366] The European Commission and court have also considered complaints regarding the non-disclosure of evidence to defendants in criminal trials. In *Edwards v UK* [1367] the applicant complained that evidence which had not been disclosed by the prosecution in the course of his trial rendered the trial unfair. The court said that its task is to ascertain whether the proceedings in their entirety were fair. It held that the defects of the original trial were

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1361 See Samson "The right to a fair criminal trial in German criminal proceedings law" in Weissbrodt and Wolfrum (1998) *op cit* 530.

1362 The Federal Constitutional Court had to make a finding in a decided case whether the denial of the right to examination of files violates the right to a fair trial. The Court held that the prosecution's advantage in having the information during the investigation is constitutional. It also declared that an oral notification of the incriminating circumstances is sufficient in "normal cases". The Court held:

> "From the right of an accused to a fair trial complying with the law and order, follows the right of an accused in custody to have his defence lawyer examine the file, if and as far as he needs the information in them in order to effectively influence the judicial custody decision and if an oral notification of the facts and evidence that the court plans to base its decision on is not sufficient."

Ibid at 531.

1363 See *S v Sefadi supra* at 34-35. Also see Eser *op cit* 360.

1364 See *De Hals and Gijsels v Belgium* (1997) 25 EHRR para 53.

1365 See *Lobo Machado v Portugal* (1996) 23 EHRR 79 para 31.

1366 See *Jespers v Belgium* 8403/78 (Rep), Dec 14, 1981, 27 DR 61.

1367 See *Edwards v UK supra* at 417.

remedied by the subsequent procedure before the court of appeal and that, as a result, there had been no breach of article 6.

The Commission has found breaches in the following circumstances.[1368] The Commission has held that the prosecution must disclose any material in their possession which "may assist the accused in exonerating himself or obtaining a reduction in sentence".[1369] Where it is claimed that the material which is not disclosed is subject to "public interest immunity", the prosecution must make an application to the trial judge, if necessary, without notice. In *Jasper v UK*[1370] the court accepted that, in some cases, it might be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Only such measures restricting the rights of defence that were strictly necessary were permissible. The court held that where the defence had been informed about the application for non-disclosure and had been able to outline its position, there was no breach of article 6(1). However, in *Rowe and Davis v UK*[1371] the court held that the prosecution's failure to make an application to the trial judge to withhold material was a breach of article 6. The fact that the material had been subsequently reviewed by the court of appeal, was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld material by the trial judge. Occasionally, the courts may approve the non-disclosure of evidence to the defence, for example, an application by the prosecution authorities to protect informers or security interests. The extent to which *ex parte* review of the material by the trial judge or court of appeal provides sufficient procedural guarantees of fairness, and lack of arbitrariness is under examination in cases pending before the Commission.[1372]

A procedure is said to be not truly adversarial if it fails to ensure "equality of arms".[1373]

1368 Where the applicant was not given the opportunity to comment on a medical report. See *Feldbrugge v The Netherlands* (1986) 8 EHRR 425.

1369 See *Edwards v UK supra*. However, see *Bendenoun v France* (1994) 18 EHRR 54, where there was no breach as a result of a failure to disclose a bulky file whose contents the applicant was aware of and which was not relied on by the court.

1370 2000/30 EHRR 1, Application No 27052/95.

1371 28901/95, *The Times*, 1 March 2000. Also see *Atlan v United Kingdom* (2002) 34 EHRR 33, where the European Court held that the prosecutor's failure to place evidence before the trial judge and allow him to rule on the question of disclosure deprived the applicants of a fair trial. Therefore, a violation of art 6(1) was found.

1372 See *inter alia*, *Rowe v Davis v UK supra* at 28901/95.

1373 See *Larry v Belgium* (1989) 11 EHRR 529, where Mr Larry had sought inspection of the investigative case file. The court held that it was essential to inspect the documents in question to challenge the lawfulness of the arrest warrant effectively. Whereas crown counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity to challenge appropriately the reasons relied upon to justify a remand in custody. The failure to ensure equality of arms led to the procedure not being truly adversarial, and therefore it was a breach of art 5(4).

In *Adams v Jamaica*[1374] a witness statement that incriminated the accused in a murder trial had not been disclosed to the defence, nor presented at the preliminary inquiry. However, it was admitted as evidence at the trial notwithstanding defence counsel's objection. The United Nations HRC held that even though his counsel had objected to the production of this evidence, as he did not request a postponement, "or even ask for a copy of the statement," no violation of the Covenant had been committed in this respect.[1375] However, a state cannot withhold evidence that indicates another person committed the crime.[1376] The Committee has held that the failure to make a statement implicating another person in *Peart* "seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants," and violating article 14(3)(e).[1377]

Therefore, both the European Court and the HRC have found disclosure to be necessary for purposes of a fair trial and to ensure "equality of arms".

5.3.6.6 NEW ZEALAND

In New Zealand, formal pre-trial disclosure in criminal cases is said to be quite a recent development. The accused is not entitled to discovery as of right, but the court has a discretion to come to his assistance when he applies for discovery. However, the court must be satisfied that he has made out a case for discovery of certain documents before granting his request. The Official Information Act of 1982 (hereinafter referred to as the "OIA") has impacted on the practice of discovery.[1378] The OIA gives citizens the right to personal information but permits the government to

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1374 Communications No 607/1994 UN Doc CCPR/C/58/D/607/1994 (1996).The accused contended that his opportunity to cross-examine witnesses on the same terms as the prosecution had been denied, as well as his right to benefit from adequate facilities to prepare his defence.

1375 The Committee also expressed concern that there is no obligation on the prosecution in Japan to disclose evidence that it may have gathered during the course of the investigation other than that which it intended to produce at trial, and also that the defence has no right to ask for the disclosure of that material at any stage of the proceedings. See the concluding observations of the Human Rights Committee: Japan CCPR/C/79/Add 102 (1998). Therefore, the Committee recommended that Japan revise its law and practice to enable the defence to have access to all relevant material in terms of art 14(3). See Weissbrodt *The right to a fair trial* Martin Nijhoff Publishers (2001) 136-137.

1376 See the case of *Garfield and Andrew Peart v Jamaica* Communications Nos 464/1991 and 482/1991 UN Doc CCPR/C/54/D/464/1991 (1995), which concerned a murder case where the main witness for the prosecution had identified the accused as the murderer, leading to his conviction and sentence. However, during cross-examination, the witness admitted to having made a written statement to the police implicating another person on the night of the incident. The prosecution refused defence counsel's request for production of the statement in *Peart*, and the trial judge found that counsel had failed to put forward any reason why the statement should be provided. The defence counsel only saw the statement after the rejection of the appeal and the submission of his petition for special leave to appeal to the Judicial Committee of the Privy Council, named another man as the murderer.

1377 See *Garfield and Andrew Peart v Jamaica supra*. This case illustrates the link between the right to information and the right to present one's case.

1378 The Official Information Act of 1982 governs pre-trial discovery in New Zealand. Discovery under the OIA is available as of right under the statute. See Doyle and Hodge *op cit* 118.

refuse to disclose if disclosure would prejudice, *inter alia,* the maintenance of the law.[1379] Therefore, the prosecution's obligations of disclosure have expanded significantly, both at common law and as a result of legislative intervention, especially with the advent of the Official Information Act.[1380]

The provisions of the OIA were interpreted by the New Zealand Appeal Court in the case of *Commissioner of Police v Ombudsman*,[1381] where the issue concerned a request by the defence for copies of statements in the police docket. The police refused to disclose these statements on the basis that the information was exempt from disclosure in terms of section 6(c) of the OIA.[1382] The majority held that before criminal charges are laid, investigations by the police will be protected from disclosure by section 6(c). However, once criminal proceedings have commenced, the balance aimed at by section 6(c), will shift in favour of disclosure. The court held therefore, that the decision of the Commissioner of Police to withhold access to the police briefs was incorrect. The court also found that to allow the defendant access to the police briefs would not jeopardise the administration of the law. Therefore, the defendant's right to a fair trial was found to prevail over the interest in investigative secrecy. The disclosure of such documents was viewed as being essential to a fair trial. This decision demonstrates that prosecution disclosure is linked to the duty of fairness and the defendant's right to a fair trial.[1383] The case also illustrates the innovative and bold approach of the New Zealand courts.

However, defence disclosure obligations have not changed much in New Zealand. The only formal obligation on the defence is to disclose intended reliance on evidence of alibi in trials on indictment.[1384] Dawkin disagrees with the argument that reciprocal pre-trial disclosure regimes promote the pursuit of truth and the more efficient conduct of criminal trials.[1385] Rather, he suggests that instead of compelling the defence to reveal all, a greater degree of voluntary pre-trial disclosure could be

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1379 It has been held that "maintenance of the law" includes the public's interest in the fairness and finality of a criminal trial, and that "personal information" includes information held by the police which is relevant to an offence charged against the person. See Taggart *op cit* 288.

1380 See Dawkins *op cit* 36. This article reviews the main arguments for and against increased defence disclosure.

1381 (1988) 1 NZLR 385. These statements were made by two witnesses who were policemen. The accused had been charged with driving with excess blood alcohol, refusing to accompany a police officer and driving without a licence.

1382 The exemption provides that the official information may be withheld if such information would prejudice the maintenance of law including the prevention, investigation and detection of offences and the right to a fair trial. See Taggart *op cit* 288.

1383 The *Commissioner of Police v Ombudsman* decision illustrates the transformation of the Official Information Act 1982 into an engine of criminal discovery. This case is said to regulate the duty of fairness at common law.

1384 See Dawkins *op cit* 36.

1385 He states that in principle, mandatory defence disclosure is also difficult to reconcile with the nature of the adversarial process and a defendant's right not to be coerced into assisting the prosecution. *Ibid* at 38.

encouraged by the introduction of a comprehensive code on prosecution disclosure.[1386] Prosecution disclosure is also implicitly required by section 24(d) and section 25(a) of the New Zealand Bill of Rights Act 1990 respectively.[1387]

Thus in New Zealand, the disclosure of prosecution documents is seen as an integral part of the accused's right to a fair trial.

5.3.6.7 AUSTRALIA

In Australia, the rights of discovery are virtually non-existent. Indeed, it has been said that there is no right to discovery in the criminal law.[1388] Academic writers have criticised as "archaic" the rationales underlying "the maintenance of an adversarial system without modification".[1389] Committal proceedings, names of prosecution witnesses and copies of statements are the usual scope of discovery. Generally, the magistrate has a discretion to grant the defendant access to statements of prosecution witnesses where the defendant has sought their production.[1390] There are provisions in all jurisdictions, except Tasmania, for the committal proceedings to take place by the tendering of the statements of witnesses, either with or without oral evidence, provided that the statements are in the necessary form.[1391] The prosecution is obliged to serve copies of exhibits on the defendant prior to a hearing.[1392] The defendant is obliged to indicate whether he objects to the statements being tendered or wishes any of the witnesses to attend for cross-examination.[1393]

However, the Australian courts are reluctant to disclose prosecution evidence to the defence.[1394] There are limited statutory requirements imposed on the prosecution regarding the disclosure of material collated by the state to the defence in criminal

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1386 *Ibid* at 60-64.

1387 Section 24(d) relates to the right to adequate time and facilities to prepare a defence, whilst s 25(a) refers to the right to a fair hearing. Also see *Allen v Police* [1999] 1 NZLR 356, 359-363; *Police v Keogh* [2000] 1 NZLR 736-749.

1388 See, *inter alia*, *Sobh v Police Force of Victoria* [1994] 1 VR 41.

1389 See *S v Majavu supra* at 68.

1390 See, for example, *Cheng Kui v Quinn* (1984) 11 FCR 217, 21 A Crim R 447.

1391 See, for example, s 90AA of the Magistrates' Court Act 1930 (ACT); s 105B of the Justices Act 1928 (NT).

1392 See, for example, s 90 of the Magistrates' Court Act 1930 (ACT).

1393 See, for example, s 90AA(3) of the Magistrates' Court Act 1930 (ACT); s 105B(3) of the Justices Act 1928 (NT).

1394 In *National Company and Securities Commission v News Corporation* 52 ALR (1984) 417, the court held that if an investigator were to disclose his hand prematurely it will not only alert the suspect to the progress of the investigation, but would also close off other sources of inquiry. The court also reaffirmed the principle that an accused should not be entitled to discovery as against the prosecution.

proceedings.[1395] The prosecution's duty to disclose is mostly governed by the common law. However, steps have recently been taken in Victoria and been proposed in New South Wales, to improve the efficiency of the criminal justice system. These steps provide the criminal courts with greater powers to control pre-trial processes.[1396]

Victoria is presently the only Australian jurisdiction to have implemented the statutory reciprocal disclosure scheme. Recent legislative changes in Victoria have imposed disclosure obligations on accused persons in criminal trials, whereby they are now required to actively participate in narrowing the issues in the case and to disclose the nature of their defence before trial.[1397] These changes have been attacked on the basis that they abrogate the presumption of innocence and reverse the onus of proof. However, Flatman and Bagaric contend that accused disclosure does not violate any criminal law objectives, but will result in many distinct advantages including considerable cost savings to the community and a greater emphasis on pursuit of the truth.[1398] The Victorian scheme is said to be more flexible than its English counterpart in the CPIA .[1399]

Freedom of Information Acts (the Freedom of Information Act is hereinafter referred to as the "FOIA") exist in most Australian jurisdictions to confer a public right of access to government documents.[1400] However, the Northern Territory is the only jurisdiction that has not enacted a FOIA. The pertinent features of the scheme in the FOIA, are that there is no standing requirement, in other words, to obtain access, a person does not have to explain or justify why they need a document; the government's right to withhold documents from disclosure is circumscribed by exemptions in the legislation, and a refusal of access can be questioned before an

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1395 See *inter alia*, s 104 of the Summary Procedure Act 1921 (SA); s 8 of the Crimes (Criminals Trials) Act 1993 (Vic). Also see Hinton "Unused material and the prosecutor's duty of disclosure" (2001) *Criminal Law Journal* 121 at 122.

1396 See the Crimes (Criminal Trials) Act 1999 (Vic) and the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW). This has included powers relating to both the prosecution and the defence.

1397 See the disclosure requirements imposed on accused pursuant to the Crimes (Criminal Trials) Act 1999 (Vic). Also see the statutory scheme requiring reciprocal disclosure in New South Wales, the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 (NSW) *supra*. For a more detailed discussion about this statute, see Dawkins *op cit* 51-55.

1398 See Flatman and Bagaric "Accused disclosure – measured response or abrogation of the presumption of innocence?" (1999) *Criminal Law Journal* 327. The writers argue that imposing disclosure obligations on an accused does not abrogate any fundamental tenets of the criminal justice process. Rather, it represents a measured and justifiable response to curtailing the ever increasing length and expense of criminal trials. Also see pages 333-334 for a list of the advantages and benefits flowing from accused disclosure provisions.

1399 This is because it allows optional disclosure procedures, prosecution disclosure is not dependent on defence disclosure, and the sanctions for non-compliance apply as much to the prosecution as to the defence. See Dawkins *op cit* 48-51, for a more detailed discussion about the Victorian scheme of reciprocal defence disclosure.

1400 See for example, Freedom of Information Act 1982 (Cth) and Archives Act 1983 (Cth).

independent court or tribunal, in which the government bears the onus of establishing the correctness of the decision under review.[1401]

Although the language of Australia's federal and state freedom of information acts allows scope for criminal discovery-motivated requests by criminal defendants, the courts have also rejected discovery-motivated FOIA access. The courts and administrative tribunals have been hostile to freedom of information requests in aid of criminal discovery. Exemptions in the FOIA may also frustrate attempts to use it as a criminal discovery tool. The protection of documents subject to legal professional privilege in section 42 of the Act may also serve as a barrier to criminal discovery-motivated FOIA requests.[1402] In *Austin v Deputy Secretary, Attorney-General's Department*[1403] the Government Solicitor withheld several documents on the ground of legal professional privilege and the Administrative Appeals Tribunal (AAT) upheld the decision. Upon further appeal the Federal Court found no error of law on the Tribunal's part. Similarly, the AAT upheld a claim for exemption in terms of section 42, thus protecting from disclosure, statements of potential witnesses. These were taken by police officers in the course of a criminal investigation and were obtained for the sole purpose of obtaining legal advice.[1404] In *Stewart and Victoria Police*[1405] the applicants had sought access to evidence gathered in the course of an internal investigation into complaints alleging assault against the police officers. The police refused to disclose this information on several grounds and the AAT upheld the appeal.[1406] The AAT also stated that "the whole area of 'criminal discovery' should, as a matter of policy remain with the criminal courts". This statement led to the implication that it was contrary to public interest to apply the FOIA according to its terms. However, this view was rejected by the Deputy President of the Commonwealth ATT as being contrary to the spirit and amendment of the FOIA Act.[1407]

The Australian experience illustrates its conservative approach. This can be

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1401 See Kinley *Human rights in Australian law* Federation Press (1998) 68. For a more detailed discussion about freedom of information laws in Australia, see Bayne "Freedom of information in Australia" (1993) *Acta Juridica* 197 at 200, where it is stated that the object of the federal FOIA law is "to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government". It should be noted that this article focusses on the realm of administrative law reform.

1402 See Taggart *op cit* 278.

1403 67 ALR 585 (Federal Court 1986). Austin was charged with sending an explosive substance through the mail which was contrary to postal legislation. He sought access to the file of the Australian Government Solicitor under the FOIA.

1404 *John and Secretary, Attorney-General's Department* 4 Freedom Information Review 54 (Admin Appeals Tribunal) (1986). Also see Taggart *op cit* 279.

1405 15 Freedom Information Review 27 (Victoria Admin Appeal Tribunal) (1988).

1406 Factors which influenced the AAT's decision were the confidentiality of the information and the possibility of harassment of civilian witnesses.

1407 See Taggart *op cit* 284.

compared to the *Steyn* era where the common-law privilege to refuse disclosure was jealously enforced by the prosecution.[1408] Not surprisingly, a call for reform on prosecution disclosure in Australia has been made on the basis of the "equality of arms" principle.[1409]

5.3.6.8 ISLAMIC LAW

Islamic Criminal Procedure attempts to strike a balance between the interests of the accused and those of society. The Qur'an states:

> "Nor would we visit our wrath until we had sent an apostle to give warning."[1410]

This has been interpreted to mean that individuals should be informed of the law before they may be prosecuted or punished. The accused and his attorney are informed of the charges and the supporting evidence. They are also informed of any evidence in the prosecution's possession that indicates the defendant's innocence.[1411] In order for a case to be acceptable, it must fulfill some conditions called conditions of validity. If these conditions are incomplete, the judge cannot commence the trial until they are fulfilled.[1412] The defendant is entitled to obtain a copy of the case against him and to ask the judge for a period of time to study it and prepare his defence. The defendant can also obtain
copies of documentary evidence tendered by the plaintiff besides witness statements which are necessary to prepare his defence.[1413]

Therefore, Islamic law also makes some provision for disclosure of evidence to the defence. The discussion on foreign jurisdictions reveals that for the most part, an accused is entitled to disclosure of evidence by the prosecution on the basis of his right to a fair trial.

5.4 THE ACCUSED'S RIGHT TO BE INFORMED OF THE REASON FOR DETENTION

1408 However, the state of Victoria is to be commended for its statutory reciprocal disclosure scheme, which has been described as being more flexible than its English counterpart in the CPIA.

1409 See Hinton *op cit* 139, where he opines that the Director of Public Prosecutions should adopt and implement the principle of "equality of arms" as the basis upon which requests by the defence for disclosure of unused material by the prosecution will be considered. This approach together with the greater involvement by the judiciary in pre-trial disclosure, will ensure that all the relevant material is placed before the jury, thereby minimising the risk of a false conviction and contributing to justice.

1410 See Qur'an, XVII: 15. Also see Mahmood "Criminal procedure" in Mahmood *et al Criminal law in Islam and the Muslim world* Qazi Publishers (1996) at 298.

1411 *Ibid* at 300.

1412 The procedure is that the judge listens to the plaintiff in the defendant's presence. The defendant (accused) is then questioned. See Attia "The rights to a fair trial in Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 351.

1413 *Id*.

The two relevant provisions are section 25(1)(a) of the Interim Constitution and section 35(2)(a) of the Final Constitution respectively. Section 25(1)(a) provides that every detained prisoner has the right "to be informed promptly in a language which he or she understands of the reason for his or her detention". The provisions of section 35(2)(a) are similar. Section 35(2)(a) provides that:

> "everyone who is detained, including every sentenced prisoner, has the right-
>
> (a) to be informed promptly of the reason for being detained;"

The right to be informed of the reason for detention is long established in South Africa.[1414] A person needs to know the reason why he is deprived of his freedom in order to decide whether or not to resist the arrest and to take reasonable steps to regain it. Therefore, the requirement of prompt notification enables the individual to decide whether to remain silent or to obtain legal representation. It is a trite fact that when a person is arrested, not only is he informed of the right to silence in terms of section 35(1)(a), but he is also informed of the reason for the arrest and the right to a lawyer in terms of section 35(2)(b). The objectives of section 35(2)(a) will be defeated if the police arrest an accused on the pretext of one charge, but detain him on a serious charge.[1415] The accused cannot exercise an informed choice about remaining silent or engaging a lawyer if he does not know that the detention is based on a more serious charge. However, in *R v Evans*[1416] the Supreme Court of Canada accepted that the requirements of section 10(b) of the Charter were met even where the accused was arrested on the pretext of one charge and the subsequent questioning indicated that he was held on a more serious charge.

The detainee needs to know the reason for his arrest, and this information will also enable the detainee to exercise his right to *habeas corpus*.[1417] In *Fox, Campbell and*

1414 See s 39(2) of the Act. Also refer to the discussion in 5.2.4 above.

1415 Section 35(2)(a) provides than an accused must be informed of the true purpose of arrest. The wording of s 35(2)(a) is similar to art 5(2) of the ECHR and s 10 of the Canadian Charter. Article 5(2) of the ECHR provides that "everyone who is arrested shall be informed promptly in a language which he understands of the reasons for his arrest and of any charges against him", whilst s 10 of the Charter provides that "everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore". Section 9(2) of the ICCPR provides that "anyone who is arrested shall be informed at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Therefore, the reason for the arrest should be given "at the time of the arrest". The Criminal Procedure Act also provides that the arrestor should notify the arrestee "at the time of effecting an arrest or immediately after effecting the arrest" in terms of s 39(2). Thus, the Act contains more explicit provisions.

1416 (1991) 63 CCC (3d) 289 (SCC) 303. It should be noted that s 10(b) of the Canadian Charter states that "Everyone has the right on arrest or detention ...

> (b) to retain and instruct counsel without delay and to be informed of that right ..."

1417 *Habeas corpus* is defined as a writ issued to produce a prisoner in court. The purpose of the right is to inform a detainee about what is happening to him. See Steytler *Constitutional criminal procedure* 150.

Hartley v UK[1418] the defence contended that the concept of "terrorist" was vague in that the accused were not given adequate and understandable information when they were arrested. The court held that merely being informed by the arresting officer of the legal basis for the arrest in terms of section 11(1) was insufficient for the purposes of section 5(2). However, the court regarded the interrogation on specific criminal acts that followed within 5 hours of the arrest, as being sufficient to enable the applicants to understand why they had been arrested.[1419] The accused also has a right "to be informed of the reason for the detention to continue". Two reasons have been advanced for this namely, that an accused should be informed of the immediate reason why it was necessary to remand the case, thus necessitating the bail decision and the reason why the bail has been denied.[1420]

The requirement that the detainee must "be informed promptly in a language which he or she understands" is incorporated in section 35(4) of the Constitution.[1421] Similar provisions are contained in foreign systems.[1422] The reason for detention should be given to the detainee explicitly and unambiguously. The detainee should not have to deduce from the arrestor's conduct what the possible reason could be.[1423] Steytler submits that a person who is fully conversant with the official language is not entitled to be addressed in a specific minority language of a country. However, special arrangements may have to be made in the case of foreigners to ensure adequate communication.[1424] In *Naidenhov v Minister of Home Affairs*[1425] the court had to consider the position of a Bulgarian immigrant detained as an illegal immigrant. The court held that section 25(1)(a) of the Interim Constitution did not require that a detainee should be informed in his native language but it should be a language which

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1418 30 Aug 1990 Series A no 182 and 40. In this case, the applicants were arrested in terms of s 11(1) of the Northern Ireland Emergency Provisions Act of 1978. This Act provided for the arrest of any person "suspected of being a terrorist".

1419 The court's decision has been criticised by many academic commentators. The effect of the court's decision means that the person is left to deduce from the interrogation the reason for his arrest. This negates the notification requirement. Similarly, the fact that the interrogation followed 5 hours after the arrest is not "prompt". See Steytler *Constitutional criminal procedure* 150.

1420 *Ibid* at 129-130. Also see *Minister of Law and Order v Kader supra* at 501-511J, where the then AD remarked that justice requires that the accused should be informed of the reason for remanding a case. The accused should also be informed about the reason why the bail has been denied.

1421 Section 35(4) provides that "information must be given to a person in a language that the person understands". Thus, the right to information is linked to the right to understand. The chapter on "The right to understand" (chapter 6) will elaborate on the language requirement.

1422 See art 5(2) of the ECHR and art 9(2) of the ICCPR in this regard.

1423 See *Fox*, *Campbell and Hartley v UK supra* .

1424 Steytler *Constitutional criminal procedure* 151.

1425 1995 (7) BCLR 891 (T). The facts were that a Bulgarian arrestee was informed in English of the reasons for his detention. The arrestee had some knowledge of English, albeit with some difficulty, and he did not indicate a failure to understand the information given to him. He also did not request the assistance of an interpreter. The court held that in the circumstances, the requirements of the provision had been satisfied.

he understood. Although the detainee's knowledge of English was limited, he understood enough to communicate in it. Therefore, *Naidenhov* confirmed the principle that an arrestee has a right to be informed promptly in a language that he understands of the reasons for his detention.

The European Court has interpreted "promptly" as not imposing a duty to inform at the moment of the arrest and periods of longer than five hours after arrest have been accepted.[1426] On the other hand, the Supreme Court of Canada requires notification to occur at the moment of arrest.[1427] This is due to the fact that a person is not obliged to submit to an arrest if he does not know the reason for the arrest and cannot exercise the right to counsel meaningfully.[1428] Steytler submits that the latter approach is correct as it conforms with the common law in terms of section 39(2) of the Act.[1429] A detainee should be informed of the reason for arrest at the moment of the arrest. If notification is impossible at the time of arrest, the duty should be discharged as soon as it is practically feasible in terms of section 39(2) of the Act.

The above discussion demonstrates that a detainee has a right to be informed of the reasons for his detention in a language that he understands at the time of the arrest or soon thereafter.

5.5 THE ACCUSED'S RIGHT TO BE INFORMED OF THE RIGHT TO LEGAL REPRESENTATION

The detainee has a right to be informed of a right to a lawyer in terms of section 35(2)(b). He has a right to be informed of the right to choose and to consult with a legal practitioner and to be informed of this right promptly.[1430] The information should be conveyed in such a manner that a detainee will be able to understand the right

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1426 See *Fox*, *Campbell and Hartley v UK supra*. Also see *Murray v United Kingdom* (1996) 22 EHRR 297, where it was held that it would be sufficient for purposes of art 5(2) if the alleged offence for the detention "must have been apparent" to the detainee in the course of her questioning. Here, the interview which was held 1 hour and 20 minutes after the initial arrest satisfied the requirement of "promptness" in terms of art 5 (2).

1427 See *R v Evans supra*.

1428 *Id*.

1429 Steytler *Constitutional criminal procedure* 154.

1430 Section 73(2A) of the Criminal Procedure Act now provides that every accused "shall (a) at the time of his arrest be informed of his right to be represented at his own expense by a legal adviser of his own choice." Thus, the accused should be informed by the police that he has the right to consult with a lawyer of his choice. It should also be conveyed to the accused that he has a reasonable opportunity to contact a lawyer. See s 73(2B) in this regard. This was inserted by s 2 of the Act 86 of 1996. Also see *S v Gumede* 1998 (5) BCLR 530 (D) and *S v Mfene and Another* 1998 (9) BCLR 1157 (N). Similarly, in **Germany** the detainee must be informed of the right to a lawyer and the right not to speak. See ss 136-137 of the German Criminal Procedural Code.

and know how to exercise it.[1431] The information need not be given in an official language of a detainee's choice, only in a language which he understands in terms of section 35(4), albeit imperfectly.[1432] The **Canadian** courts have also held that an accused is entitled to be informed of his rights in a language, and in a manner that he understands in a meaningful way.[1433] The usual way of expressing the right is to use the words in the Charter, and the practical risks of not conforming to this standard are that the police will convey incomplete information.[1434] When a police officer is aware that a detainee's ability to understand the terms used to explain his rights is compromised by an inadequate knowledge of the language, then he is required to make a particular effort to ensure that the detainees' constitutional guarantees are respected.[1435] In these circumstances, the
accused has the right to be informed of his rights in his own language by means of a card, through an interpreter, or with the assistance of a bilingual officer.[1436]

Both section 10(b) of the Canadian Charter of Rights and Freedoms and section 23(1)(b) of the New Zealand Bill of Rights 1990 guarantee to an arrestee or detainee

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1431 *S v Melani* 1996 (2) BCLR 174 (E) at 189E. The court also remarked that where it is clear that the detainee has difficulty in understanding the right, the police should take additional steps to ensure that the right is adequately communicated. This may often be the case with juveniles. The court also stated that the right to consult with a legal practitioner during the pre-trial procedure and the right to be informed of that right is closely connected to the presumption of innocence, the right to silence and the proscription of compelled confessions and admissions. Thus, the failure to recognise the importance of informing an accused of his right to consult with a legal adviser had the effect of depriving many persons of the protection of their right to remain silent and not to incriminate themselves. The court also noted that s 25(1)(c) provides no absolute prohibition on questioning an accused or obtaining a statement from him in the absence of legal representation. This is only done when it is clear that the accused has waived his right to consult with counsel. However, the right could only be validly waived if the person abandoning it knew and understood what was being abandoned. Therefore, the right to be informed of the right to legal representation is linked to the right to understand.

1432 See *Naidenhov v Minister of Home Affairs supra* at 898 J.

1433 *R v Stagg* (1987) 7 MVP (2d) 283.

1434 *R v Marshall* (1987) 50 MVR 278. It is also noteworthy that Scullin J remarked in *R v Nelson* (1982) 3 CCC (3d) 147 at 152, that: "if the unsophisticated accused is to be confused, it is better that he be confused about what the constitution states, rather than confused about what the police say the constitution states".

1435 Gautier "The Charter, the right to counsel and the breathalyzer" (1990) *Revue du Barreau* 163-210 at 190.

1436 *R v Vanstaceghem* (1987) 58 CR (3d) 121. This case illustrated the necessity of observing precautions. The failure of a police officer to inform an accused of his right to counsel in French was held to constitute a "regrettable disregard" for the respondent's constitutional rights. Therefore, the court held that the admission of the results of the breathalyser tests would tend to bring the administration of justice into disrepute. This case differs from *R v Beauparlant* (1988) 5 MVR (2d) 161 where the correct procedure was followed by the police. When the arresting officer noticed that the accused was not fluent in English, he informed the latter that a French speaking officer would be available at the police station. He also informed the accused of his rights in French and repeated the breathalyser demand in French. The Ontario Court of Appeal concluded that all reasonable steps had been taken to ensure that the accused's Charter rights have been respected.

inter alia, the right to be informed of the right to counsel.[1437] According to Butler, the purpose of the right to be informed is to secure in the detainee an understanding of the existence of the right to counsel.[1438] The Canadian courts have consistently held that a mere recitation of the Charter formula will not satisfy the requirements of the section.[1439] The courts have also held that, notwithstanding advice by a law-enforcement officer regarding the existence of the right to counsel, detainees have not been "informed" of the right to counsel within the meaning of section 10(b), where the existence of certain disabilities hindered or impeded the ability of the detainee to understand and act upon information communicated by the law enforcement official.[1440] The leading New Zealand case on the accused's right to be informed of his right to a lawyer is *R v Mallinson*.[1441] The *Mallinson* decision demonstrates a purposive interpretation of the right to be informed of the right to counsel, in that the police advice regarding the right to counsel must indicate to the detainee that he has that right. Thus, the detainee must understand the substance of the right which exists in his favour. The case also established a link between waiver and informed, in that an arrested person who understands the position would be able to make an informed choice regarding the waiver of the guaranteed right.[1442]

Section 35(2)(c) provides that the detainee must be "informed of the right to counsel promptly". This means that the detainee must be informed of this right immediately on arrest. The reason advanced is that the detainee requires immediate need of legal advice because incriminating questioning will commence.[1443] The police is obliged to inform the accused of his right to legal representation again when they take any steps

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1437 Section 10(b) provides that "everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 provides that "everyone who is arrested or detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right."

1438 See Butler "An objective or subjective approach to the right to be informed of the right to counsel? A New Zealand perspective" (1994) *Criminal Law Quarterly* 317. Butler concludes (at 330) that the proper test for the concept of "informed" under s 10(b) of the Charter is one based on the subjective understanding of the information conveyed to the accused by the law-enforcement officer.

1439 See *inter alia*, *R v Evans supra* at 289, *R v Vanstaceghem supra* at 121. It has also been held that it is not a breach of s 10(b) to question a detainee who fails to take advantage of an opportunity to contact a lawyer, provided that the detainee is fit to choose his course of conduct. See *Smith v The Queen* [1989] 2 SCR 368, 61 DLR (4th) 462. On the other hand, where a detainee submitted to questioning whilst intoxicated, brushing aside the advice of a relative not to answer questions until she had a lawyer present, the court held that s 10(b) was breached and the resultant confession inadmissible. See *Clarkson v The Queen* [1986] 1 SCR 383.

1440 Examples of such disabilities include subnormal intelligence (see *R v Evans supra*), intoxication (see *R v Cotter* (1991) 62 CCC (3d) 423) and inability to speak the language in which the advice was communicated (see *R v Vanstaceghem supra*). Also see Butler *op cit* 319.

1441 [1993] 1 NZLR 528.

1442 Butler *op cit* 326.

1443 *R v Brydges* (1990) 53 CCC (3d) 330 (SCC) 343.

to obtain information from him.[1444] However, the existence of such an obligation will depend on the circumstances of each case.[1445] The question has also arisen in Canadian law regarding the precise moment that the police are required to inform the accused of his right to counsel. The wording of section 10(b) is said to create some ambiguity as to whether the words "without delay" also qualify the right to be informed. In *R v Kelley*[1446] the Ontario Court of Appeal interpreted section 10(b) to mean "without delay". However, it has recently been stated unequivocally that the right to be informed of the right to counsel is triggered immediately on arrest.[1447] The question also arises whether the duty to inform applies again if the reason for detention shifts to a different offence or more serious offence. The Canadian courts have held that the duty to inform applies again.[1448] The reason advanced is that a different charge or more serious charge may lead the accused to reconsider his initial waiver.

Section 35(2)(c) provides that the detainee must be informed of the right to have a legal practitioner assigned to him by the state and at state expense, if substantial injustice would otherwise occur. This section may be interpreted to mean that the detainee must be informed of the right to legal aid.[1449] The police should inform the detainee not only of the existence of the right to legal aid, but how it can be

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1444 These steps include, for example, pointing out incriminating evidence, making a statement to the police officer, participating in an identification parade or making a confession to a magistrate. See *S v Mathebula and Another* 1997 (1) BCLR 123 (W) 132 E-F.

1445 See *S v Shaba and Another* 1998 (1) SACR 16 (T). The court in *Shaba* found that *S v Mathebula supra* was wrongly decided in so far as it held that the necessary warning and informing of constitutional rights was to be repeated to an accused at every pre-trial stage, and that failure to do so would render evidence obtained thereby inadmissible. *Shaba* was approved and followed in *S v Ngwenya and Others* 1999 (3) BCLR 308 (W), where the court held that the state is under no obligation to repeat the warning if some investigatory step occurs at the pre-trial stage involving the presence or the co-operation of the arrested person. Evidence obtained at the time of that investigatory step (identification parade in the particular case), will not be rendered inadmissible merely because it had not been preceded by a warning informing the arrested person of his right to assistance by a legal practitioner.

1446 (1985) 44 CR (3d) 17. The court remarked that "while it is true that 'without delay' is not explicitly made applicable to the right to be informed, it is implicitly applicable in that the right to retain counsel on arrest without delay would be ineffective unless this implication is made".

1447 See Gautier *op cit* 189.

1448 See *R v Black* (1989) 50 CCC (3d) 1 (SCC) 12 and *R v Evans supra* at 306-307. In *R v Black*, the Supreme Court held that a person who is arrested on an initial charge and is informed of his right to counsel in relation to that charge, is entitled to be reinformed of the right to counsel if the charge changes and becomes more serious. Also see Gautier *op cit* 195.

1449 Section 35(3)(g) which refers to the accused, has similar wording. However, the court's duty to inform the accused about the existence of legal aid was recognised by the South African courts long before the inception of the Constitution. See *S v Radebe*; *S v Mbonani supra* at 191, where it was held that a duty rests upon judicial officers to inform an unrepresented accused of their legal rights, including the right to legal representation, and the right to apply for legal aid in appropriate cases. Therefore, s 35(2)(c) and s 35(3)(g) now constitutionalises this duty which is also reflected in s 73(2A) of the Act. Also see *Hlantlalala v Dyantyi NO* 1999 (2) SACR 541 (SCA), where it was held that an unrepresented accused should be told in appropriate cases that he is entitled to apply to the legal aid board for assistance.

accessed.[1450] However, the duty of the police is merely to convey the necessary information about legal aid services and not to make any determination of who would be entitled to such assistance.[1451] Thus, the emphasis should be on the accused understanding the right and how the state legal system can be readily accessed.[1452]

Section 35(3)(f) also provides that an accused has the right to be informed promptly that he has the right to legal representation. Section 35(3)(f) requires that the presiding officer should inform an accused at his first court appearance of the right to legal representation.[1453] The court considered the question whether the accused was informed of his right to legal representation in *S v Gasa*.[1454] The court held that as a result of the investigating officers' failure to inform the accused of his right to legal representation, the accused had been denied his fundamental rights in the Constitution.[1455] Similarly, in *S v Moos* [1456] the court had to consider the question

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1450 See *R v Bartle* (1994) 118 DLR (4th) 83 (SCC) 102, where it was held that if there is toll-free legal advice service available on a 24-hour basis, detainees should be appraised of it and informed how to utilise the service. Also see s 73(2A) of the Act which provides that: "every accused shall (a) at the time of his arrest be informed ... if he cannot afford legal aid that he may apply for legal representation and of institutions which he may apply for legal assistance."

1451 See Steytler *Constitutional criminal procedure* 170.

1452 *Ibid* at 313.

1453 Section 35(3)(f) reflects international standards and constitutionalises the common law rule which requires that the presiding officer should inform an accused at the first court appearance of the right to legal representation. See *R v Rudman supra* at 381 C; *S v Mthwana* 1992 (1) SA 343 (A); *S v Radebe; S v Mbonani supra* at 191 (T). Also see s 73(2A) of the Act which provides that at the time of arrest, the service of an indictment or summons, the handing of a written notice or at the first court appearance, an accused must be informed of the right to legal representation, and the right to apply for legal aid. Also see Bekker "The undefended accused/defendant: a brief overview of the development of the American, American Indian and South African positions" (1991) *The Comparative and International Law Journal of Southern Africa* 151 at 178-185, for a discussion about the duty to inform the accused of the right to legal representation, and the consequences of such failure. The writer states at 179, that the preferred view is that an undefended accused should always be informed that he is entitled to employ legal representation. The accused should also be informed of his right to apply for legal aid. See *S v Mthwana* 1989 (4) SA 361 (N) at 371C-E. According to the Appellate Division in *S v Mabaso* 1990 (3) SA 185 (A) at 204 C-D, the failure to inform an accused of his right to legal representation would amount to an irregularity only if he is shown to have been ignorant of that right. This gives rise to the inference that an accused can expressly or tacitly waive his right to legal representation.

1454 1998 (1) SACR 446 (D). The accused was merely informed that if he was represented by an attorney, he could request that attorney to be present. This was immediately prior to a pointing-out exercise. The investigating officers also conceded that the accused had never been informed of his right to be provided with the services of a legal practitioner at state expense.

1455 It should be noted that the court looked at the contents of s 25(1)(c) of the Interim Constitution (200/1993), which is similar to s 35(3)(f) of the Constitution. Section 25(1)(c) conferred upon the accused the right to be provided with the services of a legal practitioner by the state in situations where substantial injustice would otherwise result. This includes the right to be informed of this right. Steytler also raises the question whether the right of access to care givers such as the spouse, partner and next of kin, contains an obligation to inform the accused of that right. He contends that the duty to inform should be discharged promptly when it becomes practicably possible to do so after arrest with the kind of the care giver and the surrounding circumstances

whether the accused had been properly informed of his right to legal representation. The court stressed the importance of advising the accused of their rights, and held that the fact that the accused's rights had been explained must appear from the record in such a manner and with sufficient particularity as to enable a judgment to be made regarding the adequacy of the explanation. The court found that the cursory manner in which the question of the advice of the right to legal representation had been recorded, did not clearly spell out that the accused had been advised of all his rights. Therefore, the accused should be given the benefit of the doubt.[1457]

If the accused has not acted upon the advice given by the police officer, the court is obliged to reiterate the information at the first court appearance.[1458] The presiding officer should execute this duty properly in each and every case.[1459] However, failure to comply with this duty should not *per se* lead to the setting aside of the proceedings.[1460] Where the accused proceeds without a lawyer in the mistaken belief that they had no such right, the setting aside of such proceedings is necessary as a fundamental principle of a fair trial has not been observed.[1461] Where the accused are only informed of the right after they have pleaded and made an incriminating statement, they should not be burdened with the prejudice flowing from the omission.[1462] However, the omission is not fatal to the proceedings where the accused knows about the right.[1463]

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determining the urgency of compliance. See Steytler *Constitutional criminal procedure* 203.

1456 1998 (1) SACR 372 (C). The accused was informed by the magistrate prior to the trial of his right to legal representation in general terms. He informed the magistrate that he would make his own arrangements for legal representation. However, there was nothing to indicate that he had ever been advised of his right to a legal representative at state expense. The accused ended up conducting his own defence. Also see *S v Gouwe* 1995 (8) BCLR 968 (B), where the failure of the presiding officer to inform the accused of his right to legal representation amounted to an irregularity with the trial being unfair.

1457 The court also found that the trial court magistrate should have queried why the accused, after initially having indicated that they would make their own arrangements for legal representation, ended up at the trial without any representation.

1458 *Mgcina v Regional Magistrate, Lenasia* 1997 (2) SACR 711 (W) 723g. The presiding officer's failure to explain the accused's right to legal representation, had resulted in a failure on the part of the state to secure a legal representative for him. This constituted a breach of the accused's fundamental constitutional rights, with the result that the conviction and sentence were set aside.

1459 See *S v Bulula* 1997 (2) SACR 267 (V) 270; *S v D* 1997 (2) SACR 671 (C)).

1460 *S v Simanaga* 1998 (1) SACR 351 (CK) 353h; *S v Radebe; S v Mbonani supra*. Also see *S v Khan* 1997 (2) SACR 611 (SCA), where the court found that there was neither a statutory provision nor judicial pronouncement at the time of the appellant's arrest and confession which required that the appellant had to be advised of his right to legal representation in terms of s 73(1) of the Act. Also see *Hlantlalala v Dyantyi supra*.

1461 See *S v Mgcina supra* at 735c.

1462 See *S v Mabaso supra* at 185.

1463 *S v Moseki* 1997 (2) SACR 325 (T) 331C.

However, the Canadian courts have taken a different view. The fact that an accused is aware of his rights does not dispense with the police informing him of these rights. In *R v Richards*[1464] the police had omitted to remind the accused, who was a lawyer, of his right to counsel in terms of section 10(b) before making a breathalyzer demand. The court allowed the appeal from the conviction and noted that it was not the privilege of a peace officer to determine those cases in which compliance with his Charter duties is unnecessary.[1465] However, a different view was taken in *R v Olson*[1466] where the British Columbia Court of Appeal overturned an acquittal which had been granted subsequent to the exclusion of evidence obtained in violation of section 10(b). However, the Quebec Court of Appeal reaffirmed the view in *Miller,* when it rejected the crown's contention in *R v Gratton*[1467] that the effect of an alleged infringement of an accused's section 10(b) rights should be examined with regard to the accused's particular status.

Thus, the above discussion demonstrates that the purpose of the right to legal representation is to allow an accused to be informed of his rights and obligations under the law, but equally if not more important, to obtain advice as to how to exercise those rights.[1468] The right to be informed of the right to legal representation, is seen to form an integral part of the judicial system. Any denial of this right will lead to a violation of the accused's fundamental rights. The accused should also be informed of his right to legal representation in a language that he understands. The right to legal representation thus provides a continuing interplay between the rights of an accused and the corresponding obligations of the state.[1469]

5.6 THE RIGHT TO BE INFORMED OF THE RIGHT TO REMAIN SILENT

Every accused person is entitled to be informed of the right to remain silent and the consequences of not remaining silent. This must be done irrespective of whether the accused is reasonably aware of the right.[1470] When informing an accused of the right

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1464 (1986) 45 MVR 151.

1465 Also see *R v Miller* (1988) 4 WCB (2d) 306, where the Ontario Court of Appeal refused to admit a statement in evidence because the accused was not informed of his right to counsel, even though he may have been aware of this protection.

1466 (1988) 7 MVR (2d) 172. The accused had been employed as a security guard at a department store and knew his Charter rights. The court held on appeal that the accused should not benefit from a breach of s 10(b) in these circumstances, as the evidence would not bring the administration of justice into disrepute.

1467 (1989) RJQ 1794.

1468 See, *inter alia*, *R v Manninen* (1987) 34 CCC (3d) 385 at 392. Also see *DPP v Ara supra* at 559, where the court held that fundamental to the right to legal representation at the police station, is the right to be informed of legal advise. This impliedly necessitates sufficient disclosure.

1469 See Gautier *op cit* 210.

1470 See *Miranda v Arizona* 384 US 436 (1966) at 468.

to remain silent, it "must be done in a language that the accused understands".[1471] The rationale for not remaining silent is that any incriminating statement could be used as evidence against an accused. The aim of informing an accused of the consequences of not remaining silent is to ensure an informed and intelligent choice.[1472] Whether the accused is represented or not, the court still has a duty to establish that the accused's rights have been properly explained to him. The court's failure to inform the accused of the consequences of testifying violate the accused's right to remain silent and the accused's right against self-incrimination in terms of section 35 of the Constitution.

Therefore, the presiding officer has a duty to establish that the accused has made an informed decision to testify.[1473] The rights to remain silent, of access to a lawyer and to be informed of the reason for the arrest, have the common requirement that an accused or detainee must be informed promptly of these rights. The rationale is that an accused is in the most vulnerable position at the time of arrest, because police interrogation may immediately commence and incriminating answers may be furnished.[1474] If it is impossible to inform an accused of the right to remain silent at the moment of arrest, then the duty should be discharged as soon as possible thereafter.[1475] However, furnishing the appropriate warning promptly on arrest does not completely discharge the duty to inform. It is incumbent upon the police to inform an accused again of the right to silence before taking any steps to enlist him as a prosecution witness.[1476]

Similarly, in **Germany**, a defendant has the right to be heard in the trial and cannot be forced to give evidence against himself.[1477] The accused must also be informed that he does not have to give evidence and is free to remain silent.[1478] His silence may not be taken as evidence against him. However, the accused having exercised the right to remain silent, can subsequently waive that right.

Therefore, the above discussion demonstrates that an accused must be informed of his right to remain silent in a language that he understands. This will enable him to make an informed choice.

1471 See s 35(4) of the Constitution. The purpose of this provision is to ensure effective communication in a language that the accused understands, albeit imperfectly. See *Naidenhov v Minister of Home Affairs supra* at 898. Therefore, the right to information is linked to the right to understand.

1472 See *Miranda v Arizona supra* at 469. Also see De Waal *et al op cit* 515.

1473 See *S v Nzima* [2001] 2 All SA 122 (C).

1474 Steytler *Constitutional criminal procedure* 118.

1475 *Id*.

1476 See *S v Mathebula supra* at 132 E-F and *S v Marx* 1996 (2) SACR 140 (W) 149 b.

1477 See s 136 of the German Criminal Procedural Code.

1478 See Foster *op cit* 223.

5.7 CONCLUSION

The principle of "equality of arms" implies, *inter alia*, that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he be given adequate time to prepare his case; that he be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by his adversary, and that he be given access to all material evidence held by the prosecution authorities which relates to his guilt or innocence.[1479] The principle of "equality of arms" between the prosecution and the defence, is implicit in the concept of a fair trial, and is entrenched in most jurisdictions.[1480] There are many ways to justify the importance of access to information. The most basic need is linked to the human fascination to uncover secrets. As a device for uncovering secrets, access legislation fulfills this human need. Democratic principles also favour broad access to information so that the people can understand and judge the performances and actions of their governments. Access legislation also improves government decision-making. It is also seen as a response to the increasing significance of information in society.[1481] The benefits of disclosure are also said to be fairness and efficiency. Early and full disclosure of the state's case is in the interest of the prosecution, because such a fully informed defendant can more easily be persuaded to plead guilty, and if made at an earlier stage, this will save court time and resources and the nation's legal aid bill.[1482]

An accused was entitled to information about the infringement of his rights, and the options that he may take before the advent of the Constitution. Section 335 of the Act provides that an accused is entitled to a copy of any statement that he himself has made.[1483] Section 144(3) provides that when an accused is arraigned for a summary trial in a superior court, he is entitled to the indictment and a summary of the substantial facts of the case together with a list of witnesses and addresses. An accused is also entitled to request further particulars to clarify the charge and to enable him to prepare his defence.[1484] However, the duty to furnish further particulars does not place a duty on the prosecution to disclose the evidence it intends using to prove the facts.[1485] Section 39(2) of the Act also provides that an arrestee must be informed of the reasons for his arrest and be furnished with a copy of the warrant on

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1479 See Leigh "The right to a fair trial" in Weissbrodt and Wolfrum (1998) *op cit* 664.

1480 See the comments of the European Court of Human Rights in *Rowe and Davis v UK supra* at para 60 in this regard.

1481 See Onyshko *op cit* 74-76 for a discussion about the need for access to information.

1482 See Doyle and Hodge *op cit* 96.

1483 Similarly, a summons or written notice informs the accused of the charge(s) against him and advises him about what options to take. See ss 54 and 57 of the Act respectively.

1484 See, *inter alia*, *R v Mokgoetsi supra* at 622.

1485 See *R v Heyne supra* at 617.

demand.[1486] Similarly, occupiers of properties must be furnished with a warrant informing them of the reason for the entry by police officers in terms of sections 26 and 27 of the Act. The police are also entitled to furnish persons whose rights are affected with a copy of the search warrant.

Most jurisdictions want to ensure that police investigation is not hampered by acceding to the accused's request for access to information in the police files. In a number of democratic societies, non-disclosure of certain categories of information is justifiable in that the public interest in the proper administration of justice overrides the right to disclosure.[1487] This is understandable in the light of the fact that the possibility of a conviction is linked to the success of police investigation. Both the police and the prosecution work hand-in-hand to secure a conviction. However, this partnership needs to consider the rights of the accused. Both the accused and the state (represented by prosecution and police) must enjoy an equal footing in the court and neither should enjoy any substantial advantage over the other. It goes without saying that the accused requires entitlement of information in the state's possession in order to have a fair trial. The accused's rights to disclosure is therefore necessary for the protection and exercise of his rights. The accused is entitled to know what information the state has in order to know the case against him, and to enable him to make full answer and defence. This involves the disclosure of all relevant material in the prosecution's possession, with the exception of that which is subject to a claim of privilege.[1488] Therefore, the obligation to disclose is only limited by relevance and privilege.

The relevant provisions affecting an accused's right to information in the Interim Constitution, were section 23 and section 25(3)(b). Section 23 provides for a right to information. Section 25(3)(b) guarantees the right to a fair trial, which includes the right to be informed with sufficient particularity of the charge concerned. Section 23 read with section 25(3)(b) was considered in various decisions of the Supreme Court resulting in accused persons being allowed access to police dockets. In some cases full access to the docket was granted,[1489] whilst in other cases, the Supreme Court formulated criteria to be applied in deciding the ambit of the right to information.[1490] The principle of fairness requires that an accused should be properly informed of the case that the state intends to prove against him. This right to sufficient information to facilitate the proper preparation of an accused person's defence, has always enjoyed general recognition.[1491] Section 35(3)(a) of the Constitution which stipulates that an accused's right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it, may thus be seen as an affirmation of the position which

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1486 This requirement must be complied with in order for the arrest to be lawful. See, *inter alia*, *S v Ngidi supra*.

1487 See Schwikkard *SACJ op cit* 337.

1488 See, *inter alia*, *R v Stinchcombe supra.*

1489 See, *inter alia*, S *v Majavu supra*.

1490 See, *inter alia*, S *v Fani supra*; *Phato v Attorney-General, Eastern Cape supra*.

1491 See *S v Hugo supra* at 540 E; *S v Ismail supra* at 40C; s 84 - s 88 of the Act.

prevailed prior to the advent of the new constitutional dispensation. The Constitutional Court finally clarified the position in *Shabalala*.[1492]

The *Shabalala* decision conforms with the right to a fair trial principle. Although there is no longer any "blanket docket privilege", this does not mean that the accused's rights of access are absolute. The result is that the state cannot make a unilateral claim of non-disclosure. However, the court retains a discretion to determine the legitimacy of the claim. Circumstances may arise where the accused's rights must be curtailed. However, this curtailment must be justified in such a manner that the accused's rights to a fair trial are not undermined. However, the decision is silent regarding the stage at which disclosure should be made. Disclosure should be made after completion of the investigation but before commencement of the trial.[1493] Any disclosure of such information for other purposes is improper. *Shabalala* is also silent regarding the question of reciprocal access.[1494] Although the court referred to the advantages of disclosure by the state, it does not mention disclosure by the defence. There will be added advantages if both parties disclose evidence simultaneously before commencement of trial. This would limit issues to be adjudicated by the court. The end result would be to increase the efficiency of the prosecutions, but this would not impede the fairness of proceedings.[1495] The decision is also silent regarding the absence of any evidence which has been in the prosecution's possession.[1496]

Foreign jurisdictions have accepted discovery as of right and have adopted a strict approach to limitations on that right.[1497] The accused's rights of access to material evidence is seen as an essential requirement of a fair trial.[1498] However, the prevailing

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1492 See *Shabalala v Attorney-General of the Transvaal supra*, which put an end to police docket privilege.

1493 *R v Stinchombe supra* is instructive in this regard. Similarly, in **Germany**, access can be denied where the investigations are not complete, and where premature access would endanger the success of the investigation. See s 147 of the StPO.

1494 The Criminal Procedure and Investigations Act 1996 in the United Kingdom *supra* encompasses reciprocal access and is instructive in this regard. So too are the Victorian legislation in Australia regarding reciprocal disclosure, and Federal Rule of Criminal Procedure 16(b) in the United States. Also see Senatle *op cit* 73, where he makes a very good case for reciprocal access. However, the South African Law Commission is not in favour of reciprocal disclosure by the defence. See *Project 73 Report* (August 2002) on a more inquisitorial approach to criminal procedure in this regard.

1495 However, Dawkins disagrees. He maintains that an adequate case for mandatory reciprocal disclosure has yet to be made on the grounds of administrative efficiency and better case management. See Dawkins *op cit* 65.

1496 The decisions of the Canadian and American courts are instructive in this regard. See *inter alia*, *R v Stinchcombe supra*, where the state was required to furnish a satisfactory explanation regarding lost or destroyed evidence. Also see *Arizona v Youngblood supra*, where the accused was required to show bad faith on the part of the prosecution in order to succeed.

1497 See *S v Majavu supra*.

1498 Also see *Edwards v UK supra*, where the European Court of Human Rights stated that prosecution disclosure of all "material evidence for and against the accused" was a requirement of a fair trial under art 6.

theme is that of the integrity of the judicial system. In Canada, the provisions of the Charter have been interpreted by the Supreme Court as providing a right of disclosure to accused persons. Indeed, the *Stinchcombe* case marked the dawn of a new era in disclosure to the defence, by holding that full and frank disclosure was a primary component of the right to make full answer and defence.[1499] In England, defence counsel has access to evidence from an early stage. The English system provides for the disclosure of summaries of the case before committal proceedings, and the furnishing of witness depositions and reports as part of the committal proceedings.[1500] The failure to disclose exculpatory evidence to the defence led to many miscarriage of justice cases. This led to the setting up of the Royal Warrant to the Royal Commission, which recommended the introduction of the CPIA of 1996.[1501] In the United States, due process guarantees to the defence "access to certain information possessed by the prosecution",[1502] and in order to prove a violation of due process rights, the defendant must show that the undisclosed evidence was material.[1503] In New Zealand, the accused's right to a fair trial have been found to prevail over the interests of society.[1504] Therefore, a survey of the foreign jurisdictions reveals that for the most part, the accused (or defence) is entitled to some rights of access.

Section 32 provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. This provision has implications, *inter alia*, for access to the basis for search warrants, the contents of police dockets and particulars relating to charge sheets. The Promotion of Access to Information Act is mandated by the constitutional right of access to information held by the state, and to information held by another person. It allows public parties to request records from private bodies. However, the Act does not apply to records required for criminal or civil proceedings already underway. Similarly, freedom of information laws in foreign jurisdictions are rarely used in the criminal context.[1505]

The right of an unrepresented accused to be informed of his right to legal representation was confirmed in many cases some time before the Interim

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1499 See *R v Stinchcombe supra*, where the court stated that the general rule is that all relevant information must be disclosed, whether it is inculpatory or exculpatory.

1500 See Leigh "Ensuring the right to effective counsel for the defense in English criminal procedure" 63 (1992) *International Review of Penal Law* 775 at 778.

1501 See Sharpe *The Criminal Law Review op cit* 273.

1502 See *Brady v Maryland supra*.

1503 See *US v Bagley supra* at 682.

1504 See *Commissioner of Police v Ombudsman supra*. In Germany, Australia and Islamic countries, the accused also has controlled rights of access to evidence in the prosecution's possession.

1505 See for example, the Federal Access to Information Act 1982 in Canada. In the United States, the FOIA is available as an alternative to conventional discovery as long as it does not exceed provisions of the Federal Rules. Similarly, in Australia, the courts have been hostile to freedom of information requests in aid of criminal discovery. See Taggart *op cit* 278-284.

Constitution took effect in 1994.[1506] The purpose of the right to legal representation, and its corollary to be informed of that right, was to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty.[1507] Thus, this protection ensures that an accused was treated fairly throughout the entire criminal process from arrest to trial. In order to give proper effect to an accused's rights in terms of the Constitution, he had to be informed of the right to consult with a legal representative in a manner so as to allow him to understand the content of that right.[1508] Similarly, an accused should be informed of the reason for his detention, and the right to remain silent in a language that he understands.[1509] It is also necessary that the accused is able to comprehend the meaning of the information.[1510] If an accused knows the reason for his detention, he can decide how best he can challenge his detention by exercising his right to remain silent or engaging legal representation.

The essential purpose of allowing an accused to engage in pre-trial discovery of the prosecution's case is to enhance the truth-finding process so as to minimise the danger that an innocent accused will be convicted.[1511] The Constitutional Court is to be commended for its bold and innovative approach in *Shababala*. Its rejection of the common law position on police docket privilege heralded a new era for access to documents. It drastically changed the scene regarding docket privilege and thereby the extent of information available to an accused. Similarly, the bold approach of the New Zealand courts towards right to information in *Commissioner of Police*, and that of the Canadian courts in *Stinchcombe*, are welcomed.[1512] These progressive decisions illustrate the courts' enthusiasm for law reform. This bodes well for its citizens. It is hoped that other countries will benefit from this criminal reform experience. The courts should strive to maintain a well-defined balance between the rights of the accused and those of the public. If the system of criminal justice is to be marked by a search for truth then disclosure must be the starting point.[1513] The "right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[1514] Indeed, the quest for better justice is a ceaseless quest, and our profession should strive for continuous examination and re-examination of our premises as to what law should do to achieve

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1506 See *S v Radebe*; *S v Mbonani supra* and *S v Mabaso supra*.

1507 See *S v Melani supra* at 174 (E).

1508 *Id*.

1509 See s 35(4) of the Constitution. Also see *Naidenhov v Minister of Home Affairs supra*. A similar viewpoint is followed in Canada. See Gautier *op cit* 163-210.

1510 See *S v Melani supra*.

1511 See Brennan *op cit* 2.

1512 So too the American decision in *Brady v Maryland supra*.

1513 See *R v Bourget* 1988 (41) DLR (4th) 756 at 757.

1514 See *R v Stinchcombe supra* at 9.

better justice.[1515]

Therefore, the accused must be informed about his rights and the case against him in order for him to prepare for his case effectively. However, it is imperative that the accused also understands what the case is about before he starts preparing for his case. He must understand the proceedings to be instituted against him. This means that he must be able to follow and comprehend the proceedings. Thus, the accused must be "fit" to be tried or "mentally present". An informed accused can only participate in the proceedings if he "understands" the proceedings. Therefore, the next chapter will discuss the accused's right to understand the proceedings.

[1515] See Brennan "The criminal prosecution: sporting event or quest for truth?" (1963) *Washington University Law Review* 279.