The Bail Jurisprudence Of Ghana, Namibia, South Africa And Zambia

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ABSTRACT

Human rights jurisprudence is interdisciplinary, and its advocacy is a universal phenomenon. Human rights encompass civil and political rights as well as economic, social and cultural rights. One right recognized in human rights jurisprudence as pivotal in the promotion of a criminal justice system that satisfies international human rights standards is fair trial, which includes the right to bail. The institution of bail traces its origins to international conventions that protect and guarantee the fundamental rights of the individual to liberty, the presumption of innocence and the due process of the law. These basic international norms and conventions have been internalized in the municipal laws of states. The general pattern of internalization is the incorporation of the basic rights in the Bills of Rights of the constitutions of the various states while the determination of detailed provisions relating to procedure and substantive rules are left with the Legislature and the Judiciary. The permissive degree of limitation on the liberty of the individual to be determined by the Legislature and the Judiciary involves balancing of choices and how these choices impact on the society. It involves the balancing of the rights of the accused and the victims of crime due cognizance being taken of the perception of the society of the bail jurisprudence and the effectiveness of the criminal justice system in addressing issues of criminality and crime prevention. This is a cultural phenomenon; the perception is a product of the values and culture of a particular society with respect to the presumption of innocence and the right to bail and hence the divergence in the bail jurisprudence of the three jurisdictions addressed in this paper.

In criminal justice jurisprudence, the right to bail forms part of the due process of the law and requires the application of principles of rationality by the Courts in order to temper the rigours of positivism. It is therefore submitted in this paper that the proper repository of the jurisdiction over bail is the Judiciary that has the inherent jurisdiction to bridge the gulf between positivism and rationality.

PART 1

INTRODUCTION

Topics such as bail jurisprudence more often that not conjure up emotions of security concerns about the "bad guy that must kept off the streets". Most often, we tend to forget about the cardinal principle of the presumption of innocence in criminal justice. Contemporary international policies and measures taken by some powers to combat international terrorism testify to the dangers of actual pre-trial punishment. The root cause of this, it is submitted, is the concentration of excessive powers over security matters in the Executive. Refusal of right to bail assumes a position that our criminal justice systems are perfect and that individuals detained for allegedly committing serious offences will be charged and tried in accordance with

the precepts of the due process of the law. Yet empirical evidence proves the contrary; there are cases in certain jurisdictions of torture at detention camps1 and the inability of the State to bring detained persons for trial within reasonable time.

Security concerns traditionally come under the jurisdiction of both the Legislature and Executive but the determination of bail application forms part of the due process of the law which belongs to the domain of the Judiciary. The question as to which organ of state has the final say in bail applications is a question of choices. Bail jurisprudence involves the balancing of the values relating to the rights of the individual and the security of the state; it involves the balancing of the dictates of positivism and rationality and how these choices impact on the individual and the society; it is a cultural phenomenon since the values of the society dictate the content of bail jurisprudence.

As stated by Nagel:2

> "The basic purpose of bail, from the society's point of view, has always been and still is to ensure the accused's reappearance for trial. But pretrial release serves other purpose as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceedings. Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares the family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defense with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble."

In criminal justice jurisprudence, the right to bail has often times been discussed in the context of the presumption of innocence and the right to liberty.

As stated by Mahomed J in *S v Acheson*3:

> "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

But it is submitted that the better approach to the jurisprudence of bail is a holistic one; an approach that must look at bail as part of the rights of the accused to the due process

1 See for example section 1005 of the Detainee Treatment Act of 2005 of the US which provides that no court, justice or judge shall have jurisdiction to hear or consider – an application of a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay; and the Military Commissions Act of 2006 which eliminates the constitutional due process right of habeas corpus for detainees at Guantanamo Bay and elsewhere by allowing the US government to hold hundreds of prisoners for more than five years without charges.

2 Stuart S. Nagel, (ed.) *The Rights of the Accused in Law and Action,* (Beverly Hills {Calif.}: Sage Publications, *1972*), 177-8.

3 1991 (2) SA 805 (Nm) at 822 A-B.

of the law and therefore forms part of the human rights discourse. Due process of the law in human rights jurisprudence under both international and municipal laws is an all embracing concept and in the context of bail, as indicated earlier, includes the right to liberty, fair trial and the presumption of innocence.

As stated by Hiemstra CJ in the case of Smith v Attorney-General,Bophuthatswana4, "Every man is entitled to 'due process of the law'. This principle is so ancient that it can be traced back to the *Magna Carta*"

Bail may be defined as security to procure the release of a person from legal custody together with an undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court. Bail application proceedings are normally pretrial proceedings and it is one of the reasons why discussion of the right to bail as a human rights issue should be in the general context of due process of the law rather than the limited confines of the presumption of innocence. Furthermore, the issue of guilt or criminal liability is not determined in the course of a bail application (this statement is made subject to the proviso that *prima facie* evidence of the guilt of the accused adduced at this stage may determine the refusal to grant bail). The presumption in criminal trial proceedings is a factor that determines and allocates the burden of proof, but put in the context of the due process of the law, the cumulative impact of the presumption of innocence and the right to freedom before conviction, permits the unhampered preparation of defense and serves to prevent the infliction of punishment prior to conviction.

There are no specific international human rights standards on the right to bail; there are only generic provisions on the right to liberty and due process of the law which are incorporated in the constitutions, which include the 48 hour rule. The detailed provisions relating to the procedure and the guidelines (both mandatory and discretionary) to be followed by the Courts in the judicial process fall under the Legislature, within the ambit of state sovereignty. Legislative intervention almost invariably has taken the form of criminal procedure legislation the contents of which are motivated by concerns of security, the right of the accused person or the arrestee and due process of the law. But it is submitted that in jurisdictions where automatic right to bail is denied on grounds of the nature of the

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offence, the legislative intervention is motivated more by security concerns than the protection of the rights of the individual.

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The concern about the potential abuse of the rights of the individual in the process of the enforcement of the penal laws by the state security apparatus and law enforcement agents has resulted in legislative intervention at both international (in the form of international covenants and conventions) and national levels aimed at protecting the rights of the individual. International Bills of Rights have impacted on municipal jurisdiction to the extent that most contemporary jurisdictions have incorporated the International Bill of Rights5 and treaty norms in their constitutions and domestic legal systems. The right to bail falls under the general rubric of the right of personal liberty and international instruments such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the International Covenant of Civil and Political Rights (hereinafter referred to as ICCPR), have provisions protecting the rights of the personal liberty of the individual both during pre-trial and trial proceedings and these provisions have been internalised in the municipal of laws of most countries. The provisions are as follows:

Universal Declaration of Human Rights:

Article 9

> No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11 (1)

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The African Charter on Human and Peoples' Rights:

Article 6

> Every individual shall have the right to liberty and to the security of his person. No one maybe deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one maybe arbitrarily arrested or detained.

5 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

Article 7(d) of the African Charter on Human and People's Rights states that every individual has the right to be tried within a reasonable time by an impartial court or tribunal.

The International Covenant on Civil and Political Rights (ICCPR):

Article 9(1)

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9(2)

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

Article 9(3)

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Article 9(4)

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

As a general application of the basic principles of the law of treaties, parties to international treaties are States, the UN and other international organizations and therefore such international standards and norms become binding on State parties either through the constitutional technique of legislative incorporation or automatic incorporation6. These constitutions guarantee the civil and political rights of every citizen as well as the democratic values of human dignity, equality and freedom. In the Bill of Rights provisions, rights such as the right to fair hearing, including the right to be heard, to appeal, to be presumed innocent, to be defended by counsel of one's choice and to have a trial within a reasonable time by an impartial court or tribunal are both entrenched and justiciable.

International Covenants such as the International Covenant of Civil and Political Rights (the ICCPR) do not only provide for these rights but also the mechanisms for redress and appropriate remedies that are available to a victim of human rights violation. State parties to such covenants are bound to these international instruments and therefore any alleged violations of individual rights are governed by the provisions of not only the municipal laws of a particular jurisdiction but also international law. The Human Rights Committee established under the ICCPR for example, is mandated to monitor and

6 Virginia Leary, *International Labour Conventions and National Law* (Dordrecht: Kluwer Academic Publishers, 1982),1

supervise the implementation of the rights set out in the Covenant (ICCPR). At the continental level such treaty bodies as the African Court on People's Human and Peoples' Rights, and the African Commission on Human and Peoples' Rights7 are mandated to protect and defend the rights of the individual against violations by state agencies.

However, it must be added that under international law, as a general rule, there is no formal obligation on States to ratify a particular international covenant or a protocol and therefore, for example, the invocation of the jurisdiction of the Human Rights Committee, mentioned above, will require prior ratification of the Protocol establishing the Committee. The limitations of the binding effect of international conventions and the lack of enforcement mechanism by which to hold signatories accountable are recognised in the jurisprudence of international law. Furthermore, under international law, individuals seeking the jurisdiction of international tribunals have the *locus standi* only where the State has acceded to the jurisdiction of the particular international organisation and the individual has exhausted all available domestic remedies to enforce compliance.

This seeming inefficacy of the enforcement mechanisms under international law does not mean, however, that states can indulge in violations of rights with impunity. There exist in modern international relations, and especially in Human Rights jurisprudence, mechanisms and instruments of compliance such as sanctions and isolation of the recalcitrant and delinquent state exerted by the international community and international human rights watchdogs, such as Amnesty International, to enforce compliance. H Steiner and P Alston8 describe the concept as follows:

> Human rights violations occur within a state, rather than on the high seas or in outer space outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state. The international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights – although the measures implemented by the international community in Bosnia-Herzegovina after the 1995 Dayton Peace Agreement and especially in Kosovo represent steps in that direction. Rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method – either observing national law(constitutional or statutory) that is consistent with the international norms or making the international norms themselves part of the national legal and political order.

7 The Protocol establishing the African Court on Human and Peoples' Rights entered into force on 25 January 2004.

8 Henry J Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Oxford University Press, 2000), 987

Under international law, the international standards and norms contained in international treaties and conventions become binding on States upon accession of the said instruments and acceptance of the jurisdiction of the particular international organization. However, if the provisions of a treaty or an international instrument are considered to be self-executing and an individual has the standing to do so, the individual may invoke the provisions of a treaty before national courts in automatic incorporation in the absence of implementing legislation. Individuals have *locus standi* before the institutions if all available domestic remedies have been exhausted. This international rule of exhaustion of local remedies before resort to international remedies is one of the basic rules in international law. The object of the rule is to enable the respondent State the first opportunity to correct the harm and to make redress. Hence, a person whose rights have been violated should first make use of domestic remedies to right a wrong rather than first address the issue to an international committee, court or other tribunal. However, if no domestic remedies are available or there is unreasonable delay on the part of the national courts in grating remedy, then a person is justified in having recourse to international remedies. The rule of local remedies should not constitute an unjust impediment to access to international remedies.

At the municipal level, the legal systems of the jurisdictions whose bail jurisprudence is discussed hereunder are characterized by the accommodation of legal pluralism as a logical consequence of the constitutional recognition of, *inter alia,* legislation, the common law and customary law as sources of law. The administration of justice, therefore, involves the application of not only legislative enactments and the common law but also customary law. Bail jurisprudence, however, has been developed more through legislation and the common law than customary law mainly as a result of the structural and jurisdictional limitations of the customary law courts. In almost all the jurisdictions of Anglophone Africa where legal pluralism is part of the legal system, the courts that have original jurisdiction to apply customary/indigenous law have limited jurisdiction over criminal matters. It is also important to note that there are no bail proceedings under most customary regimes as far as research into the criminal jurisdiction of traditional courts is concerned. The logic here is that there is no pretrial detention.

As discussed hereunder, the jurisdiction over the determination of the rights to bail is vested in the Legislature and the Judiciary. The debate is whether the granting of this jurisdiction in the Legislature does not amount to the usurpation of and encroachment on

the powers of the Judiciary by the Legislature. The resolution of this involves a choice of variables including the values of the society and of the institution perceived to have the endowments most suitable for the administration and promotion of criminal justice. It is the submission of this paper that the culture of arts implies flexibility and openness whereas the culture of science requires strictness and predetermination. Therefore vesting in the Judiciary the jurisdiction over the determination of matters relating to bail would promote the culture of flexibility and openness and enable the Judiciary to exercise rationality to temper the rigours of positivism, which is required to bridge the gulf between the two cultures.

PART 2

THE JURISPRUDENCE OF THE RIGHT TO BAIL UNDER MUNICIPAL LAW

Models of Bail System

There are three models / approaches to the right to bail as a human right balancing the right of the individual to liberty and the security of the community. The first model is premised on a policy and a constitutional position that makes the Legislature the repository of the determination of the right to bail and leaves the Judiciary with the implementation of broad legislative directives. The legislative directive invariably includes mandatory refusal of bail in certain offences and the Judiciary is left with the discretion to determine the grant or refusal of bail in other cases with the primary objectives of promoting the due process of law and securing the presence of the accused or arrestee before the jurisdiction and judgment of the court. The second model or approach is premised on the constitutional position that grants the sole determination of the right to bail to the Judiciary, subject to a minimum degree of legislative intervention. This approach does not prescribe for bailable and non-bailable offences. The accused or arrestee has the *prima facie* constitutional right to apply for bail, irrespective of the seriousness of the alleged offence. The first model/approach is adopted by countries such as Zambia, Ghana, India and certain states in the United States and the second model/approach by countries such as Namibia. The third model/approach may be described as an amalgam or hybrid of the first two models/approaches. The power over determination of matters relating to bail is generally vested in the Judiciary. There is no legislative mandatory refusal of bail; the law does not draw a distinction between bailable and non-bailable offences. However, there is a legislative intervention in the form of legislative guidelines that the Courts must follow in the exercise of their discretion to grant or refuse bail in serious or scheduled offences. This is the South African model.

FIRST MODEL/APPROACH

As stated earlier, bail jurisprudence aims at achieving a balance between personal liberty and social security or interests of the society. Consequently, the first model/approach is premised on three tenets; security concerns emanating from state sovereignty, protection of the rights of the individual, and the promotion of due process of the law. Under this model/approach legislative intervention is exercised by means of the promulgation of legislation dealing with procedural and substantive principles relating to bail. The justification for legislative intervention has been based on security concerns and therefore the Legislature has been recognized as the legitimate organ of state to be vested with the jurisdiction to make broad pronouncements on matters relating to bail. In the interest of state security and securing the presence of the accused before the jurisdiction of the courts, the Legislature has thought it prudent to draw a distinction between bailable and non-bailable offences. The former consist of less serious non scheduled offences over which the Courts have unfettered discretion to make pronouncements on whether or not bail must be granted. This notwithstanding, the Courts exercise this discretion guided by certain imperatives and values developed through case law.

The latter consists of serious or scheduled offences in which the Courts are mandated to refuse bail. This approach is adopted by Ghana and Zambia. But in order to temper the injustices that this approach may cause to the accused person, under both Ghanaian and Zambian constitutional provisions supported by relevant case law, the Courts have the power to grant bail to the accused if s/he is not tried within a reasonable time in cases of statutory non-bailable offences. But this approach tends to confuse release on bail and the accused's right to be brought to trial within a reasonable time. The fact is that release on bail is not a substitute for an accused's right to be brought to trial within a reasonable period. In all such cases the fundamental issue is the constitutionality of these legislative interventions in terms of their consistency and compliance with international human rights standards. Under this head we shall discuss the Zambian and Ghanaian models/approaches.

This model/approach traces its legitimacy to the fact that the power to determine the general policy, principles and rules of law governing the grant or refusal of bail is vested in the Legislature. But in human rights bail jurisprudence the protection of the liberty of the accused potentially stands compromised if this power is vested in the Legislature. This is a human rights issue which is traditionally recognized as falling under the jurisdiction of the Courts and therefore the approach that will be regarded as consistent

with the precepts of international norms and standards will be that of automatic legal right to appeal the determination of which will rest within the discretion of the Courts. This approach will adequately cater for all the concerns mentioned earlier that determine the content of bail jurisprudence. In the case of *Smith v Attorney General, Bophutswana*,9 Hemstra stated as follows:

> In America there is a lively controversy between those who would award the Court a constitutional policymaking function and those who want to limit its constitutional interpretation. Before a Court has established itself as an unchallenged third force in a country it would be wiser to limit itself to interpretation, which nevertheless is imaginative and designed to keep open the horizon of individual liberty. There will be an on going debate in the courts about definitions and priorities, all the time aiming, not at freedom from law, but at freedom through the law.

The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to due "process of the law". This principle is so ancient that it can be traced back to the *Magna Carta* (1225). In s61A the judicial process is eliminated. The order refusing bail to a suspect is still made in open court by a judicial officer, but it is a pantomime of a court. The magistrate is not only compelled to accept the Attorney-General's *ex parte* statements of fact, not supported by any evidence, but the statute also tells him what order to give, namely a refusal of bail. A statute which eliminates the judicial process in matters of personal liberty is plainly unconstitutional. I do not refer to the internal security laws. Other considerations apply there, brought about by s 12 (3) (g) of the Declaration of Fundamental Rights.

Due process of law does not necessarily imply court proceedings in every context, but in regard to bail it certainly does because bail is part of trial proceedings. The expression appears nowhere in the Bill of Rights, as it does in the Fifth and the Fourteenth Amendments of the American Constitution, but the wording of para (3) (b) quoted above – "shall be entitled to trial within a reasonable time or to release pending trial-clearly relates to a judicial process. It means trial within a reasonable time, or, if not tried within a reasonable time, then release pending trial subject to suitable guarantees imposed by a court of law."

This encapsulates the basic tenets of bail jurisprudence, namely, firstly, that bail application falls within the judicial process and therefore within the jurisdiction of the

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Courts; secondly that the accused has the right to trial within a reasonable time failure to which s/he is entitled to release. This latter position, however, falls short of automatic right to apply for bail. As stated earlier, release on bail is not a substitute for an accused's right to be brought to trial within a reasonable period. Release on bail on account of failure to prosecute the case within a reasonable time is not a proactive provision as it only seeks to address the issue after the fact. The automatic right to apply for bail is not specifically provided for by the Constitution (in the case of Ghana or Zambia). This is subject to the interpretation of the relevant provisions of the Constitution and the Courts in both Ghana and Zambia in their interpretations of these provisions have taken a holistic approach by relying on legislation that denies the accused the right to apply for bail in offences statutorily classified as non-bailable. This mandatory denial of bail coupled with the fact that the constitutional right to release addresses the issue after the fact, means that the right to liberty of the accused stands tremendously compromised since the accused is subjected to punitive conditions before trial. In order to remove these uncertainties, it is submitted that the jurisdiction to determine bail be granted to the Judiciary and that appropriate provisions incorporated in the Constitutions. It is submitted therefore that the correct jurisprudential approach to bail applications is that the Courts of law should adjudicate these matters and that as a matter of principle there should be no legislative or executive attempts to curtail or oust the jurisdiction of the Courts10.

ZAMBIA

The Zambian position as described earlier, falls under the first model/approach and the sources of the legal principles and rules governing the grant or refusal of bail are the Constitution, the Criminal Procedure Code11, and case law. In the context of the right to bail the Constitution of Zambia encapsulates the constitutional rule that the defendant is presumed to be innocent until he is proven to be guilty. From this rule flows the proposition that the defendant shall not be subject to unnecessary pre-trial deprivation of his freedom. This is contemplated under Article 13(3) and 18(1) of the Constitution; and Section 33(1) of the Criminal Procedure Code12 provides that arrested persons are to be taken before a competent court without undue

10 See generally *S v Ramgobin* 1985 (3) SA 587 (N); *S v Ramgobin* 1985 (4) SA 130 (N); *Bull v Minister of Home Affairs* 1986 (3) SA 870 (Z)
11 Cap 160 of the Laws of the Republic of Zambia
12 supra

delay and if not tried within reasonable time should be released either conditionally or unconditionally.

These are the fundamental provisions relating to bail and the protection of the rights of the detained person or the accused. The rest of the legislative principles, both substantive and procedural, are contained the in the Criminal Procedure Code13. In essence, the primary policy is that in the interest of the security of the community/society and guaranteeing the completion of criminal proceedings and promoting the due process of the law, a person charged with a scheduled offence such as murder, treason, aggravated robbery, rape etc is not eligible for bail. The Zambian legislature has accordingly legislated for bailable and non-bailable offences. As stated earlier, in the case of the latter, the Courts are mandated to refuse bail under section 123 of the Criminal Procedure Code. The right to bail is therefore guaranteed under Zambia's Constitution and international law. However Section 123 of the Criminal Procedure Code provides for specific offences that may not be bailable. The effect of this is that the accused person in such an instance is condemned unheard. The provisions in the Criminal Procedure Code curtailing the discretion of the courts to grant bail the specified instances can be considered to be unconstitutional as Articles 13(3) and 18(1) of the Constitution that require any accused person charged with an offence to be afforded a fair hearing before an independent tribunal within a reasonable time. The automatic denial of bail negates the spirit of the provisions of the Constitution as such an accused person is *ab initio* denied the opportunity to appear before an impartial tribunal and ventilate reasons why he believes he should be granted bail.

In addition, the offending provisions can also be regarded as unconstitutional as they attempt to curtail the unlimited jurisdiction of the High Court to hear all civil and criminal matters, which is guaranteed under Article 94(1) of the Constitution.

In summary, under Zambian bail jurisprudence, the determination of whether or not an accused has the right to apply for bail depends on the classification of the offence. The Courts have unfettered discretion to entertain applications for bail in offences prescribed as bailable and make determinations on the applications taking into considerations a mix of factors. However, in cases involving serious offences prescribed as non-bailable the Courts are mandated to refuse such applications. Under the so-called *Constitutional bail*

13 supra

*concept*14, an accused is entitled to bail if the trial does not take place within a reasonable period through no fault of the accused. However, as stated earlier under this bail regime, the rights of the accused stand compromised and susceptible to be violated.

GHANA

The Ghanaian model/approach was exhaustively discussed by Prof. Ocran JSC in the case of *Kevin Dinsdale Gorman v The Republic of Ghana15* and because of the relevance and importance of the case, I have found it necessary to refer to the relevant parts of the case in their entirety. The Court exhaustively stated the bail jurisprudence of Ghana as follows:

> "In this manner, we expect to clarify and enunciate the general policy, principles and rules of law governing the grant or refusal of bail in our legal system, spelling out the interface between and among relevant rules of criminal procedure, case law, and the1992 Constitution.
>
> Undergirding our principles for decision on applications for bail is the effective enforcement of our criminal law guided by due process considerations, which constitute the procedural aspects of our commitment to liberty of the individual. A true system of justice must indeed reflect both aspects of criminal jurisprudence. If not, one of two consequences will follow: either the law enforcement agencies of the state ride roughshod over the rights of the accused: or criminals would have had a field day in the system as they roam the streets in full liberty and with contempt for the efficacy of our criminal enactments. A good starting point of analysis is the Ghana Constitution of 1992; for, in the final analysis, all our laws and procedures, whether predating or postdating this document, and whether embodied in statutes or case law, must be consistent with the Constitution. Counsel for the 1st Accused / Appellant is right in asserting that the Criminal Procedure Code of 1960, as amended, continues to be valid only in so far as it is consistent with the Constitution of 1992.

The 1992 Constitution contains unequivocal protection for accused persons in the pre-trial and trial stages of the criminal process. Article 19(2)(c) enunciates the age-old common law presumption of innocence of the accused. It has been argued by the Counsel for some of the Appellants in this case that this provision implies a further presumption in favour of the grant of bail; and that the denial of bail for their clients thus flies in the face of Article 19(2)(c). In this connection, Counsel referred to *The Republic v. Court of*

14 See *Chetankumar Satkal Parekh v The People* (Supreme Court of Zambia unreported)
15 2003-2004 SCGLR 784 at 795-809.

Appeal: Ex Parte Attorney General16 – better known as the *Benneh Case* – which will be discussed at greater length *infra*. For the moment, it is enough to point out that Article 19(2)(c) of the Constitution is meant to be enjoyed equally by the accused held in pre-trial detention as well as the accused granted bail. For, as Coleridge said in *R. v. Scaife17*

> "I conceive that the principle on which the parties are committed to prison by magistrate's previous trial is for the purpose of ensuring the certainty of their appearing to take the trial….it is not a question as to the guilt or innocence of the person…."

Since the presumption holds for both the Accused in custody and his counterpart on bail, there is no self-contained criteria for sifting between the two categories of accused persons. In that sense, the presumption of innocence is necessary but not a sufficient ground for the grant of bail. This is not surprising. The issue of bail primarily addresses freedom, or lack thereof, of the accused "to walk in the streets" after being charged with an offence; it is principally associated with the pre-trial phase, although it has obvious consequences for the liberty of the accused during the trial as well. By contrast, the presumption of innocence primarily addresses the due processes issue of burden of proof or of persuasion once the trial commences. Thus the strong derivation of a presumption of the grant of bail from a presumption of innocence appears too sanguine.

While one might attempt to derive a presumption of grant of bail from the constitutional presumption of innocence, as Wiredu J.S.C. (as he then was) sought to do in the Benneh case (supra), a stronger basis for a presumption of grant of bail under our Constitution might be found in Article 14. Indeed, Art 14(4) embodies a direct duty to grant bail in a specific situation, i.e. when a person is not tried within a reasonable time. But this provision does not exhaust the grounds upon which bail is granted. We must also consider the cumulative effect of Art. 14(1) and 14(3), which work on the premise that every person is generally entitled to his liberty.

Basing ourselves on Art. 14(1), 14(3), and to some extent on Art. 19(2)(c), of the 1992 Constitution, we hold that there is a derivative constitutional presumption of grant of bail in the areas falling outside the courts' direct duty to grant bail under Art 14(4). However, this by itself is not dispositive of the legal problem of bails, for it seems clear that this presumption is rebuttable. Any other reading of the Constitution would lead to the untenable conclusion that every accused person has an automatic right to bail under our

16 [1998-99], SC GLR 559
17 [1841] 5. J. P. 406, at p.406:

Constitution. This presumption is, for example, rebutted in cases where a statute specifically disallows bail based on the nature of the offence, such as the situations outlined in s.96(7) of the Criminal Procedure Code.

Outside Article 14(4) of the Constitution and s. 96(7) of the Criminal Procedure Code (Act30), the presumption of the grant of bail retains judicial discretion in the matter of bails. However, the exercise of this discretion remains fettered by other relevant provisions of our law. This is where the other provisions of s. 96(1) of the Code fall into place. They serve the purpose of clarifying the manner in which this discretion may be exercised, including the factors that should be taken into account in granting or rejecting a plea for bail. Because of our rejection of the notion that the constitutional presumption of innocence calls for an automatic enjoyment of bail, we hold further that there is no prima facie inconsistency between the general provision of S.96 of the Criminal Procedure Code and the Constitution of 1992. Thus Section 96 of the Code provides for judicial discretion in the matter of bail, but should always be read in light of the constitutional duty to grant bail. This section embodies both a positive right and a negative duty for the courts. In the exercise of their judicial discretion as constitutionally circumscribed, courts are accorded under s.96(1) *the general right to grant* bail as long as the accused person is prepared to give bail or enter into a bond. The section impliedly grants the right to refuse bail as well. It should be noted that this provision does not list any specific grounds for the grant of bail; and one would surmise that any reasonable ground, such as the deterioration of the health of the accused while in detention, would suffice as a proper ground for the grant of bail. But it is made subject to other provisions of the section. The second aspect, embodied in s.96 (5), states a *general duty to refuse bail* in certain situations, including the likelihood that the defendant may not appear to stand trial. This is followed by S.96 (6), which lists the factors the courts should take into account in assessing the likelihood of the defendant's non-appearance for trial. These Code provisions dovetail neatly into Articles 14 and 19 of the 1992 Constitution.

Drawing on our general analysis of the law above, we summarize our holdings as follows:

1. The constitutional presumption of innocence embedded in Art. 19(2)(c) of the 1992 Constitution does not import an automatic right to bail.

2. The constitutional duty of the court under Art. 14(4) of the Constitution, to grant bail to the accused if he is not tried within a reasonable time, is applicable irrespective of the nature of the accusation or the severity of the punishment upon conviction.
3. In the cases falling outside the direct duty to grant bail under 14(4), there is a constitutional presumption of grant of bail drawn from the spirit of the language of Art 14(1) & (3), and 19(2)(c), in further protection of persons charged with offences in situations which do not mandate the grant of bail.
4. The said constitutional presumption of the grant of bail is rebuttable; and it is in fact rebutted by a statutory provision that expressly disallows bail, such as the circumstances outlined in s.96(7) of the Criminal Procedure Code.
5. Outside the strictures of s. 96(7) of the Code and Article 14(4) of the Constitution, the presumption of the grant of bail is still extant, and is exercised under judicial discretion which is itself fettered by other provisions of s.96.
6. There is no prima facie inconsistency between the relevant provisions of the Code and the 1992 Constitution.
7. Considerations of the nature of an accusation and the severity of punishment upon conviction, as part of the decision not to grant bail under s.96(5)& (6), are constitutional ; and that the gravity of an offence may be viewed as an aid in understanding and categorizing the nature of an accusation.
8. The Court of Appeal in arriving at its judgment of 3rd March, 2004 to rescind bail in this matter, at variance with the judgment with the judgment in the Benneh case to grant bail, did not violate the constitutional provision on *stare decisis*; and
9. The Supreme Court is not bound by the specific result of the Benneh case since the factual contexts are distinguishable."

NAMIBIA

Namibia's attainment of sovereignty and self-determination ushered in a new constitutional dispensation characterized by constitutional supremacy as opposed to legislative sovereignty, the rule of law and respect for human rights. These values have engendered new jurisprudence in Namibia and the Namibian Superior Courts have used these values as the basis of their judgments in cases involving the interpretation and implementation of the Bill of Rights of the Constitution of Namibia. The respect for international human rights norms internalized in the domestic laws has also had its impact on the criminal justice system and particularly the bail jurisprudence of Namibia.

The Namibia model/approach is premised on the constitutional position advocated by Hemstra J in the case of *Smith v Attorney General, Bophutswana18* that the universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. The jurisdiction over the right to grant or refuse bail is almost entirely left to the discretion of the Courts. The sources of bail jurisprudence in Namibia comprise the Constitution of Namibia, the Criminal Procedure Act,19 to the extent that they are relevant to Namibia, and case law. In terms of Namibian bail jurisprudence there is no distinction between bailable and non-bailable offences. The rights to liberty, bail and lawful detention in terms of the 48 hour rule are protected by the Bill of Rights of the Constitution. There are no statutory limitations to this right. The matter is solely within the discretion of the Courts, which exercise this discretion taking into consideration the case guidelines as stated in the case of *S v Acheson20* the interests of the public and the administration of justice standard introduced by section 3 of the Criminal Procedure Amendment Act 5 of 199121.

The relevant constitutional provisions are as follows:

> "Article 7 Protection of Liberty
> No persons shall be deprived of personal liberty except according to procedures established by law.
>
> Article 11 Arrest and Detention
> (1) No persons shall be subject to arbitrary arrest or detention.
> (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
> (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.
>
> Article 12 Fair Trial
> (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part

18 1984 (1) 196
19 Act 51 of 1977. This Act is applicable to Namibia but not all the amendments automatically apply in Namibia.
20 1991 (2) SA 805 (NM) 1991 (2) SA p805
21 See pp 31-36 for details and interpretation of this provision.

of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them."

In the case of *S v Acheson* 22 Judge Mahomed AJ stated the position of the Namibian bail jurisprudence in the context of the fundamental values underlying the Namibian Constitution as follows;

During the course of argument it was at some time suggested to me that the enquiry as to whether an adjournment was expedient for the purposes of enabling the State to get the absentee persons concerned before the Court was a separate matter, to be decided independently of the issue as to the length of the adjournment and independently of the issue as to whether bail should be granted. It is no doubt correct that the Court must apply its mind to the merits of each of these issues, but it would I think be an erroneous approach

22 1991 (2) SA 805 (NM) 1991 (2) SA p805 The accused in this matter was Mr Donald Acheson, an Irish citizen who was charged with the murder of Adv Anton Lubowski on 12 September 1989. When the matter was called on 18 April 1990, Mr Heyman, who appeared for the State, applied for an adjournment. He indicated that he sought a lengthy adjournment and that the accused should be kept in custody in the interim. The material facts appearing during the hearing on 18 April 1990.

The accused was arrested on 13 September 1989 and he had been in continued custody since that day. Although the initial arrest on 13 September 1989 was on the allegation of murder, he was on 15 September 1989 detained as a prohibited immigrant in terms of the Admission of Persons to the Republic Regulations Act of 1972.

An application to set aside the accused's detention in terms of this Act was successful in the Supreme Court on 6 November 1989, but the accused was immediately arrested again on the allegation that he had murdered Mr Lubowski. An unsuccessful application for bail was made to the magistrate on 13 November 1989. An appeal to the Supreme Court against that refusal of bail also failed.

On 10 January 1990 the accused again appeared before the magistrate, and the accused pleaded not guilty pursuant to the provision of s 119 of the Criminal Procedure Act 51 of 1977. The State requested a postponement until 15 February 1990 so as to enable the Attorney-General to make his decision as to the further prosecution of the matter in terms of s 122 of the Criminal Procedure Act. The defence objected to such a lengthy postponement whilst the accused was to be kept in custody and the magistrate decided to adjourn the matter until 25 January 1990.

On 25 January the accused again appeared before the magistrate. The prosecutor informed the Court that the Attorney-General had decided to arraign the accused on the charge of murder in the Supreme Court on 18 April 1990. The accused was thereafter served with a formal indictment charging him with the murder of Mr Lubowski, together with a summary of substantial facts and a list of witnesses to be called by the State.

to maximize the enquiry. The question as to whether bail is to be granted is, for example, one which clearly affects the issue as to whether an adjournment is to be granted at all and, if so, for what period. The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.

The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

Crucial to that tenor and that spirit is its insistence upon the protection of personal liberty in art 7, the respect for human dignity in art 8, the right of an accused to be brought to trial within a reasonable time in art 12(1)(b) and the presumption of innocence in art 12(1)(d).

I think Mr Grobbelaar was correct in submitting that I should have regard to these provisions in exercising my discretion. They constitute part of the constitutional culture which should influence my discretion. No judicial officer should ignore that culture, where it is relevant, in the interpretation or application of the law or in the exercise of a discretion.

I accordingly now turn to the question of bail. The State was vigorously opposed to bail for the accused, even if the adjournment sought was to be for a substantial period of time. Mr Heyman submitted that there was the danger that the accused would not stand trial, regard being had to the fact that he was an Irish citizen with no real roots in Namibia or any African country, that there was no existing extradition treaty with Ireland, and that the borders of the Republic of Namibia were extensive and difficult to police. He also submitted that this Court had previously dismissed the appeal against the refusal of bail by the magistrate.

I am unable to agree with the suggestion that I am precluded from considering bail for the accused, merely because the accused was previously unsuccessful in this Court.

Each application for bail must be considered in the light of the circumstances which appear at the time when the application is made. A Judge hearing a new application is

entitled, and indeed obliged, to have regard to all the circumstances which impact on the issue when the new application is heard.

More than seven months have now elapsed since the accused was first taken into custody. The Court which heard the previous application was not and could not be aware that the trial would not commence on 18 April 1990 and that a further adjournment would be sought by the State. Moreover, it is no fault of the accused that the trial cannot proceed. He is willing and able to continue with his defence, having engaged eminent senior and junior counsel. The prima facie case which the State alleged it had, when it previously opposed bail, may turn out to be very much less than a prima facie case if the absentee witnesses are not procured.

An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The considerations which the Court takes into account in deciding this issue include the following:

(1) Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as

(a)how deep are his emotional, occupational and family roots within the country where he is to stand trial;
(b) what are his assets in that country;
(c) what are the means that he has to flee from the country;
(d) how much can he afford the forfeiture of the bail money; (e) what travel documents he has to enable him to leave the country;
(f) what arrangements exist or may later exist to extradite him if he flees to another country;
(g) how inherently serious is the offence in respect of which he is charged;
(h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;
(i) how severe is the punishment likely to be if he is found guilty;
(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements.

(2) The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as:

(a) whether or not he is aware of the identity of such witnesses or the nature of such evidence;
(b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject-matter of continuing investigations;
(c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;
(d) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

(3) A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as, for example,

(a) the duration of the period for which he has already been incarcerated, if any;
(b) the duration of the period during which he will have to be in custody before his trial is completed;
(c) the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay;
(d) the extent to which the accused needs to continue working in order to meet his financial obligations;
(e) the extent to which he might be prejudiced in engaging legal assistance for his defense and in effectively preparing for his defence if he remains in custody.

In the development of the bail jurisprudence of Namibia, the *Acheson case was* followed by the application and interpretation of the concept of the refusal of bail on the grounds of public interest and the interest of the administration of justice. In response to public outcry for tougher criminal justice intervention, including tougher bail regulations, to arrest the escalation of criminal activities, the Parliament of Namibia amended section 61 the Criminal Procedure Act 51 of 197723 to highlight the need for the Courts in the exercise of their discretion to consider the interest of the public and the administration of criminal justice in bail applications. Parliament did not define what constitutes the interest of the public and the administration and neither did it give any guidelines. These were left to the discretion of the Courts. The amended provision reads as follows;

> If any accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of offence the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with any police investigation, refuse the application for bail if in the opinion of the court, after such enquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial.

23 Section 3 of the Criminal Procedure Amendment Act 5 of 1991

This added another dimension to the bail jurisprudence of Namibia. The Courts in Namibia have attempted to define what constitutes the interest of the public. One definition is in the context of the legal convictions of society which encompass the legitimate, reasonable and justifiable values, expectations, norms and fears of the law-abiding members of Namibian society as enshrined and protected in the constitution of the Republic of Namibia, with due consideration to corresponding and relevant values, expectations, norms, perceptions and fears in comparable civilized societies in the community of nations24.

The legislative amendment referred to provides that it is the interest of the public and the administration of justice *as seen by the judicial officer*, i.e. in his or her *opinion*, which is decisive. Such judicial officer will therefore obviously have to make a value judgment of what are the legal convictions of society and what is the impact of such convictions o the particular case where the Court must adjudicate on an application for bail.

The legal convictions of the community will hold that an accused person should not be released on bail provided there is *prima facie proof* against such person that he or she has committed the type of serious crime discussed and is therefore, in the opinion of the Court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be a threat.

The other variables used to determine what constitutes interest of the public were laid down in the case of *Charotte Helena Botha v The State25.* The High Court in its judgment summed the background and the implications of the amendment and reiterated the fact that in cases of serious crimes and offences the court is entitled to refuse bail on the grounds of interest of the public or the interest of the administration of justice, even where it has been proved to the satisfaction of the Court that it is unlikely that the accused will abscond, interfere with any witness for the prosecution or with the police investigation.

The Court added that Amendment Act 51 of 1991had to be seen as an expression of the concern of the Legislature at the very serious escalation of crime and the similar escalation of accused persons absconding before or during trial when charged with serious

24 See: Articles 1(1) and 5 of the Namibian Constitution. and *S v Van den Berg*, 1995 (4) BCLR 479 (Nm) at 490, B – 491 C.
25 High Court of Namibia Case N0n70/95 unreported.

crimes or offences. The amending legislation was obviously enacted to combat this phenomenon by giving the Court wider powers and additional grounds for refusing bail in the case of the serious crimes and offences listed in the new Part (iv) of the second schedule of the Criminal Procedure Act 51 of 1977. At the same time the substitution of the new section 61 for the previous section, took away the power of the Attorney-General and since independence, the Prosecutor-General, to prevent the Court from considering bail. The Court stated thus:

The fact that the Courts additional power to refuse is stated in wider terms, indicate that the Court, when considering public interest, is not restricted to the limited form of public interest on which the Prosecutor-General could rely in the substituted section 61 as the second ground, viz the ground that the release is likely to '*constitute a threat to the safety of the public or the maintenance of the public order.'. It is obvious, therefore , that the Court is the final arbiter on the question of whether bail is granted or not and may not allow the mere ipse dixit of either the Prosecutor-General or the investigating officer or both, to be substituted for the courts discretion".*

One important factor that has influenced the exercise of judicial discretion in the determination of bail applications in the post *Acheson* decisions of the Courts of Namibia is the concern to instill public confidence in the Judiciary and the administration of justice by taking into consideration the sentiments of the public or 'public outcry' and whether a *prima facie* case has been established that the accused is guilty of one or more of the scheduled offences. But the Courts have been quick to point out the dangers of reliance on public outcry that might earn the bail laws of Namibia the label of 'lynch law' . The Court in the *Botha* put it as follows:

> Certainly the application of the provisions of section 61 cannot depend exclusively or even mainly on whether or not there was a public outcry or indignation over the commission of certain types of offences or in respect of a particular offence, although of course an outcry if notorious or clearly established, could be given some weight provided it is clear that it was or is spontaneous and not artificially induced or incited. But even then it can only be one of several indicators of what is to be regarded by a court as in the public interest or in the interest of the administration of justice. Certainly more weight indicators of what is to be regarded as public interest or the interest of the administration of justice are the pronouncements of the Courts over a long period and of the Legislature, as crystallized in its legislation. In the final resort it is the Court seized of the particular application, which must decide what is in the interest of the administration of justice or the public in the particular circumstances…

Other examples of the possible application of the new grounds are: The accused satisfies the Court on a balance of probabilities that it is unlikely, i.e. improbable, that he or she will abscond or will interfere with the State witnesses or with the investigation of the case.

In further support of this approach is the fact that the application of the traditional approach in this respect has not been effective in the circumstances presently prevailing in Namibia, to prevent the dramatic and grave escalation of crime and of instances where persons accused of serious crime, have absconded. For this very reason wider powers and responsibilities have been vested in Courts to deal more effectively with the problem.

Strydom JP in the second appeal in the case of *Timotheus Joseph v State*[26], gave a further important guideline in the attempt to define the ambit of the terms in the interests of the public or administration of justice.. The learned judge said:

> In such instances the letting out on bail a person who is accused of a callous and brutal murder, or a person who continued to commit crimes, creates the perception that the public is at the mercy of such criminals and that neither the police nor the courts can effectively protect them, Considerations such as the public interests may, if there is proper evidence before the court, lead to the refusal of bail even where the possibility of absconding or interference may be remote.

The court maybe dealing with accused persons who, according to the prosecution have committed a callous and brutal murder or murders or a robbery or robberies where dangerous weapons are used or who are alleged to have committed rape where death or serious injuries have been inflicted or where small children have been raped or where gangs are involved.

The State may allege that the accused are members of sophisticated and or dangerous crime syndicates or that the accused is a psycho path or habitual criminal or a person with a personality or disposition to become violent, dangerous and uncontrollable without warning and at the slightest provocation.

The release of such persons on bail will create a *legitimate fear* in the minds of the victims that such crimes may be repeated against them even if there is no proof that that would be the case. The perception may reasonably be created that the police, the Courts and the State in general is unable and unwilling to protect them. This fear has become more real, reasonable and therefore justified, now that the State is compelled to disclose not only

26 Namibia High Court case no 11/08/1995 in par 2 at p.6 (unreported)

the statements of victims and other witnesses to the accused, but also all relevant information in the police brief. Over and above the actual victims of the crimes, the said fear and perception may also arise in the minds of law-abiding citizens, who fear that they are not safe and that they can become victims of the same accused and are consequently endangered by the release of such persons on bail. The public should not be exposed to such dangers and risks and the aforesaid perception should be avoided by giving proper consideration to such factors in bail applications, subject of course to the requirement that the relevant facts justifying such a course be placed before the judicial officer.

THE THIRD APPROACH /MODEL: SOUTH AFRICA

The sources of the bail jurisprudence South Africa are the Constitution of South Africa, the Criminal Procedure Act27and case law. The South African Constitution guarantees individual liberty including the right to freedom and security of the person28. The protections are extended to arrested, detained and accused persons. These guarantees, however, are not absolute in the sense that they are circumscribed in accordance with the limitations clause. In the case of the right to bail, for example, an arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

As stated earlier, the South African bail laws do not draw a distinction between bailable and non-bailable offences. However, because of security concerns, the Legislature has intervened by providing legislative guidelines that the Courts have to consider in the exercise of their discretion in bail applications in order to satisfy the broad constitutional limitations that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.29

Under the provisions of section 60(11)(b), which applies only to serious violent crimes enumerated in schedule 630 of the Criminal Procedure Act 51of 1977, the accused

27 Act 51 of 1977
28 See sections 12,35 and 36
29 Section 36
30 Schedule 6 provides Murder when it was planned or premeditated;\ the victim was - a law enforcement officer performing his or her function as such whether on duty or not , or a law enforcement officer who was killed by virtue of his or her holding such a position; or a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: rape or robbery with aggravating circumstances; or the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance

is required to adduce evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permits his or her release.

The South African bail scheme, in general, takes detailed account of the state's legitimate interests in protecting the integrity of the criminal justice system and the public safety between the time of arrest and trial, giving the courts broad discretion to detain individuals who pose an identifiable risk to the interests of justice pending trial. Not only does the Constitution's 'interests of justice' standard permit detention of any individual whose liberty would threaten the interests of justice between the time of arrest and trial, but the statutory provisions that guide the application of this constitutional standard give thorough consideration to the state's interests, enumerating in great detail factors relevant to assessing dangers to the public safety, risks of flight, threats of interference with witnesses or evidence, jeopardy of the criminal justice system and exceptional threats to public order pending trial31.

The constitutionality of these provisions has been challenged in Court on the grounds that they circumscribe the jurisdiction of the Courts and usurp the judicial prerogative to interpret the 'interests of justice' standard. Section 60(11) (b),it has been argued, also imposes a reverse onus on the accused to prove that the grant of bail will be in the interests of justice. Commenting on the bail system of South Africa, Hilary S Axam writes that 'in the bail context, as in the criminal trial context, a reverse onus raises a presumption against the individual's liberty interests, permitting the state to deprive an individual of his liberty by relying on his failure to rebut a legal presumption in the state's favour, instead of by affirmatively establishing factual grounds to justify the deprivation32.

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of a common purpose or conspiracy. Rape-when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice, by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy by a person who is charged with more having committed two or more offences of rape; or by a person, knowing that he has acquired immune deficiency syndrome or the human immunodeficiency virus; where the victim-is a girl under the age of 16 years is a physically and disabled woman who, due to her physical disability is rendered particularly vulnerable. Is a mentally ill woman as contemplated in s 1 of the Mental Health Act 18 of 1973; involving the infliction of grievous bodily harm Robbery involving the use by the accused or any co-perpetrators or participants of a firearm the infliction of grievous by the accused or any co-perpetrators or participants, or the taking of a motor vehicle Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.

31 Section 60(4)-(9) of the Criminal Procedure Act 51 of 1977

32 Hilary S Axam, " If the Interests of Justice Permit: Individual Liberty, the Limitation Clause, and the Qualified Constitutional Right to Bail," SAJHR 17(2001):330.

The South African bail jurisprudence was discussed in the case of *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat33* All four of the separate cases dealt with issues relating to bail proceedings and were accordingly dealt with in a single judgment. In all the cases, the courts had to deal with the legal principles that applied to the granting of bail. Section 35 of the Bill of Rights provides that a detained person has the right to be released from detention 'if the interests of justice permit'. The Criminal Procedure Act 51 of 1977 had developed procedures and guidelines that would regulate the granting of bail. The court had to consider whether the procedures (including the admission of evidence), guidelines and criteria were consistent with the right granted in Section 35.

In these three matters, namely *S v Schietekat, S v Joubert* and *S v Dladla*, the court had to consider the constitutionality of the provisions of the Criminal Procedure Act 51 of 1977 in so far as they related to the granting of bail. It was argued that, in setting out the criteria that a court could consider in determining what constituted "the interests of justice", the legislature was usurping the function of the court in determining what was in the interests of justice. According to the argument, this violated the separation of powers doctrine.

The court rejected this argument and found that the criteria laid down by the Legislature constituted a proper exercise of legislative function, and that it did not relieve the court from making its own evaluation or looking at any other factor it deemed relevant. At most, it was in the nature of a checklist that could assist, but not necessarily bind the court.

A further challenge was premised on the argument that some of the bail provisions amounted to "lynch law" in that they elevated the sentiments of the community above the interests of the detainee. These provisions relate to factors such as whether the release of an accused person will lead to a sense of shock and outrage on the part of the community etc.

The relevant parts of the Court's decision are as follows:

> 'In the respective cases before the Court the constitutionality of certain provisions of s 60 of the Criminal Procedure Act 51 of 1977 (the Act) was challenged. Those provisions were tested against s 35 (1) (f) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). Section 35 (1) (f), in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences and may for that

33 1999(4) SA 623

reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by s 12 of the Constitution. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it. Section 35 (1) (f) postulates a judicial evaluation of different factors that make up the criterion of the interests of justice, and that the basic objective traditionally ascribed to the institution of bail, namely to maximize personal liberty, fits snugly into the normative system of the Bill of Rights.34

Although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising such oversight in regard to bail the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so35. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court to be essential, it must itself the initiative36. Even when the prosecution concedes bail, the court must still make up its own mind37. In principle, that policy of the Act, and the consequential provisions mentioned, are in complete harmony with the Constitution38.

There is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trail court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.

The Court's holdings on the constitutionality of the criteria laid down by the Legislature may be summarized as follows:

WHETHER S 60 (4)-(9) OFFENDS AGAINST THE SEPARATION OF POWERS PRINCIPLE.

If one were to read the opening sentence of ss (4) without regard to the provisions of ss 60 (1) (a) and s 60 (9) of the Act and s 25 (2) (d) of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution), it could possibly be understood as a mandatory injunction to a judicial officer to conclude that something is or is not in the interest of justice irrespective of the officers own conclusion. That certainly would constitute an objectionable deeming provision. But one must read the provisions together. Subsections (4) - (9) are not intended as deeming provisions at all. What those subsections do is to list, respectively, the

34 Paragraph [6] at 636 C/D-F/G.)
35 See s 60 (1)(c) of the Criminal Procedure Act 51 of 1977
36 See s 60(3) of the Criminal Procedure Act 51 of 1977
37 See s60(10) of the Criminal Procedure Act 51 of 1977
38 Paragraph [10] at 641B/C-D/E.)

potential factors for and against the grant of bail to which a court must pay regard. Neither subsection ss (4) nor ss (9) command a court to come to an artificial conclusion of fact. On the contrary, courts are told that if they find one or more of the factors listed in s 60 (4) (a) – (d) to have been established, a finding that continued detention is in the interest of justice will be justified. Put differently, judicial officers are pointed towards categories of factual findings that could ground a conclusion that bail should be refused. By like token a court is not enjoined to accord decisive weight to the one or other or all the personal factors mentioned in ss (9). In short, the Legislator was providing guidelines as to what are factors for, and what are factors against the grant of bail. Whether and to what extent any one or more of such pros or cons are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer. Such guidelines are no interference by the Legislator in the exercise of the Judiciary's adjudicative function; they are a proper exercise by the Legislator of its functions including the power and responsibility to afford the Judiciary guidance where it regards it as necessary.

CRITERION OF THE INTERESTS OF JUSTICE

In s 60 (4), (9) and (10) the drafters must have contemplated something closer to the conventional interests of society concept or the interest of the State representing society. That must also be the sense in which the interests of justice concept is used in ss (4). That subsection actually forms part of a functional unit with ss (9) and (10). Between them they provide the heart of the evaluation process and the bail application, ss (9) being predominant. If it is read first and the interest of justice bears the same narrow meaning akin to the interest of society (or the interest of justice) minus the interest of the accused, the interpretation of the three subsections falls into place. In deciding whether the interests of justice permit the release on bail of an awaiting trail prisoner, the court is advised to look to the five broad considerations mentioned in ss (4) (a) – (e), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required as by s (9) and (10). Section 60 (4), (9) and (10) should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear on an evaluation in which the liberty and interest of the arrested person are given the full value accorded by the Constitution. In this regard it is well to remember that s 35 (1) (f) itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrested person therefore does not have a totally untrammeled right to be set free more pertinently than in the past, a court is now obliged by s 60 (2) (c), (3)

and (10) to play a proactive role and is helped by ss (4) – (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail.39

USE OF FACTORS UNRELATED TO TRIAL IN SS (4) (A) AND (5)

Section 35 (1) (f) presupposes a deprivation of freedom- by arrest- that is constitutional. This deprivation is for the limited purpose of ensuring that the arrested person is duly and fairly tried. But s 35 (1) (f) neither expressly nor impliedly requires that, in considering whether the interests of justice permit the release of that detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contemplated by the interest of justice test can, in that context, legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will commit a fairly serious offense can be taken into account. The important proviso throughout is if there is a likelihood, i.e. a probability that such risk will materialize. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor to be weighed with all others in deciding what the interests of justice are. That is not constitutionally offensive nor does it resemble detention without trail, the reprehensible institution really targeted when one speaks of preventative detention. If a proper basis for the original arrest is absent, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial related grounds.40

WHETHER SS 4 (E) AND 8 (A) FRUSTRATE THE RIGHT TO BAIL.

Ordinarily, the factors identified in s 60 (4) (e) and (8) (a) would not be relevant in establishing whether the interest of justice permit the release of the accused. Although they do infringe the s 35 (1) (f) right to be released on reasonable conditions, they are saved by s 36 of the Constitution. Open and democratic societies based on human dignity, equality and freedom after weighing the factors enumerated in s 36 (1) (a) – (e) of the Constitution will find s 60 (4) (e) and (8) (a) reasonable and justifiable in the prevailing climate in South Africa. The constitutional principle is clear; a court, 'may' not must, take the factors enumerated in ss (8) (a) into account, and must do so judicially; and the ordinary appeal and review mechanisms can remedy any undue deference that may be afforded to public sentiment. It is important to note that ss (4) (e) and (8) (a) expressly postulate that it is to come into play only in exceptional circumstances. This is a clear pointer that this unusual category of factors is to be taken into

39 Paragraphs 47-50 and 10 at 656H-657B/C,657E/F and 680 H
40 Paragraph 53 at 658F-IJ

account only in those rare cases where it is really justified. What is more, ss (4) (e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities. Once the existence of such circumstances has been established, para. E must still be weighed against the considerations enumerated in ss (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for ss (4) (e) and (8) (a) will be extremely limited.41

EXCEPTIONAL CIRCUMSTANCES

Under ss (11) (a) the law giver made it quite plain that a formal *onus* rests on a detainee to satisfy the court. Furthermore, unlike all other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that exceptional circumstances exist. To that extent, therefore, that the test for bail established by s 60 (11) (a) is more rigorous than that contemplated by s 35 (1) (f) of the Constitution, it limits the constitutional right. Section 60 (11) (a) does not contain *an outright ban on bail* in relation to certain offences but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial offices have the ultimate decision as to whether or not, in the circumstances of a particular case bail should be granted. There is no validity in the complaint that the term exceptional circumstances is so vague that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances whether they relate to the nature of the crime, the personal circumstance of the applicant or anything else that is particularly cogent. In requiring that the circumstances prove to be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated in ss (4) – (9). That evaluation is to be done judicially, which means that one looks at substance, not form. Although the inclusion of the requirement of exceptional circumstances in s 60 (11) (a) limits the right enshrined in s 35 (1) (f),it is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in the current circumstances in South Africa.42

41 Paragraphs 55-57 and 101 at 659F-F/G, 660C/D-D/E, 660G/H-661B and 681A/B-B
42 Paragraphs 61,65,74,75,76 and 77 at 663D-664B/C,665E-E/F,668H-669B,669E and 670A-B

The accused must be given a reasonable opportunity to establish what the subsection requires. The law giver did not specify how that is to be done, nor what would be necessary to qualify as reasonable. This much is clear however: an opportunity has to be afforded and it has to be reasonable; having regard to the limits that the subsection places on the category of arrested persons concerned. The requirement of reasonableness is preemptory, though the subsection does not spell out what that means. Nor need it do so. What is or is not a reasonable opportunity must depend upon the facts of each particular case. No accused can ever be lawfully confronted with the dilemma that the onus and the duty to begin is on her or on him to prove the exceptional circumstances of the prosecution case- the presiding judicial officer would be failing in his or her duty were that to be permitted to happen. It is one of the fundamentals of a fair trial, whether under the Constitution or at common law standing co- equally with the right to be heard, that a party be apprised of the case which he or she faces.43

PART 3

ANALYSIS AND CONCLUSION

The institution of bail traces its origins to international conventions that protect and guarantee the fundamental rights of the individual to liberty, the presumption of innocence, and due process of the law. These basic international norms and conventions have been internalized in the municipal laws of states. The general pattern of internalization is the incorporation of the basic rights in the Bills of Rights of the constitutions of the various states and the determination of detailed provisions relating to procedure and the substantive rules of bail are left with the Legislature and the Judiciary.

In the jurisdictions whose bail jurisprudence has been discussed, legal pluralism forms part and parcel of the legal system. However because of the limited criminal jurisdiction of the customary law courts and their structural limitations, the bail jurisprudence of these jurisdictions has been developed more by the formal courts than the customary or traditional courts.

The enactment of broad bail legislation is the jurisdiction of the Legislature but the actual determination of the right to bail is a judicial process involving the balancing of conflicting values and interests. The exercise of the judicial discretion to grant or refuse

[43] Paragraphs 80 and 10 at 671 B/C-C/D,E-G and 681B-C/D

bail impacts on the society's perception and evaluation of the criminal justice system. This is an exercise that is not achieved by mere automatic application of pre-existing rules. It requires evaluation of evidence and application of a variety of factors to achieve a purpose. That is the culture of the arts; a culture of flexibility and openness. But to the extent that bail provisions consist of both legislative enactments and the common law, bail jurisprudence is a product of both Parliament and the Courts. It is an exercise involving two cultures, the culture of arts and the culture science, the culture of openness and flexibility and the culture of pre-determined and expected outcomes. It involves the choice between the application of the positive law as it is and the dictates of rationality as *a sine qua non* in the process of the exercise of judicial discretion.

In the regime of eligibility for bail , three models have been discussed. The first model is the model that imposes mandatory prohibition on the grant of bail in offences that are classified as non-bailable. This is the model adopted by Zambia.44and Ghana. Under this bail regime, however, there is the phenomenon of constitutional bail whereby as stated in the cases of *Chetankumar Satkal Parekh45 v The People Kevin Dinsdale Gorman v The Republic of Ghana46* both the Supreme Court of Zambia and the Supreme Court of Ghana held that constitutional bail could be granted in cases where bail was not available if it could be shown that the case had been unreasonably delayed through no fault of the accused.

The bail jurisprudence of Ghana is similar to that of Zambia as it draws a distinction between bailable and non-bailable offences. This position is derived from a statutory provision, to be more specific section 96(7) of the Criminal Procedure Code, and not from the Constitution. Consequently there is no automatic and mandatory grant of bail in non-bailable offences. In such cases the Courts are mandated to disallow bail. This position notwithstanding, the right to bail avails to the accused in accordance with the provisions of Art.14(4) of the Constitution of Ghana if s/he is not tried within a reasonable time. The Ghanaian bail jurisprudence, however, adds another element to the discretion to grant bail in situations where a trial is commenced within a reasonable time and the offence is 'severe'. In this case bail may be granted even in the face of the severity of an offence if there are other considerations in the mix of stipulated factors that satisfy the court that the

44 See section 123 of the Criminal Procedure Code Cap 160 of the Laws of the Republic of Zambia
45 Supreme Court of Zambia (unreported)
46 2003-204 SCGLR 784

defendant is likely to appear to stand trial. But it is submitted that release on bail on account of failure to prosecute the case within a reasonable time is not a proactive provision as it only seeks to address the issue after the fact. The automatic right to apply for bail is not specifically provided for by the Constitution.

This is subject to interpretation of the relevant provisions of the Constitution and the Courts in both Ghana and Zambia in their interpretations of these provisions have taken a holistic approach by relying on legislation that denies the accused the right to apply for bail in offences statutorily classified as non-bailable. This mandatory denial of bail coupled with the fact that the constitutional right to release addresses the issue after the fact, means that the right to liberty of the accused stands tremendously compromised since the accused is subjected to punitive conditions before trial. In order to remove these uncertainties, it is submitted that the jurisdiction to determine bail be granted to the Judiciary and that appropriate provisions incorporated in the Constitutions. It is submitted further that the correct jurisprudential approach to bail applications is that the Courts of law be given the jurisdiction to adjudicate these matters and that as a matter of principle there should be no legislative or executive attempts to curtail or oust the jurisdiction of the Courts47.

Under the Namibian model/approach, the bail system is underpinned by human rights values of the new dispensation. Consequently, the Constitution provides the basic human rights of the right to liberty and due process of the law but the procedural aspects of the principles relating to bail are contained in the relevant legislation, the Criminal Procedure Act48. In all cases involving bail applications the Courts are guided by certain considerations and factors in assessing the promotion of the interests of justice and the protection of the right of the individual. In Namibia these guidelines are basically case law guidelines developed by the Courts themselves as stated in the *Acheson* case. The only legislative intervention in that regard is the amendment of section 61 of the Criminal Procedure Act 51 of 1977 giving legislative emphasis on the consideration of the interest of the public and the administration of justice. Even in this case, the determination of what constitutes the interest of the public is left to the discretion of the Courts. There is no mandatory legislative denial of bail in certain specified offences. The jurisdiction over bail applications is entirely vested in the Courts. This implies that all accused persons have the

47 See generally *S v Ramgobin* 1985 (3) SA 587 (N); *S v Ramgobin* 1985 (4) SA 130 (N); *Bull v Minister of Home Affairs* 1986 (3) SA 870 (Z)
48 Act 51 of 1977 but note that not all the provisions of the Act are relevant to Namibia.

initial right to bail but the final determination of the application will depend on the facts of a particular case and the primary determining factor is the promotion of the interests of justice. The virtue and advantages of this model are that firstly, it accords aright with the tenor and spirit of international conventions and standards; secondly it confirms the jurisdiction of the Courts as the custodian of human rights and therefore the appropriate organ of state to be vested with the jurisdiction over pronouncements of bail: thirdly considering the view that the system of bail is part of the judicial process it is fit and proper that legislative intervention in such matters are left to the bare minimum of regulating on procedural matters rather than substantive matters which in such cases involve the rationality of limitations clauses in human rights and bail jurisprudence.

In view of the exposition on the three models as presented earlier, the only model that very closely approximates to international standards in terms of the promotion of human rights standards is the Namibian approach. The Zambian and Ghanaian models, it is submitted, are inconsistent with the spirit and tenor of international standards. There are the so-called constitutional bail or the derivative constitutional presumption and the right to bail in the event of unreasonable delay in prosecuting a case, which arguably are meant to temper the rigours of that particular bail system. However, as explained earlier, these provisions are not pro-active; they are based on interpretative conjectures and seek to address the issue of the liberty of the individual after the fact. This position compromises the right to liberty of the accused as such detention subjects the accused to punitive conditions before conviction and tends to constitute a potential violation of the generality of the right to fair trial and due process of the law.

In the bail jurisprudence of these jurisdictions, the factors that are to be considered before granting bail are statutory but these are matters that form part and parcel of the judicial process. In a jurisdiction that belongs to the common law tradition the system of judicial precedents enables the Courts to play a proactive role in the development of the law by seeking appropriate jural postulates and *ratio decidendi* in the determination of issues based on adduced evidence. Legislative intervention at times stifles this initiative and the pro-active role of the Courts and therefore, it can legitimately be argued as constituting usurpation of judicial function by the Legislature.

Bail systems involve the balancing the fundamental rights of an accused person and those of the security of the community guided by due process considerations meant to protect the liberty of the individual. What is accordingly required in each case would be a

proper and considered determination of the factors relevant in determining the granting of bail rather than a court, as it is the case in jurisdictions that adopt the first model, giving up its judicial role and allowing it to be replaced by the legislative guidelines or the sentiment of the community and the public. Important as these factors are, they do not relieve the judicial officer of applying his or her mind to all the relevant facts and making an appropriate determination and thereby bridging the gulf between positivism and rationality.

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