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The Right to Legal Representation and Equality before the Law in Criminal Proceedings in Botswana

rowland cole

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1 Introduction

Like all modern democracies, the right to legal representation is guaranteed by the Constitution of Botswana1 (“the Constitution of Botswana”). But sadly, constitutional provisions by themselves do not offer protection of fundamental human rights. Constitutional provisions become mere rhetoric and insufficient mechanisms for the protection of human rights, if proper measures are lacking to ensure that they are followed through. If the right to legal representation is to be attained, the thesis that first generation civil and political rights are negative rights which merely forbid the state from violating the rights of the individual is unsustainable. The right to legal representation is meant to ensure procedural equality. The state has a standing body of trained prosecutors who are supported by the police. Adversarialism is about “combat”, and the disadvantage suffered by the unrepresented accused facing a trained prosecutor is in similitude with pitting an unarmed peasant in contest against an armed gladiator. No matter how fair the process, how generous the prosecutor and how helpful the court to the accused, if he is made to stand trial unrepresented and face a trained prosecutor, he is immediately and fundamentally disadvantaged.2 Therefore, a criminal trial remains potentially unfair if the accused is unrepresented. Concepts like equality before the law, access to justice and other procedural rights remain hollow promises if the right to legal

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1 This article is a revised version of a chapter of the author’s thesis, RJV Cole Equality of Arms and Aspects of the Right to a Fair Criminal Trial in Botswana LLD thesis Stellenbosch University (2010). Promoter Prof SE van der Merwe.

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In the civil case of Airey v Ireland ECHR (1979) Series A No 32; (1980) 2 EHRR 305 314-315, the applicant wanted to petition for judicial separation in the Irish High Court but could not afford to hire a lawyer. The test applied by the Court was whether the applicant was able to present her case satisfactorily and properly. The Court, applying the adversarial requirement, said:

“It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court’s opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the government, the judge affords to parties acting in person.”
representation is not attainable. The right to legal representation should ideally include the provision of legal representation by the state where the accused cannot afford one. In Botswana, there is a constitutional right to legal representation without a concomitant provision of legal aid. Legal aid is central to equality before the law. Therefore, the main obstacle to the full realisation of the right is the availability and allocation of funds for legal aid.

This article examines the constitutional and statutory guarantees in relation to the right to legal representation. The second part discusses the constitutional basis for the right to legal representation in Botswana and articulates its scope, application and limitations. The third part underlines the statutory regulation of the right, while the fourth part articulates the relevance of legal representation to the concept of equality before the law, recognising the disadvantages suffered by the unrepresented accused in the adversarial system. The fifth part discusses the all-important duty of judicial officers to inform an unrepresented accused of his right to legal representation. It is argued that failure by the courts to recognise this duty as a constitutional right has significant consequences for the right to legal representation. The sixth part discusses the absence of a comprehensive legal aid system in Botswana and sheds light on pending reforms. The article concludes that the present constitutional framework in relation to legal representation is inconsistent with equality before the law in that it imposes no duty on the state to provide legal representation. It is concluded that the solution to the problem lies in a comprehensive state-funded legal aid programme.

2 The constitutional basis of the right to legal representation

2.1 Scope of the right

The right of an accused to legal representation at trial is guaranteed by constitutional and statutory provisions. It is a fundamental right and

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The European Court of Human Rights has relied on the principle of equality of arms to ensure that unrepresented litigants in civil cases present their cases properly and satisfactorily. In this regard the Court held that the state should provide legal representation for unrepresented litigants in civil cases in an adversarial system. See Airey v Ireland ECHR (1979) Series A No 32; (1980) 2 EHRR 305.


5 As A Lester Legal Aid in A Democratic Society (1974) paper presented at a conference on Legal Aid in South Africa hosted by the Faculty of Law, University of Natal in Durban, 02-07-1973 to 06-07-1973, (publication of Faculty of Law University of Natal) notes: “It was well understood that poverty, ignorance and fear among would-be litigants, the obscurity of the law, and the cost of delays of litigation, were major impediments to the attainment of genuine equality before the law.”

is entrenched in the Constitution of Botswana. Section 10(2)(d) of the Constitution of Botswana provides as follows:

“Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.”

The scope of this provision is limited. The accused is entitled to legal representation only if he can afford one. The state does not have a constitutional duty to provide him with legal representation. Rather, the Constitution burdens the accused to seek legal representation “at his own expense”. On the other hand, the state has a permanent and well-funded Directorate of Public Prosecutions which is well staffed by qualified lawyers. The Directorate has support staff, materials, vehicles, equipment and office space all over the country. On the other hand, the accused, generally speaking, has no resources provided for him. The constitutional recognition of the right to legal representation does not operate on the principle of equality but rather sanctions the absence of a legal aid system. By providing that the accused is entitled to legal representation at his own expense, the Constitution directs the state not to provide legal aid to the indigent. Also, there is no constitutional provision for legal representation at the pre-trial stage. Though section 10 of the Constitution is modelled after article 6 of the European Convention (“the European Convention”), the provision relating to legal representation marks a glaring and deliberate departure from article 6(3)(c) of the European Convention which specifically requires that the accused be provided with legal representation if he cannot afford one and if the interests of justice so require.

2.2 Application of the right

Case law states that section 10(2)(d) requires that the accused has a right to brief a legal practitioner and be given time to do so. This provision accentuates the time-honoured right of an accused to engage legal counsel. This is in conjunction with the fact that the right to legal representation is essential if an accused were to get a fair trial within the context of an adversarial system. The concept of the right to fair trial spans over a number of areas, from the accused’s right to be represented by counsel of his own choice, to his right to be provided with counsel at state expense under certain circumstances and the attendant limitations that go with the realisation of the right. The right to counsel presupposes that the court or the state should not in any way

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6 Tebbutt JA in Moroka v The State [2001] 1 B.L.R. 134 (CA) 139E-F declares: “There is in the common law a fundamental right of an individual to have access to legal advice and to legal representation. That right of an accused person to legal representation is now also enshrined in section 10 of the Constitution of Botswana”.
See also Chanda v The State [2007] 1 B.L.R. 400 (CA).
prevent the accused from securing an attorney. Therefore, if a trial court willfully excludes or prevents the accused’s counsel from representing him, or refuses to allow the accused reasonable time to engage the services of counsel, this will amount to a denial of justice. So where counsel withdraws unexpectedly from a case, and the accused is suddenly abandoned, the court should grant an adjournment to afford him an opportunity to secure the services of another counsel. Failure to do so will amount to a denial of his constitutional right to legal representation. The constitutionalisation of the right to legal representation is a reflection of its importance. It is a core right of immediate relevance to anyone facing trial. However, it is clear from section 10(2)(d) of the Constitution that the right to legal representation does not include the right to legal aid. Therefore, the constitutional right to legal representation in Botswana falls foul of the equality principle. Without the right to legal aid, section 10(2)(d) of the Constitution is no more than a pious promise as far as the indigent accused is concerned.

2.3 Practical limitations

Though the courts have been strict in the application of the right to legal representation, employing a pro-active protective approach, they have, at the same time, made it clear that this right, like any other, is not absolute. If the right were to have an unlimited field of application, it would be open to abuse.

2.3.1 Limitation of choice

The Constitution of Botswana guarantees the accused a right to hire a lawyer of his own choice. This choice is limited for practical and jurisdictional reasons. Also, the choice of counsel operates within certain parameters, as an accused’s right to an attorney of his choice is limited to attorneys that are entitled to practise in the courts of Botswana. Like several other countries, only attorneys who are admitted to practise at the bar in Botswana are entitled to represent accused persons in her courts. An accused cannot look further afield. The right of an accused to an attorney is also subject to the availability of the attorney. The inability of an accused to procure the services of a particular attorney does not by itself justify an adjournment. A court is not obliged to keep proceedings in abeyance pending the availability of the attorney.
attorney. Though the accused is entitled to select whom he wishes to represent him, if his choice is not available, he is obliged to look elsewhere.\textsuperscript{20}

2.3.2 Limitation posed by the bar against unreasonable delay of trial

The right encompasses a duty on the accused to make efforts to secure legal representation within a reasonable time. The courts are not expected to wait indefinitely for the accused. Therefore, the accused should avail himself of his right within a reasonable time. In determining what a reasonable time is, the court must weigh the rights of the individual against the rights of the state, bearing in mind that justice should be done expeditiously by the courts.\textsuperscript{21} The courts should ensure that the judicial process is not stifled by unnecessary adjournments.\textsuperscript{22} When the process in securing legal representation results in unnecessary delays, the right to a trial within a reasonable time is implicated.\textsuperscript{23}

The limiting aspect of the right involves a number of considerations which are best described by negative expressions. Though courts must afford accused persons certain latitude to defend themselves by employing counsel, they must not allow the process of the court to be abused by the seeking of unnecessary adjournments.\textsuperscript{24} The right to legal representation means that the court must not prevent counsel who are entitled to appear before the court from acting for the accused. It does not mean that the court is obliged to postpone the case until counsel finds it convenient, where he has been given adequate notice.\textsuperscript{25} The exercise of the right to legal representation is subject to the accused making the necessary financial arrangements and securing a lawyer who is available to perform his mandate having regard to “the court’s organisation and the prompt dispatch of the business of the court”.\textsuperscript{26} Therefore, “the convenience of counsel is not overriding”.\textsuperscript{27}

The position was aptly explained in the case of \textit{Marumo v The State}.\textsuperscript{28} In that case, defence counsel was present in court when the trial date was fixed and he consented to the date. Counsel was absent on the trial date and did not communicate reasons for his absence to the court. Therefore, the trial magistrate proceeded with the trial. On appeal, Livesey-Luke CJ had this to say:

“In my opinion the above recited facts show that the appellant was given full opportunity to exercise his right to be represented by a legal practitioner of his own choice. There is no basis for saying that the court deprived him of his right to legal representation. On the contrary it was his counsel who failed to appear to represent him, although he had full knowledge of the date fixed for the trial …

\textsuperscript{20} Bapusi v The State [2000] 2 B.L.R. 1 (CA).
\textsuperscript{25} Makhora v The State [1991] B.L.R. 104.
\textsuperscript{26} Per Harms JA in \textit{S v Halkryn} 2002 2 SACR 211 (SCA) 216A-B.
\textsuperscript{27} 216B-C.
\textsuperscript{28} [1990] B.L.R. 659.
There is no doubt that the right of an accused to be represented by a counsel of his own choice is not only a fundamental but also an important right. This is borne out by the fact that it is entrenched in the Constitution. It means that an accused has the freedom of choosing a legal practitioner, who is entitled to practise before the court, to represent him, provided of course that the services of the legal practitioner will be at the accused’s and not the State’s expense. But, in my opinion, that right does not include a right or licence on the part of an accused or his counsel to delay or frustrate court proceedings. The important consideration is the convenience of the court. Neither an accused person, nor his counsel has the right, fundamental or otherwise, to dictate to the court that it should hear his case at the convenience of the accused or his counsel. So if the counsel of an accused person’s choice fails to appear in court to defend him on the date fixed for the trial after adequate notice of the date fixed has been given, and the trial proceeds, it is not the court that has deprived him of his right, but on the contrary it is his counsel, assuming he had been properly briefed, who has failed to fulfill his obligations to his client and thereby prevented him from enjoying his right.29

Livesey-Luke CJ made it clear that the court should not be inconvenienced. He stated that neither the accused nor his counsel has a right, fundamental or otherwise, to dictate to the court that it should hear the case at their convenience. Citing the dictum of Wilkinson CJ in the American case of R v Raselo and Benson,30 he stated that if a legal practitioner is not likely to be available on the scheduled date of trial, he should not act for the accused. According to him, the accused would have been deprived of his right to legal representation if he is prevented by the state in any of its manifestations, whether judicial or executive, from securing counsel and not when counsel fails to appear without reasonable excuse.31

The constitutional demand for the expeditious administration of justice was highlighted in Maphane v The State.32 In that case the accused was arraigned on 31 October 1989. On that date he informed the court of his intention to employ the services of an attorney and was put on bail on his own recognisance. The matter was adjourned to 29 November 1989 and another adjournment was made to 29 December 1989. On that date a trial date was fixed for 31 January 1990. On 31 January 1990 no lawyer was present. The accused named a lawyer but said that he was not in court and that he was unable to proceed on his own. The trial magistrate proceeded as there was no indication that the named attorney would appear. He also took into consideration the fact that the state had brought its witnesses who had travelled substantial distances to appear in court. On appeal, Gyeke-Dako J recognised the right of an accused to brief and be defended by counsel at his trial, and to be given reasonable time to do so. However, he pointed out that if the accused does not avail himself of this right within reasonable time or if his legal representative fails to appear in court without making reasonable effort to get in touch with the court to explain his absence and seek an adjournment, then the court is entitled to

29 Marumo v The State [1990] B.L.R. 659 662A-E. However, see Thapelo Tshipo v The State High Court Cr. App No 171 of 1984 (unreported), where Hannah J, in noting the factors to be considered by the court in exercising its discretion whether to postpone a trial when counsel is absent, stated that too much weight should not be placed on the conduct of counsel, and that his sins should not be visited on his client. See also Maphane v The State [1991] B.L.R. 304 (CA) 313. Also, in the South African case of S v Yelani 1986 3 SA 802 (E), it was held that the appellant was entitled to a postponement when it was clear that his attorney’s absence was through no fault of his.
30 R v Raselo and Benson (1960) R & N 803 (NY) P 807 F; S v Molenbeck 1997 2 SACR 346 (O).
31 Referring to the English case of Robinson v R [1985] 3 WLR 84 (PC).
proceed. He based his argument on section 10(1) of the Constitution which demands expeditious administration of justice.

The *Maphane* case was cited with approval by the Court of Appeal in *Bapusi v The State*. In that case several postponements were taken as the result of unexplained absences of the accused’s attorney. Four adjournments were taken between 19 April 1995 and 28 July 1998 to enable the appellant (who was charged together with another person) to secure appropriate legal representation. In dismissing the appeal, Steyn JA delivering the judgment on behalf of the Court stated:

“It must also be borne in mind that it is not only the prejudice to the appellant that had to be considered by the court, but also the unacceptability of the delay occasioned by the frequent postponements and the consequences of such delay on the course of justice. The prejudice suffered by appellant’s co-accused was also an important consideration.”

In short, one may say that the right to legal representation is a fundamental right in respect of which an accused must not be deprived. He is entitled to a reasonable time to secure an attorney though this should not result in unnecessary delays. Once a trial date has been fixed attorneys are expected to be present.

3  **Statutory regulation of legal representation**

The Constitution apart, the entitlement to legal representation is recognised by statute. The Criminal Procedure and Evidence Act regulates the procedural content and operation of the right. Sections 177 and 181 clearly demonstrate the nexus between legal representation and procedural equality. Section 177 of the Act provides that the accused or his counsel may cross-examine the prosecution’s witnesses. The right to cross-examination is essential to a fair trial. By cross-examination the accused is able to effectively participate in the trial. The accused may through cross-examination be able to discredit the witnesses of the prosecution and also present his case. Therefore, an effective counsel-driven cross-examination is instrumental in creating equality. Similarly, the right of the accused or accused’s counsel to reply to submissions made by the prosecution is significant. Section 181 of the Act permits the accused or his counsel to make submissions in answer to those of the prosecution. Sections 177 and 181 enhance equality between the prosecution and the accused. These statutory provisions create a response element, which is core to the adversarial system. The accused is brought at par with the prosecution especially if he has legal representation. In effect, the accused is able to respond to and counter the evidence and submissions of the prosecution.

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34 [2000] 2 B.L.R. 1 (CA) 9B-C.
35 Cap 08:02.
4 Legal representation and equality before the law

Equality before the law presupposes procedural equality. Procedural equality is difficult to attain if the accused is unrepresented. Botswana’s procedural system is adversarial. The accused is compelled into a contest with a trained prosecutor. This state of affairs unduly skews the process in favour of the prosecution. The strengths of the parties are unevenly matched and the accused cannot be said to have had his day in court. The requirement for legal aid in respect of the indigent accused therefore, cannot be understated. The guiding hand of counsel and the reality that an unrepresented accused faces the risk of improper conviction has long been recognised in American jurisprudence. This is especially crucial when the accused faces serious punishment such as capital punishment or imprisonment. The unrepresented accused lacks the skill to properly prepare his defence, though he may have a perfect one. The importance of the guiding hand of a lawyer and the inequality suffered by the self-actor is epitomised in the words of Sutherland J in Powell v Alabama:

“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

“Where there is no legal representation and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.”


See, however, the contrasting case of State v Bathusi [1978] B.L.R. 20.
The plight of the unrepresented layman in Botswana is no different. In Botswana, the severe disadvantage suffered by an unrepresented accused was recognised in the case of *Mmopi v The State*[^40] where Murray J had this to say:

“When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result.”[^41]

The recognition of the disadvantage suffered by an unrepresented accused is clear from the passage. The case implicitly recognises the need for equality, and bemoans the attendant inequality that occurs in the absence of legal representation. It clearly recognises equality as a fundamental requirement for fairness. The case further highlights the need for procedural equality and also highlights the fact that procedural inequality results in the case of an unrepresented accused.

5 The right to be informed of the right to legal representation

Crucial to the constitutional guarantee of the right to legal representation, is the importance of informing the accused of this right. The question arises whether there is a duty on a judicial officer to inform the accused of his right to legal representation.[^42] The right to be informed of the right to legal representation does not seem to have achieved constitutional status. The rule of law is that the duty of the court to inform an accused of his right to legal representation is not mandatory, but rather a salutary rule of practice. While this position has been confirmed in the Court of Appeal, it was in the High Court that the matter received full exemplification when it came up for determination in the case *Bojang v The State*.[^43] Though Gyeke-Dako J dealt with the matter in detail, his views appear somewhat wavering. In this case, the magistrate did not advise the accused of his right to legal representation. Though she had consulted with a lawyer before she was charged, she decided to proceed without him as the prosecutor and a police officer had told her that the matter was a simple one and did not require a lawyer. She was convicted on a plea of guilty and sentenced to a prison term of nine months of which three months were suspended. At first Gyke-Dako J expressed the right as a constitutional requirement when he stated:

“Section 10(1) of our Constitution speaks of a ‘fair hearing’ being afforded to every accused person who appears before our courts. It is for the attainment of this goal that certain rights are conferred on accused persons by our laws. To what use are those rights to a beneficiary if that beneficiary does not even know of their existence and is not told or reminded of their existence?”[^44]

[^41]: *Mmopi v The State* [1986] B.L.R. 8 10F-G. See also *Morobatseng v The State* [2003] 1 B.L.R. 466.
[^44]: *Bojang v The State* [1994] B.L.R. 146 159H.
He noted that on the first appearance of an accused the judicial officer should inform him of his right to defend himself. If he states that he requires legal representation and that he will be able to pay, the court should adjourn the case for a sufficient period to enable him to secure legal representation. But he watered down this statement when he stated:

“Having regard to the present state of our laws on the subject, the above suggestion, however salutary it may be, is only a desirability, a breach of which will not per se amount to an irregularity vitiating the proceedings.”

The purport of the first quotation above then becomes questionable. It becomes doubtful whether the judge was emphasising the right to be informed of legal representation as a constitutional right or whether he was stating that the importance of the right to legal representation makes it vital that the accused be so informed. It is doubtful whether he was aligning the right to legal representation or the right to be so informed, to the constitutional requirement for a fair trial. He continued:

“Having expressed my complete agreement with the principle that failure of a presiding officer to inform an unrepresented accused of his right to legal representation may only vitiate the proceedings if such failure results in a miscarriage of justice, I now turn to consider whether or not in the circumstances of this case, a miscarriage of justice was occasioned through the absence of the suggested advice to the applicant per se.”

A constitutional right is a fundamental one. That the Court was willing to condone its breach, on the grounds that no prejudice occurred to the accused, leads one to construe its conflicting statements to the effect that it did not regard the right to be informed of the right to legal representation as a constitutional right and fundamental rule of law, but rather as a rule of convenience. It appears that the Court was merely stating that the only way the constitutional right of the accused to legal representation can be realised is by a legal duty on judicial officers to inform the accused of the right. But if this is so, why is the duty to inform not a fundamental constitutional requirement?

On the basis of Bojang, the failure to advise an accused of his right to legal representation will depend on whether the irregularity amounted to prejudice to the accused with each case depending on its peculiar facts and circumstances. Similarly in Leow v The State, Lesetedi J also commented that there existed no constitutional or statutory duty on a judicial officer to inform the accused of his right to legal representation. However, he noted that


46 Bojang v The State [1994] B.L.R. 146 161B-C.

47 Molatlhegi is, however, of the view that the purport of the judgment is to the effect that there exists a constitutional duty to inform the accused of his right to legal representation. See Molatlhegi (1997) SAJHR 464.

48 See also Rakgole v The State [2008] 1 B.L.R. 139 (CA); Phologolo v The State [2007] 1 B.L.R. 61; Moroka v The State [2001] 1 B.L.R. 134 (CA); Melore v The State [1998] B.L.R. 449; Masango v The State [2001] 2 B.L.R. 616; Ramogotho v Director of Public Prosecutions [2007] 1 B.L.R. 334 (CA); Chanda v The State [2007] 1 B.L.R. 400 (CA). See also the South African case of S v May 2005 2 SACR 331 (SCA); A Pillay “Case Reviews” (2005) 18 SACJ 400 402.

it is a salutary rule of practice which has developed to ensure a fair trial. This approach was confirmed by the Court of Appeal in *Moroka v The State*\(^{50}\) where the Court noted that the duty to inform an accused of his right to legal representation is not mandatory but a salutary practice, the failure of which would not necessarily vitiate the proceedings except where a failure of justice occurs.\(^{51}\) It is clear that in the Botswana legal order there exists a duty on the judicial officer to inform the accused of his right to legal representation.\(^{52}\) The consequences of failure to do so would amount to an irregularity, which may vitiate the proceedings only if the accused suffers prejudice. That the right to information in respect of such a crucial right is not a constitutional right is both unfortunate and mundane. It seems that this approach is partly due to three factors. First, there is no positive duty on the state to provide legal representation for the accused. Second, the right to be informed of the right to legal representation is one of recent origin.\(^{53}\) Third, the legal system has not embraced and does not recognise the import of the principle of equality before the law in relation to procedural rights. It is my view that had equality before the law been embraced as a fundamental rule of constitutional proceduralism, the demand that the accused be made aware that he may engage counsel would definitely receive application as a rule of constitutional practice. Lack of legal representation immediately results in procedural inequality and consequently has a telling and negative impact on the fairness of a trial. Failure by the court to inform the accused of the right significantly disadvantages him in the course of the trial. It therefore goes to the core of fundamental fairness that the accused be informed of this right.

It is wrong to use the absence or presence of prejudice as a criterion for determining the consequences of judicial failure to advise the accused of such a fundamental right. A procedural right is of no value unless the bearer of the right is aware of it. Prejudice is a relative term. When does prejudice arise and how is it assessed? Does it occur when an accused is convicted? Is it possible to say that no prejudice occurred if an unrepresented accused is convicted even though he was not made aware that he can hire an expert? An attorney is able to raise several issues that an unrepresented accused cannot. Therefore, one can never know how different the proceedings would have turned out had an accused been represented. To state therefore that the failure to advise the accused of his right to legal representation is cured by the lack of prejudice is highly presumptuous. The fact remains that several cases do not go on appeal and several people can suffer dire consequences for failure to brief an attorney

\(^{50}\) *Moroka v The State* [2001] 1 B.L.R. 134 (CA); *Matlapeng v The State* [2001] 1 B.L.R. 161 (CA).

\(^{51}\) *Moroka v The State* [2001] 1 B.L.R. 134 (CA) 140.

\(^{52}\) *Bojang v The State* [1994] B.L.R. 146. See the Namibian case of *S v Kau* [1993] NASC 2; 1995 NR 1. See also the South African case of *S v Moss* 1998 1 SACR 372 (C). In *S v Mbonzo* 1999 2 SACR 421 (W) the accused was charged with an offence which carried a mandatory life sentence by virtue of ss 51-53 of the Criminal Law Amendment Act 105 of 1997. The trial Court advised the accused of the right to legal representation. However, the Court did not inform him of the possibility of life sentences if convicted, nor was he encouraged to exercise his right to legal representation. It was held that these omissions constituted irregularities. See also *S v Nkondo* 2000 1 SACR 358 (W); *S v Manale* 2000 2 SACR 666 (NC).

just because they were unaware of their right to do so. In an adversarial system, the fact that an accused has to defend himself without legal expertise results in inequality which, I submit, amounts to prejudice. It is vitally important therefore that the accused should be made aware of this right. Legal proceedings should be handled by those specially trained in the field. The demand therefore that an accused should be made aware of his right to legal representation is as fundamental as the right which such information seeks to protect. The right to be informed of the right to legal representation is a clear demonstration of the underlying connectivity that equality before the law plays in relation to various procedural rights.

Neighbouring jurisdictions recognise a legal duty to inform the accused of his right to legal representation. The Constitution of the Republic of South Africa, 1996 declares in clear terms that an accused must be promptly informed of his right to legal representation. This serves as the basis of this essential right to access information in that country’s legal order and makes it fundamental to the procedural process. Consequently, a judicial officer has a bounden duty to inform an accused of his right to legal representation. Failure to inform an accused of his right to legal representation therefore may result in a failure of justice. The courts in their bid to protect the rights of the accused have established that when an accused is facing a serious charge and elects to represent himself, the judicial officer should ensure that the accused is not labouring under some misunderstanding, and if he is, the matter must be put right. South African jurisprudence is informed by the reasoning that it is meaningless to advice an accused of his right to legal representation if he is unable to afford one. This was recognised in the old order and has been embraced by the new constitutional order which demands that an accused must be informed of his right to have a legal practitioner assigned to him if substantial injustice would otherwise result. In my view, a failure to inform the accused of his right to legal representation can only avoid scrutiny when it is clear from the proceedings that he was aware of such right and opted not to exercise it.

54 S 35(3)(f) of the Constitution of the Republic of South Africa, 1996 ("the Constitution of South Africa"); see also s 73(A) of the South African Criminal Procedure Act 51 of 1977. In South Africa, where an accused declines legal representation, the presiding officer has a duty to encourage him to exercise his right to legal representation especially in cases of serious offences: S v Mitshama 2000 2 SACR 181 (W); M Cowling “Recent Cases – Criminal Procedure” (2000) 13 SACJ 368 378-379. However, an accused should not be compelled to do so (S v Mbambo 1999 2 SACR 421 (W)).


56 S v Nkondo 2000 1 SACR 358 (W); S v Manale 2000 2 SACR 666 (NC); Bekker et al Criminal Procedure Handbook 77.

57 S v Davids; S v Dladla 1989 4 SA 172 (N); S v Mhlanza 1989 4 SA 361 (N).


59 As Walia J stated in Morobatseng v The State [2003] 1 B.L.R. 466 468F, referring to the duty of a magistrate to advise an accused of his rights and options at the close of the state’s case: “Unless it appears on the face of the record that the accused was aware or made aware of his constitutional rights, the accused cannot be said to have received a fair trial.”
The Namibian Supreme Court held in *S v Kau*\(^6^0\) that since the right to legal representation is a constitutional right, the court has a duty to inform the accused of this right except when it is apparent that the accused is aware of the right. The Court noted that there were exceptional circumstances where failure to inform the accused of this right would not breach a fair trial. In this regard, the Court noted that failure to inform persons who are aware of the right (such as educated or knowledgeable persons, or lawyers) will not breach the requirements of a fair trial. The Court noted that the appellants were illiterate and did not understand the proceedings and that under the circumstances, they should have been informed of their right to legal representation.

6  **Access to justice and legal assistance**

6 1  **The provision of legal aid**

Equality before the law and access to justice are enhanced by equal access to the court and its procedures.\(^6^1\) Not only are states under a duty not to obstruct access to court, they also have a duty to ensure that access is effective and practical.\(^6^2\) Legal assistance determines whether or not an accused can effectively participate in the trial. Equality and fairness can therefore be adequately guaranteed by committing substantial resources to the provision of legal aid.\(^6^3\) In Botswana (as in several third world commonwealth countries where there is no comprehensive legal aid scheme) the state provides *pro deo* attorneys only in respect of cases that carry capital punishment. The approach in such countries is that in cases requiring capital punishment it is presumed that the interests of justice require that the accused be represented and therefore be entitled to legal aid.\(^6^4\) There is no such presumption in other cases. In non-capital cases the issue of legal aid is determined on whether it is desirable in the interests of justice. This is similar to the position in the United States prior to 1963.\(^6^5\) Prior to 1963, while counsel was only provided for an indigent in capital cases, in other cases the courts examined each case to determine whether the absence of counsel would result in a trial that is “offensive to

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\(^6^0\) [1993] NASC 2; 1995 NR 1.

\(^6^1\) Lester *Legal Aid* 1; Harlow argues that access to court is a human right (Harlow “Access to Justice” in *EU and Human Rights* 203). In *Golder v United Kingdom* (1979-80) 1 ECHR 524, it was noted that the right of access to court was an inherent element of the European Convention and that refusing the applicant access to a solicitor was in breach of article 6(1). See also, in general, *Campbell and Fell v United Kingdom* (1985) 7 ECHR 165; *Arico v Italy* (1981) 1 ECHR 1.

\(^6^2\) *Airey v Ireland* ECHR (1979) Series A No 32; (1980) 2 ECHR 305.

\(^6^3\) *S v Kau* [1993] NASC 2; 1995 NR 1; *Steytler Undeﬁned Accused* 10; Bekker notes that equality before the law means that an accused should not be denied access to the courts because of poverty (Bekker (2004) *CILSA* 179). See also V Smit “Indigence and the Right to Counsel: S v Khanyile 1988 (3) SA 795 (N)” (1988) 4 SAJHR 363 366:

“Equality before the law is so manifestly incompatible with the possibility that an important right may be available only to a wealthy minority (those who can afford counsel) that judicial steps towards the elimination of this possibility cannot be regarded as a fundamental innovation.”


\(^6^5\) In 1932 the United States Supreme Court ruled that the Fourteenth Amendment required the provision of counsel at least in capital cases. See, generally, *Powell v Alabama* 287 US 45 (1932); JA Lentine “Gideon v Wainwright at Forty – Fulfilling the Promise?” (2003) 26 *Am J Trial Adv* 613 615.
the common and fundamental ideas of fairness and right…”. The approach of determining each case to enquire whether the “special circumstances” of each case demanded the presence of an attorney was developed. The special circumstances test was used to overturn several convictions where the accused did not have an attorney. But in 1963 in *Gideon v Wainwright*, the Court emphasised the need for legal representation in all cases of serious offences. This case involved a felony and there remained an uncertainty as to whether the decision related only to serious offences. However, the situation was clarified in *Argersinger v Hamlin* where it was held that no person may be imprisoned unless he was represented, whether the offence was classified as petty, misdemeanour or felony, or unless the accused had waived such right. *Argersinger* was interpreted in *Scott v Illinois* to mean that the appointment of counsel for an indigent accused is only required if imprisonment is actually imposed and not if it is threatened or authorised.

The Constitution of South Africa provides that a legal practitioner shall be assigned to an accused by the state and at state expense if substantial injustice would result. The Constitutional Court has identified certain factors in deciding whether substantial injustice would arise from failure to provide legal representation. These factors include the complexity or simplicity of the case, the ability of the accused to defend himself and the gravity of the possible consequences of conviction. Therefore, though legal representation is guaranteed as a right, the Constitution does not ensure that everyone gets legal representation at state expense except where substantial injustice would

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68 Gideon v Wainwright (1963) 372 US 335 9 L Ed 2d 799 83 S Ct 792 93 ALR2d 733.
70 *Scott v Illinois* 440 US 367 (1979). The Court noted: “Although the intentions of the Argersinger Court are not unmistakably clear from its opinion, we conclude today that Argersinger did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of Argersinger—that imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. Argersinger has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.” (373).
71 S 35(3)(g) of the Constitution of South Africa; see H van As “Legal Aid in South Africa: Making Justice Reality” (2005) 49 *J Afr L* 54 58 for the Legal Aid Board’s guide as to when “substantial injustice would otherwise result”.
72 *S v Vermaas; S v Du Plessis* 1995 2 SACR 125 (CC); *Legal Aid Board v Msila* 1997 2 BCLR 229 (E); *Mgcina v Regional Magistrate, Lenasia* 1997 2 SACR 711 (W); G Budlender “Access to Courts” (2004) 121 *SALJ* 539 342. These criteria had earlier been set by Diederick J in *S v Khanyile* 1988 3 SA 795 (N) 815, having adopted them from the United States Supreme Court decision of *Betts v Brady* 316 US 455 (1942). It was stated in *S v Lombard* 1994 3 SA 776 (T) (a case dealing with the Interim Constitution whose provisions on legal representation are similar to those of the present Constitution) that substantial injustice would occur if the state does not provide legal representation for an offence for which imprisonment is possible. PM Bekker “The Right to Legal Counsel and the Constitution” (1997) 2 De Juris 213 222; NC Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, 1996 (1998) 307-313.
result. However, should the Legal Aid Board, having regard to its guidelines and policies, decide not to provide an indigent accused with a lawyer, a court may overrule their decision if in its view the provision of counsel is essential to a fair trial. The entrenchment of legal aid in the Constitution sets to strengthen procedural equality within the adversarial system.

In England, “any question as to whether a right to representation should be granted shall be determined according to the interests of justice”. In considering the “interests of justice” what has come to be known as the Widgery criteria are employed. The criteria include consequential factors and factors relating to legal complexity. These include whether the accused is likely to lose his liberty, the likelihood that he may suffer serious damage to reputation, whether the proceedings may involve complex questions of law, tracing, interviewing or cross-examination of expert witnesses, and whether the accused will be able to understand the proceedings or state his case. These criteria typically represent the significant role played by counsel, which cannot in any way be covered by a self actor.

In Botswana, by contrast, the Constitution requires the accused to engage legal representation at his own expense. The state, therefore, has no duty to provide the accused with counsel. The only legal obligation on the court is to permit him to secure legal representation. In my view it is a fundamental path of legal reasoning that an accused should be represented in respect of an offence where imprisonment is certain if convicted. A need to ensure legal representation in cases of serious offences cannot be understated. Therefore,

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73 S Ellmann “Weighing and Implementing the Right to Counsel” (2004) 121 SALJ 318 319. It was held in *S v Ambros* 2005 2 SACR 211 (C) that the obligation under s 35(3)(g) of the Constitution of South Africa is not necessarily satisfied by the setting up of a Legal Aid Board and that where the Board rejects an application for legal representation the state should still consider whether substantial injustice would result if the accused were unrepresented. This case recognises that some people who do not qualify for legal aid may be unable to defend themselves.

74 *S v Du Toit* 2005 2 SACR 411 (T).

75 SA Law Commission (SALC) *Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials)* Discussion Paper 96 Project 73 (2001) para 3.2 <http://www.saflii.org/za/other/zalc/dp> (accessed 11-05-2010); as Steytler *Undefended Accused* 236 points out: “To ensure equality before the law, the only solution is to provide legal aid for accused who are too poor to employ a lawyer.”


78 Young & Wilcox (2007) *Criminal LR* 111; see also *S v Khanyile* 1988 3 SA 795 (N).

79 S 10(2)(d) of the Constitution of Botswana; CM Fombad “The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework” in CM Fombad (ed) *Essays on the Law of Botswana* (2007) 1 21: “In spite of Botswana’s impressive economic growth rates in the last decades, the majority of its population is poor and unable to afford adequate legal services.” See also EK Quansah “Legal Aid in Botswana: A Problem in Search of a Solution” (2007) 40 *CILSA* 509 511: “[T]he current economic situation of many Batswana render the fundamental rights, especially those of access to legal representation, nugatory in view of their inability to access legal services to uphold or vindicate their rights.”
an accused should be represented in all cases where he faces the prospect of imprisonment.80

The constitutional provision that legal representation is available to the accused, at such accused’s own expense, is contrary to the notion of fairness. It makes the constitutional guarantee of legal representation an empty declaration. One would, therefore, recommend that legal representation be provided in respect of all cases that attract minimum sentences. One may ask what kind of system passes minimum prison sentences, reverses the onus of proof, and hails the accused into court without the assistance of an expert to defend him?81 This is oppressive in design. The state cannot have its cake and eat it. The trial of a person under such circumstances is an act and a sham, where the fate of the accused is predestined by state policy. It gives the prosecution monumental advantage in the proceedings and deprives the accused of his right to equality before the law. The criminal process is unfairly skewed in favour of the state and the trial is reduced to mere formal and procedural steps aimed at conviction. Under the circumstances, there is an urgent demand for the institution of a legal aid system.

6.2 Inadequacies in state-funded defence

The right to legal representation is only attained, and equality met, if the accused is afforded adequate representation. The provision of legal representation by itself does not satisfy the operation of the right. While the law on the right to quality legal representation is still developing in Botswana,82 the law of South Africa is more comprehensive in this regard.83 A key problem with legal aid systems is quality representation.84 In this regard the experience of the practitioner and the diligence with which he conducts the case, are usually matters that compromise the quality of representation and thus the fairness of the trial.85 That quality representation is an essential component of the right to legal representation is reflected in the well-developed legal tradition of placing a high duty of care on counsel in the discharge of his duties to his client. The experience of counsel and his dedication to pro deo cases often impact on the quality of representation. The remuneration in respect of pro deo cases is usually low, thereby attracting

80 Argersinger v Hamlin (1972) 407 US 25 32 L Ed 2d 530 92 S Ct 2006; Gross notes that legal aid is necessary to add any meaning to the right to legal representation (Gross Legal Aid 33). Gyeke-Dako J states that depending on the resources of the state, legal representation must be provided “where there is the probability of the accused losing his liberty even for a day” (Bojang v The State [1994] B.L.R. 146 158 G-H); A Ashworth “Legal Aid, Human Rights and Criminal Justice” in R Young & D Wall (eds) Access to Criminal Justice (1996) 55 57 notes: “[I]t is contrary to the principle of equality before the law that the ability to defend oneself adequately against a criminal charge should depend on one’s financial resources. Thus, to allow legal representation without providing state funding for the indigent would be to respect the right of the innocent not to be convicted only in so far as they have money, and would fail to ensure equal access to justice.”

81 Several statutes in Botswana have minimum prison sentences and reverse onus.

82 See Ditshwanelo v The Attorney-General (No. 2) [1999] 2 B.L.R. 222.

83 S v Halgren 2002 2 SACR 211 (SCA); S v Mofokeng 2004 1 SACR 349 (W); S v Charles 2002 2 SACR 492 (E); S v Chabedi 2004 1 SACR 477 (W); S v Xali 2003 1 SACR 613 (W).


mostly junior counsel, or resulting in less time and attention being given to such cases. Practising lawyers with several years’ experience lose interest in criminal matters. In *S v Huma* Claassen J highlighted the practical problems encountered by *pro deo* counsel when he opined:

"Pro deo counsel is, however, in a peculiar and difficult position, because he does not normally have the assistance of an attorney, nor funds to pay for the proper preparation of the accused’s defence."

He also alluded to the fact that *pro deo* counsel are mostly junior counsel. Consequently, there is an imbalance if the accused is represented by a lawyer with a significantly lower level of experience and limited resources, than a prosecutor who, in addition to his experience, will be assigned one or more junior counsel who will assist with research. Accused persons are short-changed because more experienced attorneys are not prepared to accept the fees allocated under legal aid schemes and this implicates procedural equality. Accused persons who cannot afford or do not possess the quality of legal resources possessed by the prosecution, are placed at a substantial disadvantage. The more complicated the charges, the more profound the effects of insufficient legal resources will be.

It was pointed out earlier that there is a manifest and disproportionate imbalance between the prosecution and the defence in terms of resources. The office of the prosecution is well-established and funded by state resources. However, several accused persons go undefended because of the non-availability of legal aid in Botswana. It is a fundamental pillar of fairness that an accused be given adequate facilities to put up his defence. The lack of funding for legal representation is a recipe for disproportional equality in competing interests. Therefore, a comprehensive legal aid system needs to be established and provided for in the national budget, just as state prosecution is budgeted for. For the prosecutor and defence to have procedural equality of arms, indigent accused persons must be supported by an adequate level of resources. The rationalisation of a system that takes into consideration the remuneration of attorneys for the defence, considering issues like their experience and complexity of each case so as to bring in experienced attorneys, will enhance quality representation. The Constitution of Botswana clearly states that legal

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86 *S v Huma* 1995 2 SACR 407 (W).
87 *S v Mayo* 1990 1 SACR 659 (E); see also *S v Siebert* 1998 1 SACR 554 (A) in relation to incompetent defence counsel.
89 315.
91 It should be noted, however, that the Trial Chamber and ICTR Appeals Chamber in *Prosecutor v Clément Kayishema and Obed Razindana* Case No ICTR-95 – 1-A, Appeals Chamber Judgment (Reasons), 1 June 2001; *Prosecutor v Clément Kayishema and Obed Razindana* Case No ICTR-95 – 1-A, Trial Chamber II, Judgment and Sentence, 21 May 1999 respectively ruled that equality of opportunity between the parties to present their case does not extend to equality of resources and that the rights of the accused should not be interpreted to mean entitlement to the same personal and financial resources. See also *Prosecutor v Milan Milutinovic et al* Case No IT-99 – 37-AR73, Appeals Chamber, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003. However, the Special Court for Sierra Leone established a Defence Office as a permanent institution of the court to counterbalance the Prosecution.
representation is at the expense of the accused, thereby absolving the state of any duty to provide legal aid. Therefore, the rationalisation of access to legal representation remains purely a procedural matter without any consideration to resources and affordability. Though the state provides legal representation for capital offences, there is a vast number of offences that are complex in nature, laden with statutory reverse onuses, mandatory and lengthy minimum sentences, for which the state has no duty to provide legal representation. At the risk of sending accused persons to lengthy prison sentences, the state is able to say that it has limited resources to assist with legal representation.

6.3 The promise of reform

The Botswana judicial system is currently undergoing significant reforms, and the introduction of legal aid promises to be one of them. However, the legal aid project is still at an incubatory stage. A consultancy report was published in 2008 which recommended the introduction of legal aid. The Report recommends the introduction of a mixed model comprising of *pro bono*, *pro deo, judicare* and the public defender systems. It also recommends that the system operates under and be administered by an independent entity to be known as Legal Aid Botswana (“LAB”). It is suggested that this body serves as central administrator of legal aid through Government funding. The Report recommends that LAB provides legal aid through “justice centers”, which will be manned by lawyers, paralegals and administrators. In addition, the Report provides that LAB collaborates with the Law Society of Botswana, the University of Botswana Law Clinic, and other civil society groups involved in providing legal aid. In other words, these entities will provide manpower while LAB provides funding for persons who are assisted by these entities. In this regard, LAB will outsource or rather stimulate existing and potential legal aid services, while simultaneously providing legal aid through its Justice Centres. The Report also emphasises the use of paralegals, to be stationed at the Justice Centres, as well as police stations and prisons. The Report suggests that two initial pilot Centres be set up by January 2011. The Report also enjoins the Law Society to bind every practitioner to do at least forty hours of *pro bono* work per annum. Whereas the mixed system will be confusing to the public upon inception, it is obviously intended to obviate the shortage of manpower. The use of paralegals is also meant to cushion manpower constraints.

The Report calls for enabling legislation to put its recommendations into place. It also calls for constitutional changes. It calls for section 10(1)(d) of the Constitution to provide that an accused be provided with a lawyer of his own choice where “justice demands”. In turn, it further calls for a removal of the provision that the accused provides legal representation at his or her

\[92\] See, generally, JD Williams *Project on Legal Aid and ADR* (2008).
own expense. It calls for the amendment of policy and or internal regulation to require

“[p]olice officers, investigating officers, prosecutors, judges, magistrates and officers of the customary courts dealing with an unrepresented indigent arrested, detained or accused person [to] inform that person of his or her right to legal aid and arrange for that person to be referred to LAB.”

The immediate effect of this recommendation, if implemented, is that the right to legal representation will extend to pre-trial investigations and the right of the accused to be told of his right to legal representation will be guaranteed. However, the Report does not state whether this provision should be legislated. If it remains a “policy or internal” regulation as the Report suggests, its legal status will depend on judicial attitudes. Present trends show that the courts are not prepared to enforce these demands.

7 Conclusion

The Botswana constitutional guarantee of the right to legal representation is inconsistent with the constitutional guarantee of equality before the law. It places the burden of funding legal representation on the accused. As a result, the state is legally excused from funding legal representation of accused persons. Unfortunately, equality before the law is not a mere theoretical concept. The resulting procedural inequality and disadvantage suffered by the unrepresented accused undermines the fairness of trials and the credibility of the legal system. In reality, a large number of people are tried without legal representation. This is dictated by the economic realities of the country. Since the system is adversarial and party driven, judicial officers do not investigate crime and more than often, do not call for necessary evidence that may assist the accused. The sad reality is that the unrepresented accused, no matter how intelligent, lacks the necessary skills to match a trained prosecutor. The inequality and consequent unfairness cannot be more pronounced. A further obvious inequality is bound to occur amongst accused persons themselves. Wealthier and elite accused persons, who can afford legal representation, are more likely to be served better and have fairer trials than their counterparts, who are unable to afford legal representation. This social inequality certainly reflects the existence of a widened gulf between the poor and the attainment of justice.

The right to legal representation can only be effectively guaranteed if viewed against the backdrop of equality before the law. The mainstreaming of equality should be made to take root. The constitutional and legal framework ought to recognise the relationship between legal representation and the accused’s right to equality before the law. To achieve this, some theoretical and practical changes will have to be accepted. Two fundamental changes need to be implemented to attain this end. First, theoretical recognition that first generation civil and political rights may well be positive rights is required. They may well require governments to allocate resources for their attainment. Obviously, the Government of Botswana should budget for the

69 Williams Project on Legal Aid and ADR para 12.2.
setting up and funding of legal aid. Second, a constitutional change is more than desirable. The constitutional guarantee of legal representation is weak, in that it provides that the accused should secure legal representation at his own expense. This effectively forms a barrier to access to justice, marginalising a wide section of the population. A removal of the provision that the accused should provide legal representation at his own expense will remove the potential constitutional impediment to the introduction of the legal aid system and bring the Constitution of Botswana up to international standards regarding this issue.

A comprehensive legal aid programme is crucial to attaining procedural equality before the law. Therefore, the impending legal aid programme is a welcome relief. The consultancy Report recommends the setting up of a legal aid programme and the enactment of enabling legislation. This is a step in the right direction. Of course, the introduction of legal aid in Botswana will encounter some challenges which the Report sought to address. The recommendation that paralegals be trained is of utmost importance. Botswana is a developing country with few skills and resources. This suggestion is crucial as Botswana lacks trained legal personnel to man a comprehensive legal aid system. This will reduce the manpower constraints that the programme will inevitably face. Also, while the Report considered the issue of means, it did not consider areas of prioritisation in the provision of legal aid. Economic realities will demand a prioritisation of resources. Perhaps, these issues will filter in as part of the policy of the LAB. As stated above, the country suffers from a deficit of resources and legal skills. This poses a challenge to the provision of legal assistance for accused persons. Under the circumstances, one would suggest that, while the means of the accused should serve as a pivotal determining factor in providing legal aid, the nature of the offence and sentence should also play a great part. The state should provide legal representation in respect of capital offences and offences for which prison sentences are mandatory. This should then extend to other offences in order of seriousness. The state should make the allocation of funds in this regard a paramount objective of state policy.

The inequalities between the state and accused in the criminal process are inevitable. This is so even when the accused is represented. Whereas prosecutors are in the permanent employment of the state, defence counsel usually work on hourly rates and are employed on a contractual basis. As opposed to the more permanent relationship between the state and prosecutors, the relationship between the accused and his attorney is more transient and fluid, based on ad hoc monetary considerations. However, what is important is that the accused does not suffer substantial disadvantage in relation to the prosecution. The adversarial system can only be fair when the accused is given access to legal representation, thereby ensuring that he operates on a level of relative equality vis-à-vis the prosecution. Therefore, the issue of funding and resources are crucial to the constitutional right to legal representation.
SUMMARY

Undeniably, the right to legal representation is crucial to the maintenance of balance and equality during criminal trials. An unrepresented accused is put at significant disadvantage vis-à-vis the state, which has trained prosecutors to prosecute crime. Under such circumstances, miscarriages of justice are bound to occur and the prospect of conviction is more likely than not. The central purpose of criminal proceedings, the desire of convicting the guilty and setting the innocent free, becomes a farce. However, this article cites the constitutional provision relating to the right to legal protection in Botswana as an obstacle to the right to meaningful legal representation in Botswana. Instead of providing for meaningful protection of the right, it supports institutional imbalances between the prosecution and the state. Therefore, the article calls for constitutional changes and the introduction of meaningful legal aid in Botswana.