

The Duty to Produce One's Firearm for Inspection in Terms of the *Firearms Control Act*: The Right to Silence under Siege?

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Abstract

The right of the arrested and accused persons to remain silent at pre-trial and during their trial are significant to ensuring a fair trial. The purpose of the right to remain silent is to ensure that the state bears the duty to prove the guilt of the accused beyond reasonable doubt. In essence, the right serves to dissuade the state from engaging in any manner or form of coercing the accused person to assist the state in meeting its case, whether during pre-trial or during trial. An individual who is accused of committing an offence must not through his or her words or deeds assist the state in satisfying its burden of proof. The *Firearms Control Act* 60 of 2000 (the Act) seems to dilute these rights. The Act empowers the police official to request an owner of a legal firearm to produce it within seven days of the request at a threat of a criminal sanction. At the time the request is made the individual has been neither arrested for nor accused of a criminal offence. However, on the failure to produce the firearm on demand by a police official the individual may be charged with a criminal offence and evidence that has been obtained in terms of the Act would be admissible at the subsequent trial. This is despite the fact that at the time the request to produce a firearm is made the individual does not have a choice but to comply with the request lest he or she be charged with an offence under the Act. The purpose of this contribution is to investigate whether the individual to whom a request to produce a firearm has been made is entitled to the right to remain silent entrenched in section 35 of the *Constitution*, and whether the limitation of this right by the Act passes constitutional muster.

Keywords

Accused; arrested; detained; firearms; limitation of rights; right to fair trial; right to silence; suspect.

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1 Introduction

The proliferation of illicit firearms is fuelled by the irresponsible ownership of legal firearms.¹ In order to counter this phenomenon, the *Firearms Control Act* 60 of 2000 (the Act) was promulgated. The intended purpose of this legislation is to dissuade irresponsible firearm ownership and use, and to curb the theft and negligent loss of firearms. Thus, it addresses the need for improving control over legally possessed firearms.² To this end, the legislation creates a number of offences relating to the irresponsible loss or theft of firearms.³ In addition, the Act envisages making the investigation of lost or stolen firearms easier for the law enforcement authorities. For example, any police official or a person authorised by the Registrar may request the holder of a licence, permit or authorisation issued in terms of the Act to produce such a document or the firearm itself within seven days after being requested to do so.⁴ A failure to comply with such request amounts to a criminal offence.⁵

Section 35(3) of the *Constitution* guarantees the right to a fair trial to all accused persons. An accused is a person who has been charged with the commission of an offence. Being "charged" means that allegations against the individual have been formally formulated.⁶ However, a person upon whom a request is made in relation to the commission of an offence is not necessarily charged. In the context of section 106 of the Act, the request to produce a firearm does not amount to allegations being formulated against an individual. At this stage the individual is not yet charged; neither is he or she arrested or detained. In terms of the *Constitution*, the right to a fair trial accrues only to an accused persons, and a person who is subject to section 106 of the Act enquiry does not, strictly speaking, qualify for any of the rights enumerated in section 35 of the *Constitution*. As a result, this note seeks to investigate whether the individual subjected to a section 106 of the Act enquiry may rely on the rights guaranteed in section 35(1) or (3) of the *Constitution* at his or her subsequent trial, despite the fact that, textually, the individual does not fall under any of the categories protected by these provisions.

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¹ Masandzu 2006 *CILSA* 131.

² See s 2 of the *Firearms Control Act* 60 of 2000 (the Act).

³ Section 120(8) of the Act.

⁴ Section 106(1) of the Act. In this discussion, for the sake of brevity, reference will be made to "police official" and "firearm" only.

⁵ Section 120(1)(c) of the Act.

⁶ *Sanderson v Attorney-General, Eastern-Cape* 1998 2 SA 38 (CC) para 18.

This discussion will be organised as follows: a synopsis of section 35 of the *Constitution* is provided in paragraph 2. The aim of this exploration is to determine the ambit of section 35 and to locate the context within which the provisions of the Act are considered. Thereafter the author endeavours to establish whether the provisions of the Act violate the right to remain silent and the related rights. Then a brief exploration is undertaken of the limitation clause and an investigation of whether the violation of the right to silence by the provisions of the Act is reasonable and justifiable.

2 Section 35 of the *Constitution*: a synopsis

Section 35 of the *Constitution* guarantees the interrelated rights of arrested, detained and accused persons. Subsection (1) refers to arrested persons; subsection (2) relates to detained persons; and subsection (3) protects accused persons.⁷ The restricted reading of these provisions suggests that any person who does not fall into any of the specified categories cannot benefit from these subsections. In other words, the above-mentioned rights are not applicable to any person outside these categories. Flowing from this restricted reading is that a person suspected of having committed an offence, as he or she is not explicitly mentioned in section 35, cannot therefore lay claim to the rights contained in these provisions. However, it is inevitable that police officials interact with persons who are yet to qualify for inclusion in any of the categories enumerated in section 35 of the *Constitution* during the investigations of criminal offences. During these interactions there is a real likelihood that such persons – suspects – may incriminate themselves, as they are neither warned of their right to remain silent nor of their right against self-incrimination.⁸

The *Constitution* does not define the terms arrested, detained and accused. Schwikkard,⁹ after analysing the meaning of the term arrested in terms of the *Criminal Procedure Act* 51 of 1977, comes to the conclusion that the restricted reading of this concept has the potential to expose persons not falling under this category to vulnerability. For instance, where a police official harbours a suspicion that an individual has committed an offence but is of the view that he or she does not have sufficient information and decides not to arrest the former but to question him or her instead. It is inevitable that in certain instances the answers that the individual proffers may confirm the police official's suspicion

⁷ Schwikkard "Arrested, Detained and Accused Persons" 748.

⁸ Naude 2009 *SAPL* 507.

⁹ Schwikkard "Arrested, Detained and Accused Persons" 748. S 39(1) of the *Criminal Procedure Act* 51 of 1977 (the CPA) defines arrest as follows: "[a]n arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body."

and lead to his or her arrest. As was said in *Sebejan*,¹⁰ being a suspect is a precursor to being arrested or becoming an accused. He or she is "at or near the starting point of an investigation". The restricted reading of section 35(1) does not extend the enjoyment of the right contained therein to suspects.¹¹ The same is true of section 35(2). A detained person is defined as a person who has been arrested and is in lawful custody.¹² The individual in this case has neither been arrested nor is he or she in legal custody. The same applies to section 35(3): an accused is a person who is facing criminal charges.¹³ At this stage the individual does not face any charges. However, if section 35(1), (2) and (3) are read restrictively, it does not mean that evidence obtained against an individual whose rights were breached when they were suspects or even before they became suspects cannot rely on section 35(5) of the *Constitution*.¹⁴ The textual reading of section 35(5) suggests that a suspect may rely on this provision. This provision provides for the exclusion of any evidence that has been obtained in a manner that violates *any* right in the Bill of Rights. The question that arises is whether the phrase "any right in the Bill of Rights" extends the rights in subsections (1), (2) and (3) of section 35 of the *Constitution* to suspects; the rights which the individual who is requested by a police official to produce his or her firearm does not enjoy at the relevant time. This is the question which, with particular reference to the right to remain silent (and thus not incriminate oneself), will be addressed in due course in the context of section 106(1) of the Act.

2.1 The rationale for the right to remain silent: a brief overview

This section seeks to highlight briefly the rationale for the protection of the right to remain silent. It is readily conceded that this is contested terrain, and that the topic has elicited various conflicting viewpoints.¹⁵ The right to silence gives content and meaning to the right against self-incrimination and the right to be presumed innocent.¹⁶ The South African *Constitution* expressly protects the three inter-related categories of rights in section 35. These rights seek to ensure

¹⁰ *S v Sebejan* 1997 1 SACR 626 (W) 635 quoting *Shabaan Bin Hussien v Chong Fook Kam* [1969] 3 All ER 1627 (PC) at 1630; Naude 2009 SAPL 511.

¹¹ See among others *S v Langa* 1998 1 SACR 21 (T); *Khan v S* 2010 JOL 25782 (KZP).

¹² See s 39(2) of CPA.

¹³ See s 38 of the CPA; also see *Sanderson v Attorney-General, Eastern-Cape* 1998 2 SA 38 (CC) para 18.

¹⁴ Schwikkard "Arrested, Detained and Accused Persons" 805; Steytler *Constitutional Criminal Procedure* 115.

¹⁵ See among others Stein 2008 *Cardozo L Rev* 1115-1140; Bibas 2003 *Iowa L Rev* 423-432; Hocking and Manville 2001 *Macquarie LJ* 63-92; Jackson 2009 *ICLQ* 835-861; Theophilopoulos 2003 *TSAR* 258-275; Theophilopoulos 2002 *SAJHR* 505-529; Schwikkard 2001 *Int'l J Evidence & Proof* 32-38.

¹⁶ Hocking and Manville 2001 *Macquarie LJ* 66.

that the state proves its case against the accused person without the assistance of the accused himself or herself. In other words, the state must respect the will of the individual regarding matters in which he or she may choose to condemn himself or herself.¹⁷ It is a salutary rule of our common law that the state bears the duty to prove the guilt of the accused beyond reasonable doubt. In essence, the right serves to prohibit the state from engaging in any manner or form of coercing the accused person to assist the state in meeting its case.¹⁸ An individual who is accused of committing an offence must not through his or her words or deeds assist the state in satisfying its burden of proof.¹⁹ Theophilopoulos²⁰ asserts that the right to silence extends beyond utterings and includes non-cooperation with the authorities, such as a refusal to point out or to hand over articles or documents.

Given the unequal power relations between the individual and the state, the constitutional protection of the right to silence is geared not only towards ensuring fairness in criminal proceedings (during a trial), but also towards ensuring that law enforcement officers conduct themselves in a constitutionally acceptable manner. Thus the right to silence, in subsections (1) and (3) of section 35, underlies different aspects or immunities within the right,²¹ and thus the need to claim them at different stages of the criminal justice process. However, this does not mean that an individual has a right to remain silent in all instances. The *Constitution* does not confer any right to potential witnesses in the investigation of the commission of a crime. For example, section 41 of the *Criminal Procedure Act* 51 of 1977 empowers a peace officer to arrest an individual who, in the opinion of the peace officer, may be able to give evidence in the commission of an offence if such a person refuses to furnish his or her name and address to the peace officer.²²

As is evident from the above, the right to silence is central to the accusatorial system. It maintains a balance between the weaker individual accused and the almighty state accuser. This it does by curbing over-zealousness on the part of

¹⁷ Jackson 2009 *ICLQ* 846.

¹⁸ *Thebus v S* 2003 6 SA 505 (CC) para 55; Skinnider and Gordon "Right to Silence" 4.

¹⁹ Schwikkard 2001 *Int'l J Evidence & Proof* 32.

²⁰ Theophilopoulos 2003 *TSAR* 258.

²¹ *Thebus v S* 2003 6 SA 505 (CC) para 81.

²² In *R v Singh* 2007 3 SCR 405 the Canadian Supreme Court held that the right to silence does not mean that the individual has a right not to be spoken to by state authorities (para 28).

law enforcement officials, especially during evidence gathering.²³ As Moseneke J²⁴ (as he then was) commented

[t]his 'distate of self-incrimination,' as Ackermann J puts it, is a response to the oppressive and often barbaric methods of the Star Chamber and indeed to our own dim past of torture and intimidation during police custody.

Those who are arrested and under detention are readily vulnerable to intimidation and manipulation.²⁵

In the European system²⁶ the right to silence does not extend to the evidentiary material that is compulsorily recoverable from the accused, despite the accused's unwillingness to co-operate in the discovery of such evidence, such as documents pursuant to a warrant, breath, blood and urine samples, and bodily tissues for the purposes of DNA testing. This is also the position in South Africa. In other words, where a law permits the recovery of such material, the right to silence is not breached.²⁷ Despite the foregoing, the right to silence not only protects individuals against directly incriminating themselves but also to the use of any material that may be discovered as a result of the violation of this right.²⁸ The same is true in South Africa. The right to silence may be compromised either directly or indirectly.²⁹ Jackson,³⁰ commenting on the European system and relying on *Murray v United Kingdom*,³¹ posits that "a certain amount of indirect compulsion was acceptable". The Canadian Supreme Court has equally held that the use of legitimate means of persuasion is permitted under the Canadian law.³² It is doubtful that these positions will find resonance in South Africa.³³

2.1.2 Who has the right to silence?

It is trite that the right to remain silent is an instance of the broader right to be presumed innocent. At the very least, the right to be presumed innocent implicitly protects the right of the individual to remain silent in the face of

²³ See Theophilopoulos 2002 SAJHR 505.

²⁴ *Thebus v S* 2003 6 SA 505 (CC) para 55; see *Osman v Attorney-General, Transvaal* 1998 4 SA 1224 (CC) para 10; also *R v Singh* 2007 3 SCR 405 para 29.

²⁵ *Thebus v S* 2003 6 SA 505 (CC) para 55.

²⁶ See *Funke v France* 1993 18 EHRR 297 para 44; *Heaney v Ireland* 2001 33 EHRR 334 para 40.

²⁷ For example ss 36C, E and 37 of the CPA; see s 225 of the CPA; *Minister of Safety and Security v Gaqa* 2002 1 SACR 654 (C).

²⁸ Jackson 2009 ICLQ 837.

²⁹ Jackson 2009 ICLQ 838.

³⁰ Jackson 2009 ICLQ 838.

³¹ *Murray v United Kingdom* 1996 ECHR 3 para 45.

³² See among others *R v Singh* 2007 3 SCR 405, especially para 47.

³³ See s 217(1) of the CPA.

allegations of wrongdoing against him or her - at least at trial stage. Yet it is accepted that the right to remain silent and not to incriminate oneself operationalises the right to be presumed innocent at pre-trial stage.³⁴ Though the *International Covenant for Civil and Political Rights* (1966) does not explicitly guarantee the right to remain silent, the related rights to be presumed innocent and not to be compelled to testify against oneself are expressly guaranteed.³⁵ The right to silence is not a single, self-contained right, but consists of a "cluster of procedural rules that protect against self-incrimination"³⁶ and conceals "a bundle of more specific legal relationships".³⁷ The Canadian *Charter of Rights and Freedoms* also does not expressly provide for the right to remain silent. However, the Canadian Supreme Court has found this right to be protected as a principle of fundamental justice.³⁸ As alluded to above, the South African *Constitution* expressly guarantees the arrested person's right to remain silent and right to be informed of this right³⁹ as well as the accused person's right to be presumed innocent, to remain silent, and not to testify during proceedings.⁴⁰ As already indicated, the literal reading of section 35 of the *Constitution* does not cover suspects and therefore suspects cannot lay a claim to any of these guaranteed protections.⁴¹

However, commenting on the proper approach courts must adopt in reading section 25 of the *Interim Constitution*, the precursor to section 35 of the *Constitution*, the Constitutional Court commented that:

[W]e have to enquire whether non-trial related interests are catered for in the section. Textually, the argument for their exclusion is persuasive. Not only is section 25(3)(a) expressly 'include[d]' as one of several incidents of a fair trial, but what 'fair trial' means in this context is suggested by paragraphs (b) to (j) of section 25(3), all of which relate directly to the conduct of the trial itself. Furthermore, the

³⁴ Drawing clear bright lines between the right to be presumed innocent and the other related rights, e.g. the right to remain silent and the right against self-incrimination, is not an easy exercise. As Schwikkard puts it: "[a]lthough the presumption of innocence as a constitutional right has a narrowly defined content, its operational efficacy is dependent on a number of associated rights". Schwikkard "Arrested, Detained and Accused Persons" 754.

³⁵ Skinnider and Gordon "Right to Silence" 6. Similarly, the *European Convention on Human Rights* (1953) does not expressly provide for the right to remain silent. However, the European Court has recognised this right, see *Murray v United Kingdom* 1996 ECHR 3 14; also see the *Universal Declaration of Human Rights* (1948) and the *African Declaration of Human and People's Rights* (1986).

³⁶ Skinnider and Gordon "Right to Silence" 4.

³⁷ Skinnider and Gordon "Right to Silence" 10; Hocking and Manville 2001 *Macquarie LJ* 63; see *Osman v Attorney-General, Transvaal* 1998 4 SA 1224 para 17.

³⁸ *R v Hebert* 1990 2 RCS 151 163; Skinnider and Gordon "Right to Silence" 10.

³⁹ See ss 35(1)(a) and (b) of the *Constitution*.

⁴⁰ Section 35(3)(h) of the *Constitution*.

⁴¹ Steytler *Constitutional Criminal Procedure* 114; Steenkamp and Nugent "Arrested, Detained and Accused Persons" 631.

trial emphasis in section 25(3) marks a clear contrast from sections 25(1) and (2); the former covering the custodial situation, the latter covering the arrest situation.

Despite the persuasiveness of this textual argument, it appears to me that all three kinds of interests should be regarded as being protected under the rubric of section 25(3)(a). There are two reasons for this. First, this Court has taken a broad and open-ended approach to the scope of section 25(3). Writing for the Court in *S v Zuma and Others*, Kentridge AJ affirmed that:

The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.⁴²

In *S v Sebejan*⁴³ the court commented that it was imperative that the right to silence be extended to suspects. However, in a number of cases⁴⁴ the *Sebejan* approach was rejected. Despite this contradictory approach by the high courts, in *S v Orrie*⁴⁵ the prosecution conceded during argument that there was a duty on police officials to inform the suspect of "his rights". The court endorsed the *Sebejan* approach. Underpinning the *Sebejan* approach is the rationale that no one should be compelled to answer questions that might have the tendency to expose oneself to criminal conviction.⁴⁶

The *Constitution's* extension of the right to silence to arrested and accused persons is in keeping, according to Hocking and Manville, with the common law approach that this right extends to various stages.⁴⁷ This guarantee does not operate in isolation but is interrelated with and reinforces the related rights and must thus be interpreted and applied purposefully.⁴⁸ Commenting in this regard, the Canadian Supreme Court warned that conferring protection against self-

⁴² *Sanderson v Attorney-General, Eastern-Cape* 1998 2 SA 38 (CC) paras 21-22.

⁴³ *S v Sebejan* 1997 1 SACR 33 (W); Steenkamp and Nugent "Arrested, Detained and Accused Persons" 631.

⁴⁴ *S v Langa* 1998 1 SACR 21 (T); *S v Mthethwa* 2004 1 SACR 449 (E); *S v Van der Merwe* 1998 1 SACR 194 (O).

⁴⁵ *S v Orrie* 2005 1 SACR 63 (C). See *S v Langa* 1998 1 SACR 21 (T). However, the *Langa* case is distinguishable in that in this case the first accused was charged with contravening s 36 of the *General Law Amendment Act* 62 of 1955 (possession of suspected stolen property), which requires an individual to give an explanation as to the goods in his or her possession when a police official reasonably suspects that such property has been stolen (24g-h). See *Osman v Attorney-General, Transvaal* 1998 4 SA 1224 (CC). However, in *Langa* the court proceeded to comment that "accused 1 had not been detained by the police at the time she volunteered the information and neither had she been arrested which is what is required in s 25(2). The use of the word detained in s 25(1) is intended in my judgement to deal with situations where a person is incarcerated, as illegal immigrants. It does not deal with the situation where policeman stops a person of whom he has cause to be suspicious and asks him what is he doing" (24j-25b). With these words the court refused to follow *S v Sebejan* 1997 1 SACR 626 (W).

⁴⁶ See Hocking and Manville 2001 *Macquarie LJ* 65.

⁴⁷ Hocking and Manville 2001 *Macquarie LJ* 66.

⁴⁸ Devenish *Commentary* 504.

incrimination to accused persons at trial whilst not extending similar protections to persons not yet formally accused would render such protection illusory.⁴⁹ More so, because it is at this stage of the interaction with the criminal justice system that the individual is particularly vulnerable.⁵⁰ This paradox is observed by Theophilopoulos⁵¹ when he states that:

[t]he accused's trial silence is treated as a near absolute 'right' (at a stage when the accused is least vulnerable), but the accused's pre-trial silence is treated as a 'privilege' (at a stage when the accused is most vulnerable).

The inevitability of this interaction is undergirded by the fact that all criminal investigation logically presupposes that at one stage or another there will be suspicion that an individual was involved in the commission of an offence.⁵² This, therefore, should lead to the inevitable conclusion that the rights in section 35 must, by inferential reasoning, be extended to suspects. At the very least the individual's fair trial right is threatened at this stage.⁵³ Such a conclusion would also be in line with a generous and purposive interpretation of the *Constitution*. As Satchwell J held in *Sebejan*:⁵⁴

If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who is operating within a quicksand of deception while making a statement. That pre-trial procedure is the determinant of trial fairness and is implicit in the Constitution and in our common law. How can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception?

This is underscored by the fact that the SAPS internal documents – SAPS 3M – provides that the suspect must be warned of the rights that superficially accrue to the arrested and accused persons.⁵⁵

In Canada, detention⁵⁶ embraces both arrest and detention. As in the South African jurisprudence, where the exact moment of arrest is has been

⁴⁹ *R v Herbert* 1990 2 RCS 151 178.

⁵⁰ Klukach and Lumba 2008 *Sup Ct L Rev* 484.

⁵¹ Theophilopoulos 2002 *SAJHR* 508; *R v Singh* 2007 3 SCR 405 para 32.

⁵² *S v Ndlovu* 1997 12 BCLR 1785 (N) 1792; *R v Singh* 2007 3 SCR 405 para 28.

⁵³ Section 38 of the *Constitution*. See in general Ally 2010 *CILSA* 239-259. Karl Klare's observations are apposite in this regard: "[c]onstitutional rights are only justiciable when an infringement occurs or is threatened, and fair trial rights cannot be infringed or threatened until a trial of an accused is commenced. But the drafters could easily have intended that a 'threat' to fair trial rights occurs at the earlier point in time when self-incrimination is compelled in a winding-up proceeding (even if, at that point, no one has yet to be accused or put to trial). On a 'generous reading,' pre-trial, compulsory self-incrimination can be said to 'threaten' fair-trial rights by precipitating a situation (a 'threatening situation') that, as a practical matter, empowers the authorities later to infringe fair-trial rights". Klare 1998 *SAJHR* 178.

⁵⁴ *S v Sebejan* 1997 1 SACR 626 (W) 634.

⁵⁵ See *S v Orrie* 2005 1 SACR 63 (C).

contentious, the Canadian courts have also grappled with deciding the precise moment at which an individual is taken under detention.⁵⁷ In *R v Therens*⁵⁸ the Supreme Court found that an individual need not necessarily be subjected to physical detention for article 10 of the *Charter of Fundamental Rights* to be violated. In *R v Grant*⁵⁹ the Supreme Court found that an 18 year-old black man who had been stopped and asked some questions by a uniformed policeman had been detained. The uniformed policeman asked him to place his hands in front of himself and he was then joined by two plain-clothed police officials (who had initially urged the police official in uniform to have words with the accused) who flashed their cards and identified themselves as police officials and obstructed the accused's way forward. The accused was then asked by the uniformed police official what he had in his possession. He answered that he had a small bag of weed and a firearm. He was then arrested and only then was advised of his right to counsel. The Supreme Court held that the accused's right against arbitrary detention and to counsel had been violated. What these two Canadian cases indicate is that the threshold in relation to when a person is detained or arrested is very low.

3 Does section 106(1)(c) of the *Firearms Control Act 60 Of 2000* violate the individual's right to remain silent?

As already stated, the Act confers on police officials the power to request individuals to produce their firearms within seven days after such a request has been made.⁶⁰ The requirement is accompanied by the threat of penal sanction.⁶¹ In essence the individual has no choice in regard to the production of the firearm when required to do so by the police. The Act does not provide for any exception. The production of a firearm amounts to non-verbal communication. The fact that the request is accompanied by penal sanction elevates this form of communication to being involuntary and therefore a violation of the right to silence. In instances where the individual is able to produce the firearm there will be no issues. But what if the firearm has been

⁵⁶ Detention in Canada is the equivalent of arrest in South Africa. In Canada detention precedes arrest, whereas the contrary is the case in South Africa.

⁵⁷ *R v Grant* 2009 2 RCS 353 para 133.

⁵⁸ *R v Therens* 1985 1 RCS 613.

⁵⁹ *R v Grant* 2009 2 RCS 353. The reason why these police officials urged the police official in uniform to have a word with the accused was that they had observed him fidgeting with his coat and pants when they passed him. The prosecution had conceded that the police officials had not entertained any suspicion before they stopped him. It is submitted that in the South African context the court would have been inclined to conclude that a reasonable suspicion was formed by the two plain-clothed police officials.

⁶⁰ See s 106(3) of the Act.

⁶¹ See s 120(1) of the Act. In terms of Schedule 4 of the Act the failure to comply with s 106 is punishable by up to two years' imprisonment.

misplaced, lost or stolen? Is the individual not compelled to inform the police that he or she has committed an offence, thus involuntarily incriminating himself or herself?⁶²

Furthermore, section 118 of the Act creates a presumption that must be rebutted by reasonable doubt, namely that failure to comply with the police request to produce a firearm within the stipulated seven days shall be sufficient proof that the firearm has been lost.⁶³ The result of this presumption, in relation to the right to remain silent, is that an individual would not only be compelled to incriminate himself or herself in relation to the lost firearm but he or she would also be bound to testify at his or her trial at the threat that failure to testify would result in a conviction.⁶⁴ In addition to the afore-going, it should also be noted that section 120(8) creates offences related to the loss of firearms in certain circumstances. Inevitably, a report of a loss of a firearm in terms of section 106(1) of the Act has the potential of exposing the individual to prosecution either in terms of section 106(1) itself or section 120(8) of the Act.⁶⁵ Clearly an individual to whom this request is made and who has lost his or her firearm finds himself or herself trapped between Scylla and Charybdis.

At the time when the request to produce the firearm is made, the police might or might not (as section 106 does not provide for the circumstances under which the police official may request the individual to produce the firearm) be aware that the individual has or has not lost his or her firearm.⁶⁶ However, it would be nonsensical in the extreme for the police official to request the production of the firearm from an individual if he or she does not suspect that the firearm has been lost or stolen. One thing is certain though: at the time the police official requests the production of the firearm he or she must have harboured a particular belief about the presence or otherwise of the firearm. This brings about the question whether at the time the request is made to the individual the individual has the right not to comply with the request of the police official. If the individual who has misplaced or lost or had his or her firearm stolen has no choice but to comply with the police official's request, would not that amount to the violation of the individual's right to remain silent and not to be forced to give

⁶² See s 120(8) of the Act.

⁶³ The constitutionality of this provision is doubtful. See s 50 of the CPA; see *S v Manamela* 2000 3 SA 1 (CC).

⁶⁴ See 35(1)(c) of the *Constitution*; also see s 35(3)(h) and (j) of the *Constitution*. The provision also violates the right to be presumed innocent in that an individual will be convicted for failing to comply with the provision despite the existence of a reasonable doubt in the mind of the court.

⁶⁵ The prosecution has discretion to choose to proceed either in terms of s 106 or s 120 of the Act. See *S v Sehoole* 2015 2 SACR 196 (SCA).

⁶⁶ See s 108 of the Act.

self-incriminating information? Although the individual is not arrested, detained or accused, he is clearly a suspect. Should not therefore the right to remain silent accrue to the individual?

In *Sebejan Satchwell J*⁶⁷ defined a suspect as:

[o]ne about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved.

According to Satchwell J it would be unfair not to extend the right accruing to the arrested persons in terms of section 35 to suspects. The basis of the unfairness lies in the fact that although the arrested person has been made aware that he may be charged for committing an offence, the suspect is not placed on terms. The suspect may have no qualms about incriminating himself or herself. He or she may operate in the bliss of ignorance. Thus, the suspect is always

[i]n jeopardy of committing some careless or unwise act or uttering some incautious and potentially incriminating words which would subsequently be used against her in a trial.⁶⁸

It was on this basis that the court posited that the suspect is entitled to the rights that accrue to "an accused when arrested".⁶⁹

In contrast, in *S v Mthethwa*⁷⁰ the court found that the rights in section 35(1) did not accrue to a suspect. However, the court concluded on the facts of that case that the statement that the accused had made must be excluded on the basis that it was obtained in breach of the Judges Rules and its admission would render the trial unfair.

Schwikkard⁷¹ bemoans the reliance on Judges Rules for the exclusion of suspect's evidence on the basis that courts tend to dismiss them as merely administrative directives which are not binding. It is thus submitted that the right to silence must be extended to suspects despite the wording of the *Constitution*. In *Dawood v Minister of Home Affairs*⁷² the Constitutional Court held that the list of rights in the Bill of Rights is not exhaustive. In other words, although a right might not be expressly contained in the Bill of Rights, its existence might be

⁶⁷ *S v Sebejan* 1997 1 SACR 626 (W) 632.

⁶⁸ *S v Sebejan* 1997 1 SACR 626 (W) 633.

⁶⁹ *S v Sebejan* 1997 1 SACR 626 (W) 635.

⁷⁰ *S v Mthethwa* 2004 1 SACR 449 (E).

⁷¹ Schwikkard "Private Privilege" 138; *Khan v S* 2010 JOL 25782 (KZP) paras 27-28.

⁷² *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 28.

inherent in other rights in the Bill of Rights⁷³ or may be required by the values that underlie our constitutional enterprise, especially section 1(a) of the *Constitution*, which provides that the Republic is founded on human dignity, the achievement of equality and the advancement of human rights.⁷⁴ Furthermore, section 39 enjoins the court when interpreting legislation to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights. The requirement of a generous and purposive interpretation of the Bill of Rights mandates this approach.⁷⁵

However, in the context of this discussion, matters are complicated by the fact that the individual is not yet formally a suspect upon whom section 35 may confer protection, as argued above. In this respect one may argue that the police request is nothing more than an enquiry. However, that argument is devoid of substance. At the time the police official requests the production of the firearm, the likelihood is that he or she would have had a suspicion as to the whereabouts (at least that it has been lost) of the individual's firearm. Whether the individual is able to produce the firearm or not is neither here nor there. The vulnerability of the individual in this case is reinforced by the fact that failure to comply with the police official's request is a punishable criminal offence. He or she has no choice but to abide by the police request. Therefore, it is submitted that the individual to whom the police official makes a request to produce his or her firearm must, for all intents and purposes, be regarded as an arrestee or at least a detainee.⁷⁶ Failure to entertain a suspicion as regards the whereabouts of the individual's firearm gives unfettered discretion to the police official. This is undesirable in a constitutional dispensation. Therefore the unqualified reading of this provision may result in its unconstitutionality on that score alone.⁷⁷ It is unlikely that courts will embrace this open-ended reading. The Constitutional Court has held that where a statutory provision is open to two interpretations, one constitutional and another not, courts must prefer the constitutional interpretation over the one that would lead to the invalidity of the provision.⁷⁸

Given the above, it is submitted that an individual may rely on the provisions of sections 35(1) and (3) of the *Constitution* at his or her subsequent trial, despite

⁷³ See *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 101.

⁷⁴ See *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) paras 32-41, the CC commenting on the proper approach to be followed in the certification of the Constitution process.

⁷⁵ See *S v Zuma* 1995 2 SA 642 (CC) para 14 *et seq.*

⁷⁶ In this regard see Schwikkard "Arrested, Detained and Accused Persons" 752.

⁷⁷ See *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); see s 108 of the Act.

⁷⁸ De Ville *Constitutional and Statutory Interpretation* 266.

the fact that at the stage the request was made he or she was neither an arrested nor an accused person in the true sense of the words.⁷⁹ The argument that suspects are entitled to rely on the protection of section 35 of the *Constitution* is reinforced by the fact that the right to silence is not only a procedural right but a substantive right as well. As a substantive right, this right is extant whether or not certain procedures (like arrest or a criminal trial) have begun. The rights to privacy and dignity give effect to the right to silence as a substantive right.⁸⁰ In other words, a person who cannot rely on section 35 of the *Constitution* for the right to remain silent may rely on the rights to privacy and dignity in order to challenge legislative provisions that violate his or her right to remain silent. This is underscored by the fact that even where the accused "voluntarily" answers questions by the police official prior to being warned of his or her constitutional right to silence, the court may, in the exercise of its discretion, exclude such evidence.⁸¹ In *Salinas v Texas*⁸² the US Supreme Court held that there was no duty on the police to read the *Miranda* warnings to a witness who was not in custody. Such a witness, if he or she wishes to rely on the Fifth Amendment, has to expressly invoke it. It is doubtful whether this position would obtain in South Africa. If it is admitted that the suspect may rely on the right to remain silent then this right is applicable whether or not the suspect invokes it or not, unless he or she expressly or implicitly waives it. In

⁷⁹ See Ally 2010 *CILSA* 242.

⁸⁰ Jackson 2009 *ICLQ* 836. Writing about the European Court Jackson posits that "the case law of the Court has focused more on those aspects to do with upholding the dignity and will of the individual accused than on the more procedural aspects of the right which link it to defence rights when a suspect or accused is called upon to answer criminal investigations. While the substantive dimensions may be subject to proportionate curtailment, the procedural dimensions have at their root a need to enable the accused to mount an effective defence which cannot be balanced away against other considerations." Although Jackson criticises this approach, in the South African context this approach is not ill-conceived. It is readily admitted that "substantive right" does not mean the same thing as "substantive fairness". It is submitted that the former may be relied upon to achieve the latter. It is trite that during apartheid the phenomenon of fair trial was limited to the procedural aspects only, which significantly attenuated the "substantive aspects". For instance, by disregarding the suspect's right to dignity or to be free from violence the apartheid courts were prepared to admit evidence despite the fact that the suspect might have been tortured or detained for a considerable length of time, and kept *incommunicado*. For an elaborate discussion on this see Snyckers and Le Roux "Criminal Procedure" 51-1 to 51-38.

⁸¹ *S v Van der Merwe* 1998 1 SACR 194 (O) quoted in *Magwaza v S* 2016 1 SACR 53 (SCA) para 21.

⁸² *Salinas v Texas* 570 US 1 (2013). In this case the suspect, who was questioned by the police for double murders, voluntarily answered the questions posed to him. During the questioning he was asked whether the casings found at the crime scene would match his shotgun. The witness did not answer and started to fidget. The prosecution used his reaction as evidence of his guilt. He was found guilty. He lodged an appeal on the basis that the reliance by the jury on his silence violated his Fifth Amendment right not to be compelled to testify against himself. The Court of Appeals and the Supreme Court dismissed his application.

Canada the use of some persuasion to encourage the accused to break his silence does not violate section 7 of the Charter despite the accused having asserted his right to silence.⁸³ Again, it is doubtful that this approach would find resonance in the South African jurisprudence.

The position of the individual who is requested to produce his or her firearm in terms of section 106 of the Act is not akin to the facts in *S v Van der Merwe*.⁸⁴ In that case the accused had spontaneously made an exculpatory statement to the police official who had not entertained a suspicion that the accused could have been involved in the commission of the crime. After this statement the police official urged the accused to remain silent and he then read him his rights. The court found the statement to be admissible on the grounds of the spontaneity of the statement and because the accused was not even a suspect at the time he made the statement. Rather, the issue we are seized with in this discussion is more in line with the facts in *S v Mthethwa*.⁸⁵ In this case, when the police officials went to the accused's dwelling to search for a firearm with a warrant, they had already been informed that the accused possessed one. In other words, they went there with the suspicion that the accused possessed a firearm. On their arrival they requested permission from the accused to search his shack. He granted them permission and they found the firearm in the shack, where-after they questioned him about where he got the firearm from and the accused answered that he had picked it up. It was only then that the police official explained his rights to the accused. There were other people in the shack so the accused could not be convicted of possession, as the state evidence was insufficient to prove that it was the accused who possessed the firearm. The court a quo relied on the statement the accused made to the police officials to convict. On appeal, the conviction was set aside on the basis that the police officials had failed to administer the necessary warnings to the accused before they questioned him.

4 The limitation of rights: A brief overview

If it is accepted that the rights in section 35(1) or (3) of the *Constitution* accrue to the suspect, the next question is whether such rights could be limited in terms of the limitation clause. It is trite that the rights in the Bill of Rights are not absolute; they may be limited in terms of the law of general application where

⁸³ *R v Singh* 2007 3 RCS 405.

⁸⁴ *S v Van der Merwe* 1998 1 SACR 194 (O). The court intimated that whether the rights were read to the accused in terms of Judges' Rules or section 25 of the *Interim Constitution* applicable made no difference as they were substantially similar. I would like to express my appreciation of the assistance of Prof Annette Van der Merwe in translating the case for me.

⁸⁵ *S v Mthethwa* 2004 1 SACR 449 (E).

the limitation is reasonable and justifiable in an open and democratic society, taking into account a number of factors enumerated therein. Needless to say, the limitation of rights applies to all rights in the Bill of Rights.⁸⁶ According to Currie and de Waal "limitation" is synonymous with "justifiable infringement".⁸⁷

The limitation analysis involves a two-stage enquiry. At the first stage the court must determine whether the applicant is the bearer of the right, the contours of the right in question, and whether the impugned legislation violates the right in question.⁸⁸ The duty to prove these requirements rests on the applicant. The first stage involves two inquiries. The first enquiry (which relates to the boundary of the right) is interpretive. The second enquiry depends on the nature of the infringement. According to Cheadle, infringement may take place either intentionally (as where the provision of legislation (directly) limits a constitutional right) or the infringement might not be intentional (as where the provision may be overly broad or indirectly infringe upon a right). In relation to an intentional infringement the enquiry is interpretational, and in relation to an unintentional infringement the enquiry is factual or evidential (in relation to the effect of the infringement).⁸⁹ At this stage the court must interpret the right in question generously.⁹⁰ It is only when these requirements are satisfied that the court moves to the second stage of analysis. This involves the court's establishing whether the impugned legislation is reasonable and justifiable in an open and democratic society.⁹¹ In this case it has been established that the impugned provision of the Act violates the applicant's right to remain silent. The limitation analysis will therefore proceed to the next stage.

This enquiry involves the justification of the infringement by the respondent. Unlike the first stage, in this stage the court requires evidence or facts to determine whether the limitation is reasonable and justifiable having regard to a number of factors set out in section 36 of the *Constitution*.⁹² It is common cause that these factors are not a closed list, nor does a court considering the limitation of a right in terms of section 36 of the *Constitution* have to consider them sequentially, but it does have to look at them holistically taking into account the facts of each case.⁹³ These factors are just an aid in the

⁸⁶ Currie and De Waal *Bill of Rights Handbook* 152.

⁸⁷ Currie and De Waal *Bill of Rights Handbook* 151.

⁸⁸ Cheadle "Limitation" 697-698.

⁸⁹ Cheadle "Limitation" 696-697; Currie and De Waal *Bill of Rights Handbook* 154.

⁹⁰ See for example *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 48.

⁹¹ See for example *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (SA 406 (CC) para 56-83; *S v Manamela* 2000 (3) SA 1 (CC) para 26.

⁹² Currie and de Waal *The Bill of Rights* 154.

⁹³ *S v Manamela* 2000 3 SA 1 (CC) para 32.

determination of whether "the limitation is reasonable and justifiable". Therefore, in a number of cases the Constitutional Court has undertaken a limitation analysis without reference to all the factors tabulated in section 36(1).⁹⁴ Is the limitation of the right to silence in terms of the Act reasonable and justifiable? This is the question we deal with in turn.

5 Is the limitation of the right to silence in terms of section 106(1)(c) of the Act reasonable and justifiable?

The proliferation of illicit guns and their use in the commission of crimes calls for measures to ensure responsible gun ownership.⁹⁵ The business of the ownership of firearms is regulated for good reason. The Constitutional Court, writing in another context, the supposition that is apt to this discussion, had this to say:

Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products, or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. The objective of such laws is to put pressure on the persons responsible to take pre-emptive action to prevent harm to the public.⁹⁶

And in *South African Hunters and Game Conservation Association v Minister of Safety and Security*⁹⁷ the court held that:

There is no question that firearms are hazardous and that possession and ownership must be strictly controlled. A failure to comply with the Act exposes the public to potential harm, especially in a society like ours where violence is rife.

The regulation and control of gun ownership by the state could be likened to the terms and conditions of a contract to which a party voluntarily binds himself or herself. In the event of a breach the other party must have recourse to remedy the breach. The breach in our case is the failure to exercise responsible ownership. A term of the contract for the ownership of a firearm is that the owner must at all times ensure that the firearm is not negligently lost or stolen. It is thus a factual matter within the exclusive knowledge of the individual firearm owner as to the whereabouts of the firearm or the circumstances that have led to the loss or theft of the firearm. It might be, for instance, that the firearm was lost during a robbery or housebreaking. This the firearm owner must report, and

⁹⁴ See among others *S v Manamela* 2000 3 SA 1 (CC) para 32; *Hassan v Jacobs* 2009 5 SA 572 (CC) paras 40-43.

⁹⁵ See *S v Manamela* 2000 3 SA 1 (CC) para 27.

⁹⁶ *S v Manamela* 2000 3 SA 1 (CC) para 29.

⁹⁷ *South African Hunters and Game Conservation Association v Minister of Safety and Security* 2017 3 All SA 1059 (GP).

conceivably there would be no consequences. This pro-active conduct on the part of the firearm owner may minimise the chances of that firearm's being used in the commission of crime. Combating the proliferation of firearms is not the sole preserve of the state. Responsible citizens (especially owners) must take the necessary steps to ensure that legal firearms do not land in the hands of criminals, either wittingly or unwittingly.⁹⁸

It is only through attributing sanction for the breach of responsible ownership that this goal could be achieved. Not unlike the traffic regulations where the owner of the motor vehicle is presumed to be the driver,⁹⁹ only the owner of the gun who must exercise sole responsibility over it can account for its whereabouts. As Cameron J¹⁰⁰ posited, this measure "accords with practical common sense and its production produces equitable results". The limitation targets with precision the mischief it has identified.¹⁰¹ In *Manamela*¹⁰² the Constitutional Court commenting on the offence of receiving goods knowing them to have been stolen in contravention of section 37 of the *General Law Amendment Act* 62 of 1955 said that

there is nothing unreasonable, oppressive or unduly intrusive in making an accused who has already being shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely, that he or she had a reasonable cause for believing that the goods were acquired from the owner or from some other person who held the authority of the owner to dispose of them.

In relation to our discussion this dictum indicates that it could not be unreasonable for the state to put in place measures imposing certain responsibilities on individuals who consciously enter into the regulated space.

Furthermore, courts have upheld the limitation of the right to remain silent in relation to provisions that are more invasive than section 106(1) of the Act. In a number of cases the attack on section 37 of the CPA as being an unreasonable and unjustifiable limitation of the right to silence has been dismissed by our courts. This provision allows for the taking of bodily samples for the purposes of ascertaining prints and the bodily appearance of the accused. In *Levack v Regional Magistrate, Wynberg*,¹⁰³ for instance, the Supreme Court of Appeal

⁹⁸ *S v Manamela* 2000 3 SA 1 (CC) para 89.

⁹⁹ *S v Manamela* 2000 3 SA 1 (CC) para 29.

¹⁰⁰ *S v Meaker* 1998 8 BCLR 1038 (W).

¹⁰¹ *S v Manamela* 2000 3 SA 1 (CC) para 34.

¹⁰² *S v Manamela* 2000 3 SA 1 (CC) para 38.

¹⁰³ *Levack v Regional Magistrate, Wynberg* 2003 1 SA 187 (SCA). However, the Court did not deal with whether such a compulsion infringed the accused's right to fair trial. In this regard the Court held "[a]ll these are issues for determination at the trial, which has not begun. Once the appellants have pleaded, the trial court will be vigilant to ensure

held that it was permissible to compel an accused to submit a voice sample for analysis. The fact that the appellants in *Levack* were already accused and thus entitled to section 35(3) of the *Constitution* protection clearly suggest that the chances that the individual, who on the face of it does not qualify for the same protection, will succeed in his or her section 106(1) of the Act challenge are tenuous at best.

6 Conclusions

This note has sought to ascertain whether section 106(1)(c) of the Act violates the individual's right to remain silent as guaranteed in section 35 of the *Constitution*. Although the provision does not relate to individuals who have been arrested or accused, as envisioned by section 35 of the *Constitution*, it is contended in this note that the provisions of section 35 must be read to include persons to whom section 106 applies. In short, section 106(1)(c) of the Act violates the individual's right to remain silent. However, it is contended that this violation of the right to remain silent is in accordance with the limitation clause.

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observance of their rights" (para 23). The Court's reasoning in this regard is unsatisfactory. The purpose of obtaining voice samples from the applicant was with a view of using them at trial. The Court was called to answer a general question whether such compulsion violated the appellants' fair trial right. The issue was not about whether the voice sample was conclusive to prove the guilt of the accused, as suggested by the SCA. That indeed was the question for determination by the trial court. The question was therefore ripe for determination by the Court. Even after the determination of this issue, the trial would be seized with technical aspects. See *S v R* 2000 1 SACR 33 (W) 39.

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CPA	Criminal Procedure Act 51 of 1977
ICLQ	International and Comparative Law Quarterly
Int'l J Evidence & Proof	International Journal of Evidence and Proof

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