

PART ONE

CHAPTER 1

THE RIGHT TO MEANINGFUL AND INFORMED PARTICIPATION IN THE CRIMINAL PROCESS: ITS ORIGINS AND CONTEXT

1.1 BACKGROUND AND CONTEXTUAL REMARKS

1.1.1 THE ROLE OF THE CONSTITUTION

Parliamentary sovereignty has been regarded as the hallmark of constitutional development in South Africa since the beginning of the 19th century.¹ However, the advent of the Interim Constitution Act 200 of 1993 and the Final Constitution Act 108 of 1996, led to the introduction of a new constitutional dispensation and democratic order in South Africa.² Therefore, the old system of parliamentary sovereignty was replaced with one of constitutional supremacy.³ The South African Constitution is regarded as the product of the struggle for a democratic society in South Africa. The Bill of Rights in Chapter 2 aspires to be a "historic bridge" between the past ridden with strife, suffering and the injustices of apartheid, and the future where human rights and democracy will be the rage.⁴ Although section 35 of the Bill of Rights entrenches basic norms of criminal procedure, the Bill of Rights itself does not replace the ordinary rules and principles of criminal procedure.⁵ The ordinary statutory and common law rules and principles still govern criminal proceedings. However, they must now comply with the provisions of the Bill of Rights.⁶ The Constitution is concerned with building a new democratic South Africa based on freedom and equality. In interpreting the Constitution, the courts will have to consider its language and the history, traditions and moralities of the South African people. Therefore, the Bill of Rights will be seen as a powerful instrument in the reconstruction and transformation of South African society. However, the Bill of Rights should not be regarded as a panacea for all ills. Rather, it should be

¹ This meant that fundamental rights were usually dealt with under the framework of parliamentary sovereignty. See Mubangizi "The constitutional rights of prisoners in South Africa: a critical review" (2002) *De Jure* 42.

² It should be noted that the Interim Constitution Act 200 of 1993 came into effect on 27 April 1994, whilst the Final Constitution came into effect on 4 February 1997. Unless there is direct reference to the Interim Constitution, the word "Constitution" will usually refer to the Constitution Act 108 of 1996.

³ See s 2, chapter 1 of the Constitution.

⁴ See for example, s 35 of the Bill of Rights, which provides for the rights of arrested, detained and accused persons.

⁵ See Steytler *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* Butterworths (1998) at 1-6.

⁶ See De Waal *et al The bill of rights handbook* Juta (2000) at 502.

understood and used within the structural context of the whole Constitution, from which it must draw its strength. The success of the Bill of Rights will not only depend on how the judiciary or the legal profession deals with it, but also how assertively and judiciously those whose rights are entrenched, will invoke this instrument.⁷

1.1.2 THE CLASSIFICATION OF CRIMINAL PROCEDURAL RIGHTS OF THE INDIVIDUAL⁸

1.1.2.1 TRADITIONAL CLASSIFICATION

The Universal Declaration of Human Rights recognises that "all human beings are born free and are equal in dignity and rights."⁹ Human rights refers to the rights of individuals in society.¹⁰ Although all individuals are said to count equally, it is accepted that their rights are not absolute.¹¹ It is universally accepted that the idea of human rights was formulated in the West during World War II.¹² Therefore, the concept of human rights originated in reaction to totalitarian rule and the arbitrary action of organs of state.¹³ Human rights are usually divided into two categories namely, substantive or material rights and freedoms, and procedural rights.¹⁴ Principles found in international instruments such as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and

⁷ See Du Plessis and Corder *Understanding South Africa's transitional bill of rights* Juta (1994) at 137.

⁸ The term "individual" refers to the arrested, detained and accused person. Section 35 of the Constitution provides for the rights of arrested, detained and accused persons. Usually, a person is first "arrested", then "detained" and finally "accused". Therefore, detention comes after arrest, which is then followed by a formal charge. See Mubangizi *op cit* 43. It should be noted at the outset that in South African criminal procedure it is customary to use the term "accused" when referring to the detainee or arrestee. Unless there is specific reference to the term "detainee", the term "accused" will be used. Also note that for purposes of convenience, the term "accused" will usually be referred to in the masculine form.

⁹ See Macfarlane *The theory and practice of human rights* (1985) at 152.

¹⁰ According to Joubert, human rights may be defined as rights and freedoms directed at the protection of the individual against arbitrary exercise of executive powers, unless such protection is limited by objective legal rules. For a detailed discussion of the definition of human rights, see Joubert *Die legaliteitsbeginsel in die strafprosedure* (unpublished doctoral thesis) Unisa (1995) at 88-90.

¹¹ To illustrate this, derogations are possible where, for example, there is a state of "grave" public emergency. It should be noted that limitations of human rights will differ from system to system. See *inter alia*, Rautenbach "Die begrip menseregte as sistematiserende faktor in die Suid-Afrikaanse publiekreg" (1976) *Tydskrif vir die Suid-Afrikaanse Reg* 168 at 170.

¹² However, the basic underlying values such as equality before the law, freedom from slavery and torture are not foreign to the East.

¹³ See Neethling "Enkele gedagtes oor die juridiese aard en inhoud van menseregte en fundamentele vryhede" (1971) *THRHR* 240.

¹⁴ See *inter alia*, Carpenter *Introduction to South African constitutional law* (1987) at 94. It should be noted at the outset that for purposes of this thesis, only the criminal procedural rights of the accused will be addressed.

Fundamental Freedoms have permeated the domestic laws of states.¹⁵ As Joubert notes, these international principles can also be found in Chapter 2 (the Bill of Rights) of the Constitution.¹⁶

Procedural human rights can be defined as a set of legal rules prescribing basic standards with which the conduct of officials of the executive must comply.¹⁷ A list of "classic" procedural human rights can be found in international and constitutional law charters. This list includes *inter alia*, the prohibition against cruel, unusual or degrading punishment, prohibition against arbitrary arrest and detention and the right to a fair trial.¹⁸ The remaining criminal procedural rights such as the right to be informed about the nature of the charge, the right to legal representation, the right to a speedy trial and the right to confrontation are also found in international instruments.¹⁹ Joubert points out that the criminal procedural human rights (twenty four *in toto*) have been mentioned without any comment and in a haphazard fashion in the constitutional and international law instruments such as the Universal Declaration of Human Rights.²⁰ The unstructured and "confused" classification of the criminal procedural human rights in the international instruments calls for some clarity.

1.1.2.2 OTHER METHODS OF CLASSIFICATION

Some attempts at clear and concise classification have been made. To illustrate this, section 35 of the Constitution demonstrates a rudimentary pigeonholing of rights.²¹ However, Joubert opines that the particular grouping of the criminal procedural human rights in section 35 is unsystematic because various rights are often bundled together in the same phrase.²² To illustrate this, section 35(3)(c) makes reference to both the right to a public trial and the right to an ordinary trial in one phrase. Similarly, section 35(3)(h) refers to both the right to be deemed innocent and the right to remain silent in a single phrase. Therefore, the classification in section 35 is open to criticism.

¹⁵ See GA Res 217A (III) and UN Doc A 810 (1948) respectively. Also see Joubert (1995) *op cit* 91.

¹⁶ *Id.*

¹⁷ See Van der Vyver *Seven lectures on human rights* (1976) at 83.

¹⁸ See Joubert (1995) *op cit* 92-93 for a complete list of these rights.

¹⁹ *Ibid* at 94-96 for a complete list of these rights.

²⁰ *Ibid* at 96. However, all these rights are found in the 1996 Constitution, thus making it one of the most progressive constitutions in the world.

²¹ Section 35(1) deals with the rights of arrested persons, s 35(2) deals with the rights of detained persons whilst s 35(3) deals with the rights of accused persons. The rights of arrested and detained persons regulate the process of depriving persons of their freedom for the purpose of charging them with a criminal offence. The rights of accused persons deal with the fairness of the criminal trial itself. See De Waal *et al op cit* 502.

²² Consequently, this grouping of rights leads to confusion and complications. See Joubert (1995) *op cit* 470.

Steytler also attempts some grouping together of the criminal procedural rights.²³ According to him, the approach should be to seek to harmonise the public's demand and right to effective protection against crime with the constitutional rights of persons investigated for, accused or convicted of crime.²⁴ However, it appears that Steytler's attempt at classification closely parallels that of the grouping of rights in chapter 2 of the Bill of Rights. To illustrate this, chapter 5 of Steytler's book, which is entitled "an arrested accused's right to remain silent", addresses the right to remain silent (s 35(1)(a)), the right to be informed of that right (s 35(1)(b)) and the right against compelled confessions and admissions (s 35(1)(c)). Nevertheless, Steytler's approach appears to be cohesive and structured.

1.1.2.3 JOUBERT'S CLASSIFICATION OF CRIMINAL PROCEDURAL HUMAN RIGHTS

Joubert proposes a certain scheme of classification in his thesis, whereby the criminal procedural human rights are divided into specific groups or categories to achieve a workable system.²⁵ Procedural human rights are divided into the following four main categories:²⁶

- 1.1.2.3.1 The overarching rights
- 1.1.2.3.2 The classic rights to life, physical integrity and property (including legal property like privacy and dignity)
- 1.1.2.3.3 The rights that are subspecies of the right to informed and meaningful participation in the criminal process
- 1.1.2.3.4 The rights that are subspecies of the right to a fair trial

1.1.2.3.1 THE OVERARCHING RIGHTS

The rights in the Interim Constitution are said to apply equally.²⁷ However, Joubert proposes that there are some criminal procedural rights which precede the other rights because they are overarching rights. The overarching rights are those rights that are important throughout the course of the criminal process and their effect is not confined to a specific phase of the process. The existence of other rights, moreover, often depends on these overarching rights. The following rights are

²³ See the classification in Steytler *Constitutional criminal procedure* xi-xxiii.

²⁴ See Steytler's comments in the preface to his book. See Steytler *Constitutional criminal procedure* v.

²⁵ It should be noted that this classification is not cast in stone. The discussion on the classification system will demonstrate that the right to protection against irregular pre-trial executive action is classified under the classic rights to life, physical integrity and property. This is because the actions of executive agencies involved in *inter alia*, arrest and search functions, threaten one's legal interests. The right to present one's case is classified under the comprehensive right to informed and meaningful participation in the criminal process. However, the right to protection against irregular pre-trial executive action and the right to present one's case may also be classified under "a right of access to the legal system". See Joubert (1995) *op cit* 470.

²⁶ For details of the classification put forward by Joubert, see Joubert (1995) *op cit* 472-540.

²⁷ See the comments of Froneman J in *Gardener v Whitaker* 1994 (5) BCLR 19 (E).

examples of overarching rights, namely, the right of access to the law, the right to legal representation or assistance, the right to impartial adjudication, the right to equality before the law and the right to remedies.²⁸ The right to legal assistance/representation depends on the right of access to the law. Similarly, the right of access to the law is related to the right to impartial adjudication. In order for an individual to exercise his right of access to the law, he must have his rights explained to him.²⁹ Therefore, an understanding of these overarching rights will facilitate one's understanding of the other procedural rights.

1.1.2.3.2 THE CLASSIC RIGHTS

The classic rights to life, physical integrity, liberty and property prominently feature in international law and constitutional law charters worldwide.³⁰ The Constitution also provides that every person has the right to life (s 11), human dignity (s 10), freedom and security of the person (s 12), privacy (s 14), freedom of movement and residence (s 21) and property (s 25). The following rights are discussed by Joubert under classic rights, namely, the right to a speedy trial, the right to protection against irregular pre-trial executive action, the right to bail and the right to protection against cruel and unusual punishment and torture.³¹ Therefore, the classic rights comprises those rights which protect the individual's physical integrity and his legal property.³² These rights may be infringed by the operation of the criminal process. The right to a speedy trial applies to the freedom and security of the individual. It is aimed at reducing the possibility of pre-trial detention or delays prejudicing the defence case.³³ The right to protection against irregular pre-trial executive action protects the legal property or physical integrity of the individual. Therefore, this right is directed against irregular action by executive organs such as arrest, detention, search and seizure to name a few. The right to bail is related to the freedom of the person whilst the right to protection against cruel and unusual punishment and torture is aimed at the protection of the physical integrity of the individual. Therefore, the classic rights ensure that the individual's physical integrity and personal property are safeguarded from any unjustifiable infringement on the part of the state.

²⁸ For a detailed discussion about these rights see Joubert (1995) *op cit* 472-489. The discussion of the composite right in chapter 2 will also elaborate on these overarching rights.

²⁹ The right to have one's rights explained is closely related to the right to understand. The right to understand is classified under the comprehensive right to meaningful and informed participation in the criminal process. The chapter on the right to understand will elaborate on this.

³⁰ See Joubert (1995) *op cit* 91.

³¹ *Ibid* at 489-510 for a detailed discussion about these classic rights. Also see Steytler *Constitutional criminal procedure* 41-108 (right to freedom and security of the person, right to life and right to privacy), 131-147 (right to bail) and 403-428 (right against cruel, inhuman and degrading punishment).

³² It should be noted that the other two composite rights namely, the right to informed and meaningful participation in the criminal process and the right to a fair trial are aimed at the participation of the individual in the criminal process.

³³ See Joubert (1995) *op cit* 491.

1.1.2.3.3 THE RIGHT TO INFORMED AND MEANINGFUL PARTICIPATION IN THE CRIMINAL PROCESS

The rights forming part of this composite right do not fall under the category of overarching rights. The various rights are grouped together because they are related to the individual's ability to participate in the criminal process as a legal subject, and not as an object of the proceedings.³⁴ Therefore, they are "isolated" because they share the necessary elements to fall within this group. According to Joubert, the heading is merely a convenient collective term for these rights.³⁵ The following rights are discussed under this category, namely, the right to information, the right to be prepared for one's trial, the right to be present, the right to present one's case, the right to understand and the right to confrontation.³⁶ These rights ensure that the individual will not take part in the criminal process from an unfavourable position. They form part of the comprehensive right to a fair trial.

1.1.2.3.4 THE RIGHT TO A FAIR TRIAL

The concept of a "fair trial" is not defined in section 35(3) of the Constitution.³⁷ The courts have been assigned the task to interpret this concept.³⁸ The notions of fairness and justice is used as the yardstick to determine the contents of the right to a fair trial.³⁹ The recent approach to determine the test for a fair trial is to evaluate the case from a holistic point of view.⁴⁰ The right to a fair trial also features in all international instruments.⁴¹ The following rights are discussed by Joubert, namely,

³⁴ The discussion on the accused in historical perspective in para 1.2 below will elaborate on the individual's erstwhile position as object of the proceedings.

³⁵ Joubert (1995) *op cit* 511.

³⁶ *Ibid* at 511-524 for a discussion about these rights. This thesis takes over the discussion about this composite right under the heading "The right to meaningful and informed participation in the criminal process". The detailed discussion of the composite rights in the various chapters (namely, chapters 5-10) will elaborate on these rights.

³⁷ Section 35(3) provides that every accused person has a right to a fair trial. It enumerates a list of rights to be included such as *inter alia*, the right to be informed of the charge with sufficient detail to answer it (35(3)(a)) and the right to have adequate time and facilities to prepare a defence (35(3)(b)). It should be noted that some of these rights will be dealt with under the discussion of the composite rights.

³⁸ Indeed, it has been stated that the framers of the Constitution intended s 35(3) to make the courts the custodians of fundamental rights. See the comments of Hurt J in *Motala v University of Natal* 1995 (3) BCLR 374 (D).

³⁹ See the comments of Singh AJ in *S v Makhatini* 1995 (2) BCLR 226 (D).

⁴⁰ See *S v Tshidiso* 2002 (1) SACR 207 (W), where the test to determine a fair trial was laid down. The court held that the test to determine whether an accused's right to a fair trial is violated is to evaluate from a holistic point of view, that is, having regard to the conduct and proceedings as a whole, the causal impact on the evidence obtained and the verdict of an alleged irregularity.

⁴¹ See *inter alia*, s 10 of the Universal Declaration of Human Rights, s 14(1) of the International Covenant on Civil and Political Rights and s 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Cachalia *et al Fundamental rights in the new*

the right to a trial, the right to a public trial, the right to be deemed innocent, the right to protection against double jeopardy, the right to remain silent, the right to just and fair rules of justice and the right to protection against unfavourable rules of procedure and retroactive punishment.⁴² However, the rights to a fair trial are not regarded as a closed list and may be expanded by judicial interpretation.⁴³

1.1.3 DIRECTION AND FOCUS OF THESIS

The thesis examines the sub-rights forming the components of the composite right: "the right to meaningful and informed participation in the criminal process".⁴⁴ These are the right to information, the right to understand, the right to be prepared, the right to be present, the right to confrontation and the right to present one's case. The aim of these sub-rights is to ascertain whether the individual is adequately informed of the charges against him, whether the individual is adequately informed of the case he has to meet, whether the individual is "fit" to stand trial, whether he understands the charges brought against him, whether he is able to confront the "victim" face-to-face, adduce and challenge evidence, the extent of his participation and the nature of his defence. The sub-rights are not of an overarching nature like the right of access to the law or the right to legal representation.⁴⁵ The sub-rights are grouped together because they are connected to the ability of the suspect or the accused to participate in the criminal proceedings as a legal subject and not as the object of the proceedings.⁴⁶ Therefore, the heading "meaningful and informed participation in the criminal process" is a convenient collective term for these rights that share necessary elements to fall within this group. The sub-rights form part of the comprehensive right to a fair trial, which embraces the rest of the basic procedural rights of the individual.

These rights must be explained to the accused in order for him to exercise his rights effectively. Knowledge of the existence of one's rights and the scope thereof

constitution Juta (1994) at 83-84.

⁴² See Joubert (1995) *op cit* 524-540 for a detailed discussion of these rights. A detailed discussion of these rights is beyond the scope of this thesis. However, both the right to a trial and the right to a public trial are related to the following sub-rights, the right to confrontation and the right to present one's case. The relevant chapters on these sub-rights will elaborate on this. Similarly, the right to be informed of the right to remain silent is discussed under the sub-right the right to information. The chapter on the right to information (chapter 5) will elaborate on this.

⁴³ Cachalia *et al op cit* 84.

⁴⁴ The thesis expands on Joubert's discussion of the composite right to informed and meaningful participation in the criminal process.

⁴⁵ The overarching rights like the right to access to the law and the right to legal representation span the entire spectrum of the criminal process. They are also the key to the exercise of other rights for example, the right to legal representation depends on the right to access to the law. If one has no access to the courts, then the right to legal representation is meaningless.

⁴⁶ In primitive times, the accused was the object of the criminal proceedings. See para 1.2 below for a discussion of the development of the accused from medieval times to the present time.

determines one's claims to exercise such rights.⁴⁷ This is especially pertinent to an unrepresented accused whose rights must be explained to him.⁴⁸ The right to have one's rights explained to him is closely related to the right to understand, as it is imperative that an accused understands the charges against him. Therefore, an accused must be "fit" to be tried. Similarly, an accused must be furnished with relevant information such as the reason for his detention, the scope and extent of the state's case against him and the right to legal assistance. An "informed" accused will be able to exercise his right of access to the law effectively. He will also be able to prepare an effective defence. It is also important that the accused be present at his trial so that he can confront his accusers face-to-face and present his case effectively in court. Therefore, an accused must be aware of his rights before he can assertively and judiciously invoke them.

South Africa is presently experiencing an enormous crime wave. This puts tremendous pressure on the courts to satisfy the public demand for protection against criminals. At the same time, the Constitution has placed constraints on the powers and functions of the police, prosecution authorities and the courts. Therefore, the courts have to maintain a balance between the public need to address crime and the protection of the constitutional rights of the accused. The thesis examines aspects of the position of the accused in South Africa. Here, the Criminal Procedure Act 51 of 1977 (hereinafter, referred to as the "Act") and the Constitutional position are examined.⁴⁹ The following foreign jurisdictions are examined under comparative law: the United States of America, the United Kingdom, Canada, New Zealand, Australia, Germany and some Islamic legal systems. However, the need arises for foreign case law to be treated with circumspection.⁵⁰ The thesis will attempt to show how the South African courts have risen to the challenge in attempting to protect the rights of accused persons in line with the new constitutional dispensation. The thesis will also attempt to answer the question whether the future of South Africa as a democratic country in which human rights play a pivotal role has been confirmed. To this end, problems experienced by individuals in asserting their basic procedural rights will be examined and workable solutions will be proposed to address these problems. The thesis also addresses to what extent approaches from these foreign

⁴⁷ See *inter alia*, *S v Langa* 1969 (1) PH H109 (N); *S v Mzo* 1980 (1) SA 538 (C) and *S v Radebe*, *S v Mbonani* 1988 (1) SA 191 (T).

⁴⁸ See *S v Rudman* 1989 (3) SA 368 (E), where the learned judge Cooper J stated:

"At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights."

⁴⁹ It should be noted that the Constitution did not revolutionise the law of criminal procedure. Although the Constitution provided a climate of respect for human rights, it merely entrenched the time-honoured criminal procedural rights found in the Act.

⁵⁰ In *Shabalala v Attorney-General of Transvaal* 1994 (6) BCLR 85 (T), Cloete J warned that the power granted in s 35(1) of the Interim Constitution regarding comparable foreign case law, should be exercised with circumspection, because a real risk exists for the misinterpretation of the foreign legal position.

jurisdictions can be implemented in the South African context. Thus, principles extracted from foreign jurisdictions are applied to the relevant South African context if they are workable.

Part 1, Chapter 1, will firstly address the origins of the composite right in question, namely the right to meaningful and informed participation in the criminal process. To this end, the role of the Constitution in creating a culture for human rights and the classification of criminal procedural human rights will be examined. Thereafter, the impact of peripheral doctrines and phenomena will be discussed. This section will examine the historical perspective of the accused, and trace his development from primitive times to the present time. Thereafter, Part 2, Chapter 2 will examine the reason for the existence of the composite right, examine the reason for the selection of the sub-rights and their relation to the overarching rights, and discuss the practical results of isolating and analysing the composite right. Part 3, Chapter 3 will examine the definitions of the key words in the title, namely, "meaningful", "informed" and "participation". Part 4, which comprises the bulk of the thesis, contains the overview of the various sub-rights in six chapters. The six chapters will be discussed in this order: the right to information, the right to understand, the right to be prepared, the right to be present, the right to confrontation and the right to present one's case. The reason for this order is that it is imperative that the accused is informed about the case that he has to meet. If the accused understands what he is being charged with, then he can prepare accordingly for his trial. Similarly, the accused must be prepared before he can present his case. Then only can he participate meaningfully in the criminal process. Part 5 will offer conclusions and recommendations.

1.2 THE ACCUSED IN HISTORICAL PERSPECTIVE FROM OBJECT TO THE SUBJECT OF THE PROCEEDINGS

1.2.1 INTRODUCTORY REMARKS

"It is not the activity of the present moment but wise reflections from the past that help us to safeguard the future."⁵¹ History informs our understanding of the present and our expectations about the future. Therefore, it is necessary to trace the historical development of the rights of the accused from primitive times when he was regarded as the object of the proceedings, to the present moment, where he is regarded as the subject of the proceedings.

In primitive times, crime was seen to offend the gods, and the punishment of the wrongdoer, was seen to appease the anger of the gods. Usually when a crime had been committed, special sacrifices were performed to appease the anger of the gods. The criminal was declared to be a "sacer" and an outlaw, and he was cast out from the communion of gods and men.⁵² Any person who killed him, performed a task that pleased the gods. The fear of the curse of the gods led to the individual killing the criminal, or severing all relationship or ties with him. Therefore, there was no concept of the "state" in early societies. A wrong was regarded as a private matter to be avenged by direct retaliation by the victim or if he had not survived, by

⁵¹ Rawlings *A history of criminal justice 1688-1998* Longman (1999) 1.

⁵² See Von Bar *A history of continental criminal law* Augustus Kelly Publishers (1968) 9.

his family.⁵³ Therefore, both compensation and retribution for wrongdoing were exacted at the instance of the wronged individual and his kin.⁵⁴ A crime generated a *poena* or penalty which was intended for the benefit of the community rather than that of the victim.⁵⁵ However, as the community became more cohesive it became involved in the repression or prevention of wrongful acts. This was done firstly, by restricting the private vendetta and later, by abolishing it and placing the machinery of repression and punishment under public control.⁵⁶ The assumption of public control led to the investigation of the act and the imposition of the remedy being regulated and controlled by the state.⁵⁷ Thus, the transfer of primitive police functions shifted from the gods to the family, then to the community at large, and finally to the state. This led to the development of a series of rules over the centuries, called criminal procedural rules. These rules are designed to redress the imbalance in power between the accused and the state.⁵⁸

In tracing the historical development of the rights of the accused, one needs to first examine the origins of the two most important legal systems in criminal procedure, namely, the accusatorial system and the inquisitorial system. Thereafter, the origins of the western legal tradition, such as the Roman era, the influence of the Christian Church, the Middle Ages, the Germanic Period and the Frankish Empire will be examined briefly. The role of the legal systems in the various periods will become apparent. Finally, the reason for evolution and the present position will be examined. The conclusion will sum up the law, and present proposals and recommendations.

⁵³ Wrongful acts were divided according to the nature of the remedy to which they gave rise. The penalty might be capital or sub-capital. A capital penalty affected the status of the wrongdoer. Usually this meant death but with the passage of time, an alternative emerged in the form of exile. The most common form of the sub-capital penalty was the fine or *multa*. However, the money was given to the state treasury and not to the victim. Bauman *Crime and punishment in ancient Rome* Routledge (1996) 2.

⁵⁴ This led to a feud between one family and another until satisfaction was achieved, or the potential feud could be averted by customary arbitration proceedings, which were designed to secure the payment of money by way of compensation for the wrongdoing. In modern language, this was both a fine and damages at the same time. See Baker *An introduction to English legal history* Butterworths 3rd ed (1990) 571.

⁵⁵ However, a number of wrongful acts affecting individuals retained a remedy which was for the individual's benefit. These acts included damage to property, attacks on personality and theft. Here the penalty took the form of monetary compensation payable to the injured party. See Bauman *op cit* 2.

⁵⁶ *Id.*

⁵⁷ The king or the crown represented the state. A new procedural era developed when the kin began to lose all significance, and the fiscal profits of punishment fell into the coffers of the crown. See Baker *op cit* 571.

⁵⁸ The Founding Fathers of the American Constitution tried to ensure that the fledgling national government of the time, would not arbitrarily arrest, imprison, or kill those accused of crimes without giving them an opportunity to prove their innocence. However, the Founding Father's concern with potential abuse of prisoners and unfair legal proceedings, did not stem from a desire to protect conventional criminals. Rather, their concern was a response to the English history of abuse of political and religious dissenters. See Fairchild *Comparative criminal justice systems* Harry Dammer Publishers: Wadsworth Thomson Learning (2001) 140.

1.2.2 THE DIFFERENT LEGAL SYSTEMS

1.2.2.1 THE ACCUSATORIAL SYSTEM

The meaning of the term "accusatorial" can only be understood in the light of some historical references to the different systems of criminal procedure in Western Europe.⁵⁹ The first form of litigation in post-primitive society occurred by means of an accusatorial process whereby private vengeance was replaced by an open confrontation between two equal parties, the complainant and the accused.⁶⁰ This confrontation took place before an impartial arbiter, the judge or the tribal council. The accusatorial system or adversarial system is often compared to a game or contest where both sides are trying to win, and the neutral umpire has to decide on a fair winner.⁶¹ The accusation meant that the action belonged to the injured party alone, or if he was dead, to his kindred.⁶² The accusatorial trial had three characteristics: it was confrontative, oral and public.⁶³ The witnesses testified at the hearing in an open court and in confrontation with the parties. This publicity was necessary to allow the accused to discredit or challenge the witnesses.⁶⁴ All the parties had to be present when the challenge was made.⁶⁵ Thus, the accused's participation and the party-to-party approach first developed in the accusatorial system.⁶⁶ The accusatorial procedure was followed in ancient Greece, in Rome and amongst the Germanic tribes.⁶⁷

⁵⁹ See Snyman "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems" (1975) *The Comparative and International Law Journal of Southern Africa* 100 at 101. It should be noted that the South African criminal procedure is largely based on the English model of criminal procedure, which is mainly accusatorial in nature. South Africa can be regarded to form part of the Anglo-American accusatorial system.

⁶⁰ *Ibid* at 101.

⁶¹ The accusatorial system coincides with the primitive idea that the penal action is a sham fight between two combatants. The judge's role is to end the fight by making a decision against one or other of the parties. Thus, the judge acts as an umpire, and his chief responsibility is to ensure a fair contest. See Esmein *A history of continental criminal procedure* Augustus Kelly Publishers (1968) 4-6, regarding the principles which form the basis of this system of procedure. Also see Fairchild *op cit* 140.

⁶² See Esmein *op cit* 55.

⁶³ The hearing was usually held in the open air, at the gate of the castle or at the public meeting place of the town. *Ibid* at 56.

⁶⁴ This is the modern equivalent of the right to confrontation. *Ibid* at 60.

⁶⁵ The necessity for the personal presence of the parties arose from the combat situation.

⁶⁶ The parties had to appear on the day fixed in the summons unless they had a reasonable excuse. However, they could not be represented. The accuser (complainant) made his complaint orally. The accused was obliged to answer on the spot, as his silence amounted to a confession. See Esmein *op cit* 56-57.

⁶⁷ See Snyman *op cit* 101.

The principle of “equality of arms” is regarded as an essential guarantee of adversarial proceedings.⁶⁸ It implies, *inter alia*, that an individual must be informed about the case against him and that he must be given adequate time and adequate facilities to prepare for his case. Therefore, the principle of “equality of arms” addresses those situations where the state has more resources than the accused. The ultimate aim is to achieve a level playing field between the parties so that the parties have recourse to equal resources. In this way, the parties will be “equal” combatants.

The above discussion demonstrates that the leading features of the ancient accusatory procedure were that it was entirely oral, it was equal and it entailed a public contest between two private persons. However, this procedure was barbarous and inadequate and left many crimes unpunished.⁶⁹ In the Anglo-American accusatorial system, the judge plays a more passive role than his continental counterpart.⁷⁰ He is merely required to adjudicate on the matter in the light of evidence placed before the court by the parties.⁷¹ His task is to search for the formal truth as he relies upon the information placed before him by the parties.⁷² The Anglo-American accusatorial system is not above criticism.⁷³ Nevertheless, the task of the judge is to ascertain the truth and to do justice according to the law. To achieve this, he may rule on inadmissible evidence or disallow superfluous or unnecessary evidence. Therefore, the purely accusatorial character of the Anglo-American system may be qualified by inquisitorial traits.⁷⁴ However, it remains accusatorial in principle.

1.2.2.2 THE INQUISITORIAL SYSTEM

Towards the end of the middle ages the inquisitorial process gradually displaced the accusatorial procedure.⁷⁵ The two most important features are the secret enquiry to

⁶⁸ The chapter on the right to be prepared (chapter 7) will elaborate on this principle.

⁶⁹ To illustrate this, the use of the judicial duel to decide the action was barbarous. Nevertheless, the ancient procedure is commended for recognising the right to be present and the right to confrontation. See Esmein *op cit* 61.

⁷⁰ The continental system is inquisitorial in nature. Therefore, the continental judge plays a more active role during the trial. He participates in the questioning of witnesses and the accused. His wide powers enable him to search for the material truth. See Snyman *op cit* 103.

⁷¹ *Ibid* at 103.

⁷² *Id.*

⁷³ The possibility exists that the parties can “manipulate” the truth to favour their cases. Similarly, a coherent picture of the facts is not possible because of the one-sided presentation of the evidence by the parties. *Ibid* at 108.

⁷⁴ *Ibid* at 110-111.

⁷⁵ *Ibid* at 101.

discover the offender, and the use of torture to obtain his confession.⁷⁶ The detection and prosecution of the offender were no longer left to the initiative of private parties. The state proceeds "ex officio" to perform this double duty, by creating organs to investigate and to accuse.⁷⁷ The role of the judge also changed. The judge's investigation was not limited to the evidence brought before him, but he could proceed on his own initiative with the enquiry to gather evidence. However, this must be conducted according to certain rules pertaining to the particular system.⁷⁸ Nevertheless, the whole process led to a confrontation between the accused and the judge or the court.⁷⁹

The inquisitorial system demonstrates that the participation of the accused has been toned down. Accordingly, the inquisitorial system can be described as an "official enquiry", whilst the accusatorial system is characterised by a "contest" or "dispute".⁸⁰ Whereas the accusatorial system was directed at safeguarding the interest of the individual, the inquisitorial system tried to uphold the interests of society and the state.⁸¹ The secrecy and suspicion that pervades the ancient inquisitorial proceedings, the use of torture to secure a confession, the lack of confrontation between the prosecution and the defence and the reduced participation of the accused all lead to a barbarous and inadequate procedure. This was more suited to the needs of social repression.

The liberalisation of the procedure in Western Europe at the end of the 18th century led to the abolition of torture and the introduction of trial by jury or by lay-judges to counteract the power of official judges.⁸² The state prosecution was given the task of investigating the case and leading evidence before the court.⁸³ The continental inquisitorial system is also not without criticism.⁸⁴ It is debatable whether the continental inquisitorial system presents the more effective way of achieving the

⁷⁶ Torture was a method of extracting proof for example by the wooden horse, the boot or the water. Torture is an institution of Roman origin. The inquisitorial and secret procedure led to the introduction of a system of "legal proofs" as a necessary counterbalance to the interests of the defence. See Esmein *op cit* 8 -10.

⁷⁷ Therefore, trials were mostly initiated not by a private complainant, but by the public authorities. See Snyman *op cit* 101.

⁷⁸ See Esmein *op cit* 9.

⁷⁹ This process involved an unequal dual of sorts. See Snyman *op cit* 102.

⁸⁰ See Fairchild *op cit* 146.

⁸¹ See Snyman *op cit* 102.

⁸² *Id.*

⁸³ However, an investigating judge is entrusted with the task of investigating cases of a serious or complicated nature. See Snyman *op cit* 104-105 for a detailed discussion about the role of the investigating judge.

⁸⁴ The judge's double role has been criticised. The judge functions as a detective investigating the case and as an arbiter who has to evaluate the facts before him. His two functions contradict one another. *Ibid* at 107-108.

discovery of the truth.⁸⁵

1.2.3 THE ORIGINS OF WESTERN LEGAL TRADITION

1.2.3.1 THE ROMAN ERA

Almost every legal system in the world today owes its debt to Roman jurisprudence. According to Pennington, medieval and early modern Roman law deserve more attention because we have borrowed directly from it and not from its ancient predecessors.⁸⁶ Therefore, it is important to consider Roman law.⁸⁷ Prior to the Twelve Tables, the law of Rome was religious in character. The priests who were members of the patrician class, interpreted the laws. However, dissatisfaction with the law by the common people, the plebs, led to the formulation of the Twelve Tables, which was accepted by the popular assembly.⁸⁸ Roman criminal procedure was accusatorial in its nature.⁸⁹ However, inquisitorial elements gradually developed in criminal procedure during the period of the Republic.⁹⁰ The accuser was obliged to take the oath of calumny that his prosecution was in good faith.⁹¹ The trial proceedings were characterised by the greatest solicitude for the defence of the

⁸⁵ *Ibid* at 111.

⁸⁶ Pennington "The spirit of legal history", available at: <http://www.maxwell.syr.edu/maxpages/classes/his381/spirit.htm> on 14-03-2001.

⁸⁷ Roman Law is a legal system developed by the Romans from the time of their first codification of law known as the law of the Twelve Tables in 450 BC, to the death of Justinian I, ruler of the Byzantine Empire in AD 565. The revival of European commerce and the inadequacy of medieval law to meet the requirements of the changing economic and social conditions led to Roman law becoming incorporated into the legal systems of the many European countries. See Moyer "Roman law and the courts", available at <http://www.indwes.edu/courses/bil102/b37.htm> on 05-09-2001.

⁸⁸ The Twelve Tables were a combination of old Roman laws and new statutes that were adapted to meet the needs of the new Republic. The Tables have become the foundation of the modern judicial systems around the world. *Id.*

⁸⁹ Roman criminal procedure in accordance with the spirit of the Roman criminal law and the ideas prevailing in Rome, was regularly based upon the principle of a formal accusation. The accuser (complainant) was obliged to furnish the necessary evidence for his case. See Esmein *op cit* 18. Also see Robinson *The criminal procedure of ancient Rome* The John Hopkins University Press (1995) 13.

⁹⁰ The fundamental form remained that of the accusatorial procedure. However, there was a change in the nature of underlying principles, in that more inquisitorial elements were introduced through the development of the power of the state, the tendency towards centralisation, the influence of Christianity and a changed conception of punishment. The judge in his official capacity took a more active part in the discovery of the truth, even in the procedure based upon an accusation. The accused became subjected to torture, and the magistrate's examination was directed at procuring a confession. However, many safeguards were introduced to avoid abuse of procedure, such as the exercise of judicial discretion over the control of proceedings, and the introduction of legislation to prevent improper influences on the judge and to bring accused persons to trial within a reasonable time. See Esmein *op cit* 28. Also see Robinson *op cit* 13.

⁹¹ This oath which was introduced into modern systems through the canon law, was taken by the prosecutor to attest his good faith. Robinson *op cit* 5.

accused, who could choose a representative to defend him. The case was dismissed if the prosecutor was absent on the day of the trial.⁹² The rules regarding trial proceedings were similar to the system of direct examination and cross-examination, which occurs in adversarial systems such as England.⁹³ An accused was not compelled to plead to a complaint or charge. However, an accused damaged his chances by his silence and strengthened the suspicion or case against him.⁹⁴ Security was also furnished to ensure the due appearance of the accused.⁹⁵ It is incorrect to think that evidence was collected by officials as in modern times, or that the accused was excluded from certain hearings.⁹⁶

Indeed, the right of an accused to face one's accusers can be traced back to Roman law. The Roman Governor Festus is reported to have made the following comments regarding a prisoner:

"It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers **face to face**, and has been given a **chance to defend himself** against the charges."⁹⁷

Therefore, early Roman law recognised that the law does not convict a man before he is given an opportunity to defend himself face-to-face with his accusers.⁹⁸

The above discussion demonstrates the significance of Roman contribution to our modern legal tradition. Although Roman law recognised certain rights of the accused, such as the right to be present, the right to confrontation and legal representation, the barbaric practices of Roman times such as torture and exile, to

⁹² The absence of the accused did not stop the proceedings although Augustus laid down that in such cases, the condemnation must be unanimous. An accused's reasonable excuse for his absence could be holding a magistracy, appearance on the same day in another court and illness. These were regarded as reasonable grounds for adjournment. *Id.*

⁹³ See Robinson *op cit* 5, for a detailed discussion of the procedure in court.

⁹⁴ This can be compared to modern times. To illustrate this, where an accused exercises his constitutional right to remain silent, his silence cannot be used as evidence against him. See Steytler *Constitutional criminal procedure* 330.

⁹⁵ This is the modern equivalent of bail. See Esmein *op cit* 21.

⁹⁶ Such acts are contrary to the nature of the accusatorial procedure and inconsistent with the conception that no attention was paid to procure a confession. *Id.*

⁹⁷ Jones "Testimony via closed-circuit television after *Gonzales v State*" (1992) *Baylor Law Review* 957 at 960. Also see *Coy v Iowa* 487 US 1012 (1988).

⁹⁸ See Creta "The search for justice in the former Yugoslavia and beyond: analyzing the rights of the accused under the statute and the rules of procedure and evidence of the International Criminal Tribunal for the former Yugoslavia" (1998) *Houston Journal of International Law* 381 at 397. Also see Pollitt "The right of confrontation: it's history and modern dress" (1959) *Journal of Public Law* 381 at 384.

name a few, required change.⁹⁹ Thus, a development along the lines of the protection of human rights was called for, to avoid excesses and persecution of the accused.

1.2.3.2 THE CHRISTIAN CHURCH

Roman law also provided a basis for much of the canon law of the Church.¹⁰⁰ The Christian Church in its early period, regularly defended itself against the state. It prevented its members from litigating before the civil authorities, by resorting to expulsion.¹⁰¹ The Church introduced penalties aimed at ensuring the repentance and reformation of the offender. However, there were limitations as a result of lack of effective criminal procedure. It compelled the accused to either free himself upon oath or to undergo penance or punishment.¹⁰² The Church exercised a criminal power that was secular and spiritual.¹⁰³

Therefore, the Church represented and upheld the idea of an absolute objective law and order superior to all individual rights. The Church's endorsement of repentance and reformation bode well for the offender. This signified a progressive stance towards punishment. The origins of the oath can also be traced to the Church. Nevertheless, its absolute power would fall away with the passage of time.¹⁰⁴

1.2.3.3 THE MIDDLE AGES¹⁰⁵

In the early Middle Ages, disputes were settled by ordeals and by rudimentary court procedures based on written and oral evidence.¹⁰⁶ Customary usages regulated

⁹⁹ The accused also had the right to avoid the passing of any sentence by voluntary exile. Bauman *op cit* 14.

¹⁰⁰ Canon law provided a vast system of law for the Church, by which it was governed. See Parkinson *Tradition and change in Australian law* The Law Book Company Limited (1994) 35.

¹⁰¹ The oldest punishment of the Church was a complete or partial expulsion from the Church or from the office. See Von Bar *op cit* 80.

¹⁰² The oath-taking has relevance to modern times, where a witness is compelled to take the oath before he gives evidence. Penance was inflicted by the Church without regard as to whether or not temporal punishments were inflicted upon the offender. The essential purpose of penance was the offender's reformation. *Ibid* at 82.

¹⁰³ The Church performed the function of an arbitrator between private revenge or public criminal authority on the one hand, and the criminal on the other hand. The Church as the higher state of culture also passed judgment in a non-discriminatory manner. *Id*.

¹⁰⁴ The Church's role in the punishment of the offender was abandoned in the 16th century. See Milsom *Historical foundations of the common law* Butterworths (1981) at 420.

¹⁰⁵ The Middle Ages refers to the period from the end of the Roman Empire to the Renaissance.

¹⁰⁶ Litigants in important cases were represented by a staff of legal advisers. The principal means of evidence were the oath with oath-helpers, the ordeal and the duel. Eventually, oath-helpers became obsolete and ordeals and trial by combat became prohibited. Evidence by "eye and ear witnesses" and the production of documents, then became the normal means of proving one's case. Hahlo and Kahn *The South African legal system and its background* Juta (1973) at 476-

court procedure, not written jurisprudential norms.¹⁰⁷ The prosecution of criminal cases was left to the injured party. Such party could challenge the accused to combat, sue him by means of a criminal action for damages or prosecute him by means of a criminal action for compensation and punishment. The production of the *corpus delicti* namely, the body of the slain man or the stolen property was indispensable.¹⁰⁸ Thus, justice in the Middle Ages had been a community affair, but the ecclesiastical courts and the then secular courts began to adopt the new rules, which the jurists called the *ordo iudiciarius*.¹⁰⁹ By the second half of the 12th century, the jurists were conscious of a defendant's right to a trial and of his right to have a trial conducted according to the rules of the *ordo iudiciarius*. Although the community played a smaller role in a trial than before, the rules limited the authority of a judge to act arbitrarily.¹¹⁰

However, criminal procedure became modernised during the 13th century. Private action became replaced by public prosecution.¹¹¹ The proceedings were primarily inquisitorial in nature during the Middle Ages. The presiding judge directed the proceedings, and the parties participated by means of a duel of questions and answers.¹¹² The term "inquisition" was applied to proceedings instituted *ex officio* by a public prosecutor.¹¹³ The accused could be tortured if he refused to confess although the evidence against him was clear. Thus, torture was used to obtain a confession.¹¹⁴ Trials were increasingly conducted in writing, and the public was

477.

¹⁰⁷ Pennington "Due process, community, and the prince in the evolution of the *ordo iudiciarius*", available at: <http://www.maxwell.syr.edu/maxpages/classes/his381/procedure.htm> on 14-03-2001.

¹⁰⁸ In cases of homicide, the dead man was still regarded as the real complainant. The corpse had to be brought to court if it was possible. A waxen hand was later regarded as adequate. See Hahlo and Kahn *op cit* 479.

¹⁰⁹ Pennington "Due process" *op cit* 7.

¹¹⁰ Fundamental to the modern conception of the right to due process is the idea that litigants have a right to have their case heard in court, and this right cannot be taken away. *Id.*

¹¹¹ Hahlo and Kahn *op cit* 479.

¹¹² In inquisitorial proceedings, the judges directed the investigations and undertook the tasks of both the accuser and judge. The injured party became a witness, whilst the suspect was an object of the investigation. See Hahlo and Kahn *op cit* 480. Also see Ebke and Finkin *Introduction to German law* Kluwer Law International (1996) at 414-415.

¹¹³ A criminal action could be instituted by accusation, by exception or by inquisition during the latter part of the Middle Ages. The inquisitorial proceedings were usually commenced by a private denunciation. This led to a secret inquiry by the prosecutor. See Hahlo and Kahn *op cit* 479-480, for a detailed discussion about the different actions.

¹¹⁴ It was quite common during the end of the Middle Ages for an accused to be tortured even though there was no substantial evidence against him. Habitual criminals and persons of ill-repute could also be convicted without confession or the prescribed number of witnesses. See Hahlo and Kahn *op cit* 480.

excluded.¹¹⁵ The use of torture and the exclusion of the public from hearings, shows the lack of respect for the rights of the accused. Clearly, changes were called for.

1.2.3.4 THE EARLY GERMANIC PERIOD

Primitive Germanic law was based upon the principles of vengeance and self defence. The criminal was the enemy of either the individual or the community. The idea of public or state punishment only acquired prominence in relation to the community, which arranged peace between the offender and the injured party.¹¹⁶ During this period, judicial decisions were made by the tribal assembly or *ding*, which was regarded as the supreme court of the tribe.¹¹⁷ The adjudication of a dispute before a court of law, was unknown during the earlier part of the Germanic period. Only crimes against the community could be brought before the people assembled in the *ding*.¹¹⁸ The *ding* became the arbiter in private disputes, and later it began to function as a court of law.¹¹⁹

The so-called action with the dead man,¹²⁰ whereby the victim's body was brought before the assembly, ensured that the court not only saw the killer but also the victim.¹²¹ The parties were assisted by elders who became their advisers, to ensure that they did not lose their actions.¹²² The proceedings were oral, public and purely accusatorial. They were initiated at the suit of the injured party or his tribe with the aim of receiving compensation in money.¹²³ The court played the role of an umpire,

¹¹⁵ Punitive penalties such as maiming and sentences of death replaced restitution penalties. See Ebke and Finkin *op cit* 415.

¹¹⁶ If the injured party announced that he would be satisfied with the payment of a composition namely cattle, the community received "peace money" for the arrangement of the peace from the criminal. See Von Bar *op cit* 58-61.

¹¹⁷ The tribal assembly heard all serious matters, and it had the power to sentence a freeman or nobleman to outlawry or death. The assembly consisted of freemen, who gave judgment in a particular matter. See Hahlo and Kahn *op cit* 354-355.

¹¹⁸ However, a dispute over land, cattle or a murder was not regarded as a communal concern. Rather, the dispute was regarded as a private one, unless the parties agreed to submit their dispute for arbitration to the *ding*. *Ibid* at 354.

¹¹⁹ It was regarded as a contempt of the people if an individual resorted to feud, refused to appear before the *ding* when he was summonsed do so or refused to accept the *ding's* judgment. He could have avoided this by agreeing to submit his quarrel to the *ding*. However, blood feud and self-help seems to have continued together with legal processes throughout this period. *Ibid* at 355.

¹²⁰ It was believed that the wounds of the murdered man would reopen in the presence of his murderer. *Ibid* at 357.

¹²¹ This is similar to the modern equivalent of the right to confrontation, in that the court is given the opportunity not only to see the accused and judge his demeanour, but also to see the victim.

¹²² This constitutes the beginning of the legal profession.

¹²³ Ebke and Finkin *op cit* 414.

and the lawsuit was regarded as a duel between the parties.¹²⁴

In most serious cases, the guilty person could be ejected from the tribal community and declared an outlaw.¹²⁵ The principal means of evidence was the oath which was used by the party to affirm or deny the truth of a statement or charge.¹²⁶ Other means of evidence comprised of an ordeal which took the form of a drawing of lots and trial by battle.¹²⁷ The trial by battle led to a duel and the victor was entitled to kill his opponent and take his property.

Therefore, early Germanic law demonstrates the dominant role of the *ding* or tribe in carrying out punishment. However, barbaric practices such as blood-feud, self-help and ordeals were widely used during the early Germanic period. Nevertheless, the use of elders as legal advisers, and the introduction of compensation as an alternative to feud, heralded a new era.

1.2.3.5 THE FRANKISH EMPIRE¹²⁸

The accusatorial system was initially dominant. Criminal cases were conducted by means of questions and answers. The parties could be assisted by legal advisers. However, they were obliged to appear in person.¹²⁹ The principal means of evidence was the party oath. Evidence by "chance eye-and-ear witnesses" was gradually admitted.¹³⁰ The admission of documentary evidence was an important innovation. Ordeals were commonly used to support the party oath where the required number of oath-helpers was not available. The courts no longer acted as passive umpires,

¹²⁴ This is known as the accusatorial system and it is still employed in Anglo-American procedure. However, in modern Continental procedure, the court takes an active role in the proceedings. The court summonses and examines witnesses, and informs the parties how to conduct their cases. This is known as the inquisitorial system. See Hahlo and Kahn *op cit* 355-356.

¹²⁵ Ebke and Finkin *op cit* 414.

¹²⁶ The party called upon the gods, his weapons and his house to destroy him and his family, if the oath was false. This illustrates how superstitious the people were at the time. Oath-helpers comprising of friends and relatives, were required in serious cases. They were required to confirm that the oath of innocence made by the accused was true and not false. See Hahlo and Kahn *op cit* 355-356.

¹²⁷ Ordeals also included the trial by water, during which the accused was bound and thrown into the water. If he sank, he was deemed innocent and fished out. If he floated on the surface, he was regarded as guilty. See Ebke and Finkin *op cit* 414.

¹²⁸ The Frankish period refers to the period dominated by a group of West Germanic peoples, who conquered most of Gaul and Germany in the late 4th century AD.

¹²⁹ This illustrates the importance of the right to be present. See Hahlo and Kahn *op cit* 398.

¹³⁰ *Ibid* at 399.

but they took an active part in the conduct of cases which came before them.¹³¹ Therefore, the court could summons witnesses not called by the parties. The king's court could summon trustworthy persons from the village or district where the act or transaction had occurred.¹³² This led to the origin of the jury trial.¹³³

During the Frankish period the Germanic people progressed beyond the narrow limits of the tribe and merged into larger political units. This heralded a new era in European history.¹³⁴ Modern means of evidence was introduced. The focus of the execution shifted from the person to the property. In this way, forms of judicial execution upon movables and immovables developed.¹³⁵

1.2.4 REASON FOR EVOLUTION TO PRESENT POSITION

The accusatorial system symbolises the primitive combat. Therefore, it comes first in the judicial history of civilisation.¹³⁶ It is apparent that both the accusatorial procedure and the inquisitorial procedure possess good qualities and defects. However, the safeguards necessary for the administration of criminal justice are absent.¹³⁷ During the accusatorial procedure, the detection and the prosecution of offences are left to the initiative of private individuals. The publicity which exists in this procedure, and the judge's power to limit his investigation to the evidence furnished to him by the accuser, enhances the chances of impunity.¹³⁸ However, in the modern adversarial or accusatorial system, most of the procedural advantages are on the accused's side, such as the right to an attorney, the right to remain silent, the right to be free of unwarranted searches and arrests, the right to compel witnesses for the defence, the

¹³¹ This shows a change to the inquisitorial system.

¹³² These witnesses were examined regarding general facts or circumstances connected with the case. See Hahlo and Kahn *op cit* 399-400.

¹³³ *Ibid* at 400. However, according to Fairchild, the origins of the right to be judged by a jury of one's peers goes back to the concessions made by King John to his nobles in the Magna Carta of 1215. The provision in the Magna Carta was interpreted to mean that no free man should be punished "except by lawful judgment of his peers". See Fairchild *op cit* 143. Also see Baker *op cit* 580.

¹³⁴ The position in criminal law was that every offence was regarded as a breach of peace. This became the concern of the community. Emphasis was placed on the mental element in crime. Money was substituted for sentences of outlawry, mutilation and death. The authority of the court was also strengthened. The court summons replaced the party summons. See Hahlo and Kahn *op cit* 400-401.

¹³⁵ *Id.*

¹³⁶ It takes a precise form in the legislations of Greece and Rome, then disappears in the latter part of the Empire. After the fall of the Roman Empire, it becomes employed in the Germanic and feudal customs. In modern times, it has disappeared from the European continent, but continues to exist in England and the United States. See Esmein *op cit* 7.

¹³⁷ *Ibid* at 11.

¹³⁸ *Id.*

right to confront one's accuser and the right to an appeal.¹³⁹

On the other hand, the inquisitorial procedure also has very serious defects, such as, the detection of offences are entrusted to the agents of the state, there also exists an atmosphere of secrecy and suspicion during the trial proceedings and there is an absence of any real confrontation between the prosecution and the defence.¹⁴⁰ In modern civil law systems, the inquisitorial system refers not to any legacy of the Inquisition, but to the extensive pretrial investigation and interrogations that are aimed at ensuring that no innocent person is brought to trial.¹⁴¹ This system is characterised by the relative ease with which procedural rules are adopted and changed, and the importance of the pretrial process in determining the outcome of the case.¹⁴² Therefore, progress in the path of judicial civilisation is due to the borrowing of the best elements from each of these types of procedure.¹⁴³

Most sophisticated legal systems of ancient times had some conception of "due process" in their procedure, as well as the idea that a defendant has the right to be heard.¹⁴⁴ There is substantial evidence that a defendant's right to a trial, was the accepted norm from the 9th century onwards.¹⁴⁵ The general principle that defendants must be summoned to court and given an opportunity to defend themselves was well established in customary and canon law.¹⁴⁶ Indeed, the strictures of the Old Testament and Roman law required that a defendant be given an opportunity to

¹³⁹ These rules prevent the prosecutor from automatically winning a case. See Fairchild *op cit* 141.

¹⁴⁰ Esmein *op cit* 11.

¹⁴¹ The Inquisition was a notorious and cruel institution that persecuted alleged heretics during the 16th and subsequent centuries in Spain and other Catholic countries. Confessions were obtained through brutal tortures and victims were often executed by burning. According to Fairchild, confessions resulting from torture were the norm in England and Continental Europe for secular and religious crimes until the right to remain silent became the distinguishable characteristic of the adversarial system of procedure. See Fairchild *op cit* 146. Also see Esmein *op cit* 10.

¹⁴² See Fairchild *op cit* 146.

¹⁴³ See Esmein *op cit* 11, regarding the formation of a mixed system of procedure.

¹⁴⁴ The concept of due process is deeply rooted in Anglo-American law. Due process means that a person has a right to be free from arbitrary government action. This means that a government must use a fair procedure to arrive at a determination of guilt. It also means that the defendant must be notified of the charges against him, the time and place of hearing of the charges against him, an opportunity to refute the charges, and a hearing on the charges before an impartial tribunal. See Hall *et al Criminal law and procedure: cases and pleadings* Bobbs Merrill Co Inc (1976) at 735-746. Also see Pennington "Due process" *op cit* 8. Please note that in Anglo-American law, the accused is referred to as the "defendant".

¹⁴⁵ The texts of Gratian in the twelve century dealt with the question whether someone may be accused *in absentia*. The text of Pope Gratian, also expressed the idea that no one may be sentenced and no law may condemn someone who is absent. It was emphasised that a defendant must be canonically summoned and publicly convicted. *Id.*

¹⁴⁶ *Ibid* at 9-10.

defend himself in court.¹⁴⁷ Thus, criminal procedural rules have been developed over the centuries as a response to abuses of citizens by monarchs and governments in dealing with their citizens. The right against self-incrimination can also be traced to the religious conflict in the 16th and 17th centuries. At the time, the accused were required to take the oath to tell the truth without being informed of the charges against them, or the identity of their accusers. This created a dilemma for religious dissenters.¹⁴⁸ Gradually, the custom of refusing to testify at all became common and was finally legitimised by Parliament in the latter 17th century.¹⁴⁹ The right to confrontation also has a lineage that can be traced back to the beginnings of Western legal culture.¹⁵⁰

In modern times, the principal objective in criminal procedure is to determine one's guilt or innocence. The rules of criminal procedure not only prescribe the sequence of events which lead to the determination of guilt or innocence, but also define the manner in which those steps must be carried out. The accused is an object of the proceedings to the extent that he has to endure the criminal process and under certain circumstances, massive infringements of his rights, such as imprisonment. However, as subject of the process, he has numerous independent procedural rights, such as the presumption of innocence, the right to adduce and challenge evidence and the right to be present at his trial. The accused's participation as a subject of the criminal process will enable him to invoke his basic procedural rights. Throughout the criminal process, prime consideration should be given to accomplish the pre-trial proceedings' goal of paving the way for an efficient and effective trial according to the principles of due process.¹⁵¹ The burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt.¹⁵² Therefore, modern criminal procedure tries to accommodate the need to have a logical process to determine the accused's guilt or innocence and practical measures to facilitate that process. At the end of the day, the procedure should be fair and not encroach unduly on the liberties of citizens.¹⁵³

1.3 CONCLUDING REMARKS

¹⁴⁷ *Ibid* at 8.

¹⁴⁸ Religious dissenters who were called to take the oath faced a serious problem. If they acknowledged their religion, they were subject to state sanctions, but if they denied their religion, then they were going against their conscience and, risked eternal punishment. Some dissenters refused to take the oath and refused to testify. Unfortunately many of them suffered severe punishments as a result of their refusal to take the oath. See Fairchild *op cit* 143.

¹⁴⁹ *Id.*

¹⁵⁰ See Jones *op cit* 960. The origins of the trial by jury can also be traced to the Magna Carta of 1215. See Fairchild *op cit* 143.

¹⁵¹ LeGrande *The basic processes of criminal justice* Glencoe Press (1973) at 107.

¹⁵² Usually, an accused is not obliged to prove anything. However, the defence has to prove self-defence. An accused is not obliged to testify or present evidence. A not-guilty verdict can be justified if reasonable doubt is created by the defence through cross-examination of prosecution witnesses. See Hall *op cit* 735.

¹⁵³ The United States system of criminal procedure is a case in point. *Id.*

In primitive times, people were more superstitious. Every crime was seen as offending the gods.¹⁵⁴ The fear of the curse of the gods was acute, and punishment was meted out to appease the gods. A crime was regarded as more serious when the offender was taken in the act than when he was not. This enabled the victim to possess a more lawful purpose. The right became a duty. The focus shifted to the community in that the offence became regarded as a breach of peace, and as such, became the concern of the community. The reception of Roman law led to the growth of an entirely new form of criminal procedure. It was the Romans who developed law as the primary mode of social control. It was also during the Roman period that we find the role of the lawyer as the advocate and representative of the client, being developed for the first time. However, the demise of the Roman Empire led to the end of the universality of Roman law, with the re-introduction in various parts of Europe of local customs and practices intermixed with Roman principles.¹⁵⁵

The oral and formal characteristics of the accusatorial procedure became substituted by the inquisitorial procedure of the civil and canon law.¹⁵⁶ The need arose to use the German conception of freedom as a foundation for the protection of individual rights.¹⁵⁷ In German law, the focus on individual rights led to the introduction of a statute whose application to the detriment of the individual was prohibited.¹⁵⁸ The ability to overcome tribalism led to the organisation of civilised communities. By transcending the narrow limits of the tribe and merging into larger political units, this heralded a new era in European history.¹⁵⁹ As a result of wars and constant movement, the small tribal groups became fused into people led by strong governments. This paved the way for progress. This progress became reflected in the law of the time. The bargaining process replaced the blood feud, and money fines began to take the place of sentences of outlawry, blood-feuds, duels, mutilation and death.¹⁶⁰ This heralded a change from the barbaric and brute practices of the time to more civilised practices. The authority of the courts gained prominence, and modern means of evidence were introduced. The focus shifted from the person of the accused to the property of the accused. Thus, a right to a trial, even though not

¹⁵⁴ See Von Bar *op cit* 9.

¹⁵⁵ Pound *The lawyer from antiquity to modern times* (1953) 28.

¹⁵⁶ By the first half of the 16th century, the development of this procedure had resulted in the almost complete disappearance of the liberty of the defence in most continental countries, which under the older procedure had been allowed to the accused. However, in England, the development of the jury system had prevented the introduction of this inquisitorial procedure. See Holdsworth *A history of English law* Methuen and Co Ltd (1924) at 528.

¹⁵⁷ See Von Bar *op cit* 204.

¹⁵⁸ It was also necessary that the individual must have knowledge of the punishment under the statute. Statutes should also contain guarantees informing the individual about his liberties, and not follow Roman law which focussed on a means to get at the culprit. *Id.*

¹⁵⁹ The role of the Germanic peoples during the Frankish period is a case in point. See Hahlo and Kahn *op cit* 400.

¹⁶⁰ Monkkonen *Crime and justice in American history* Meckler Publishing (1991) at 502-506.

absolute, became the norm. The accused became a subject of the criminal process.

Nowadays there is more emphasis on the role of the victim and the community in responding to crime, the expansion of the private security industry and deterring criminals through severe penalties rather than through detection of crime. Our ability to develop new standards depends on the work done by people in the past, such as the Romans and the Germanic people. Indeed, the credit belongs to our ancestors who denounced the cruel ways of the past, and resorted to humane laws to protect our liberties, rather than savage punishments.¹⁶¹ Therefore, individuals play an important role in the formation of criminal justice policy. The criminal justice system was introduced to keep order, while allowing the economy to grow. The constitutionalisation of the criminal justice system is to ensure that the accused's rights are properly secured. The advent of the Constitution led to a culture of human rights in South Africa. Although various principles have existed and been canvassed in the Criminal Procedure Act before the inception of the Constitution, the Constitution highlighted important rights such as the right to human dignity, equality and freedom. It sought to correct the injustices of the past and establish a democratic and open society. The courts as guardians of the Constitution have been entrusted with the interpretation of its provisions. Their task is to seek a balance between the protection of society against crime on the one hand, and the need to protect the constitutional rights of the accused on the other hand. Therefore, the courts must strive to ensure that "a man may not barter away his life or his freedom or his substantial rights".¹⁶² The criminal justice system should be fair and just, and not encroach much on the liberties of citizens.¹⁶³ Then only can we proudly say that the spirit of the Twelve Tables has been sustained.

¹⁶¹ Bauman *op cit* 1.

¹⁶² *Insurance Company v Morse* 87 US (1874) 445 at 451. See Monkkonen *op cit* 25.

¹⁶³ Hall *op cit* 735.