

PART TWO

CHAPTER TWO

AN OVERVIEW OF THE COMPOSITE RIGHT TO MEANINGFUL AND INFORMED PARTICIPATION IN THE CRIMINAL PROCESS

2.1 INTRODUCTION

The right to meaningful and informed participation in the criminal process is isolated because it does not possess an overarching nature.¹ The various sub-rights that fall under this composite right 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. These sub-rights are grouped together because they show some connection with the ability of the suspect or the accused to participate in the criminal process as a legal subject and not as an object of the criminal process. Therefore, the heading "the right to meaningful and informed participation in the criminal process" is a collective term for these rights.

The sub-rights are fundamental to the accused exercising his right to a fair trial. These rights are all connected to the accused's right to participate meaningfully in the criminal proceedings. They are all connected to one another in that the existence of one right presupposes the existence of the other right and vice versa. This composite right embraces mainly pre-trial and trial rights and to some extent, post-trial rights. Therefore, it comprises those rights that an accused person requires to prepare for his trial,² and the right to participate meaningfully in the trial.³ These sub-rights presuppose that an accused is able to understand what he is being charged

¹ This means that it does not span the whole criminal process like the right to legal representation. Similarly, it does not presuppose the existence of another right. See the discussion in chapter 1, subsection 1.1.2.3.1 on overarching rights.

² This includes pre-trial rights such as the right to information, the right to know what case he has to meet, and the right to have adequate time and facilities to prepare a defence.

³ This includes trial rights such as the right to be present, the right to confrontation and the right to present one's case. The right to present one's case addresses, *inter alia*, the right to address the court on sentence. The right to be present is also linked to the right to understand. The right to present one's case also addresses the accused's right to address the court on sentence (post-trial).

with, and that he can follow and comprehend the criminal proceedings. Accordingly, the accused must be both “fit” to stand trial and be “mentally” present at the trial. If the accused does not understand the proceedings, he will not be able to follow and/or comprehend the proceedings, or be able to participate meaningfully in the proceedings. Such proceedings will then be futile or meaningless, let alone *ultra vires*. However, all these rights although fundamental to a fair trial, are not absolute. There are exceptional circumstances when they can be deviated from.⁴

2.2 RELATION TO OVERARCHING RIGHTS

The other composite rights that provide parallels with this composite right are the right to access to the law,⁵ the right to legal assistance or legal representation,⁶ the right to equality before the law⁷ and the right to relief at a higher instance.⁸ These rights are overarching rights in that they are relevant throughout the course of the criminal process. They are also a pre-requisite for the existence of other procedural rights such as the right to present one’s case or the right to be prepared for one’s trial. Therefore, an understanding of these overarching rights is a pre-requisite for understanding the other procedural rights. Access to the law is related to the right to present one’s case in court. If the suspect or accused has access to the courts, then he can present his case in court. Indeed, access to the law is said to be the most basic right of all, because it precedes the other overarching rights such as the right to legal representation.⁹ The right to access to the law is also connected to the right to have one’s rights explained to one. It is important to have knowledge of the existence of one’s rights as the scope thereof will determine one’s claim to exercise

⁴ See for example the right to confrontation, where the interests of the child witness will prevail over the accused’s right to a fair trial in terms of s 170 of the Act. Similarly, as discussed above, an accused’s presence from the court-room can be excluded in terms of s 159(1) of the Act, where his continuous disruptive behaviour calls for his absence.

⁵ Access to the law includes access to the courts. See s 34 of the Constitution which provides that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁶ See s 35(2) of the Constitution which refers to the rights of detainees to be informed of the right to have a legal representative appointed for him; and to be informed of the right to have a legal representative appointed at state expense if substantial injustice would otherwise occur. Similarly, s 35(3)(f) refers to the right of accused persons and embraces similar principles to s 35(2).

⁷ See s 9 of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Also see s 9(2) which prohibits unfair discrimination.

⁸ The right to appeal against judgments in lower and high courts is regulated by statute and the Constitution. Chapters 30 and 31 of the Act particularly, ss 302-324 regulates reviews and appeals by means of which any party who is feeling aggrieved or dissatisfied by the judgment of a court of first instance in the criminal proceedings, may turn to a court of higher instance for relief. Also see s 35(3)(o) of the Constitution, which provides that every accused has a right of appeal to, or review by a higher court.

⁹ The right to legal representation depends on the right to access to the law.

such rights.¹⁰

The right to have one's rights explained to him is also closely related to the right to understand.¹¹ This is pertinent where the criminal proceedings must be conducted in a language that the accused understands. If the language is not understood by the accused, then it must be interpreted to him even though he has a legal representative who understands the language concerned.¹² Similarly, it is important to explain the accused's rights in order to facilitate his comprehension of the proceedings. This is especially pertinent to an unrepresented accused,¹³ and equally so to a deaf or dumb witness.¹⁴

The right to legal representation is long recognised in South African law.¹⁵ This right is entrenched in section 35 of the Constitution, and provides that a detainee or accused must be informed of his right to legal representation, and that a detainee or accused must be informed of his right to legal representation at state expense if substantial injustice would otherwise result.¹⁶ Any failure to inform an accused of his right to legal representation would be tantamount to a case where justice has not been done.¹⁷ Therefore, the right to legal representation is closely linked to the right to information. It is also closely related to the right to be prepared for one's trial. An accused who is informed of his legal rights, and who is also represented, can prepare for his trial effectively and meaningfully.¹⁸

The right to equality before the law encapsulates, *inter alia*, recognition that all individuals are equal before the law irrespective of colour, creed or race.¹⁹ This presupposes that the accused should be entitled to equal and courteous treatment.²⁰ The principle of "equality of arms" comes into play, and means that both the

¹⁰ See, *inter alia*, *S v Taylor* 1972 (2) SA 307 (C); *S v Vezi* 1963 (1) SA 9 (N) where the courts commented strongly about the need to explain an accused's rights to him.

¹¹ See s 35(4) and s 35(2)(a) of the Constitution which entrenches the right to understand. See chapter 6 "The Right to Understand" for a detailed discussion about this sub-right.

¹² See, *inter alia*, *Geidel v Bosman and Another* 1963 (4) SA 253 (T); *Ohannessian v Koen and Another* 1964 (1) SA 663 (T).

¹³ See *S v Khanyile* 1988 (3) SA 795 (N).

¹⁴ See *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N). An interpreter should be appointed to assist the deaf or dumb person to understand the proceedings.

¹⁵ See, *inter alia*, *Dabner v SA Railways and Harbours* 1920 AD 583 and *S v Khanyile supra*.

¹⁶ See s 35(2) and s 35(3)(f) of the Constitution.

¹⁷ See *S v Radebe*, *S v Mbonani* 1988 (1) SA 191 (T).

¹⁸ See Leigh "The right to a fair trial and the European Convention on Human Rights" in Weissbrodt and Wolfrum *The right to a fair trial* Springer (1998) 664.

¹⁹ See s 9 of the Constitution.

²⁰ See for example, *S v Mpofu* 1970 (2) SA 162 (R).

prosecution and the defence must come to court on an equal footing.²¹ The principle also implies, *inter alia*, that a person charged with a criminal offence must be informed of the facts alleged against him and their legal classification (right to information); that he be given adequate time to prepare his case (right to be prepared); that he be given the opportunity to have knowledge of and comment on the evidence adduced by his adversary (right to challenge evidence or the right to present one's case) and that he be given access to all material evidence held by the prosecution (right to information). Accordingly, the right to equality before the law is connected to the right to information, the right to be prepared and the right to present one's case.

The right to relief at a higher instance is an overarching right as well. It is not limited to a particular process but is there all the time. A high court is approached by way of appeal or review to reconsider the action of a lower court to correct mistakes or injustices. Before the inception of the Constitution, no duty was placed on the trial court to inform an undefended accused of his rights of appeal and review.²² However, section 35(3)(o) now makes it incumbent on the presiding officer to inform the undefended accused of these rights, and to explain how they must be exercised, at the conclusion of the trial. The exercise of the right to appeal and review is also related to the other sub-rights, such as the right to be prepared. To illustrate this, an accused must have adequate time and facilities to prepare an effective appeal. Similarly, an accused must be furnished with adequate reasons for the trial court's decision so that he can prepare adequately for an appeal. It is debatable whether the accused is entitled to be present at an appeal hearing.²³ Although *S v Pennington*²⁴ held that section 35(3)(o) did not expressly require that an appellant is entitled to be present at the appeal, the recent decisions of the European Court of Human Rights have held that it is essential to the fairness of the proceedings that the applicant be present at the hearing of the appeal.²⁵ Thus, the right to appeal and review is connected to the right to information, the right to be prepared and the right to be present.

2.3 THE PRACTICAL RESULTS OF ISOLATING AND ANALYSING THE COMPOSITE RIGHT

The practical results of isolating and analysing the composite right is to look for alternate measures to afford the accused greater protection in the criminal process. One should strive to maintain the delicate balance between preventing the conviction of an innocent man against the need to investigate and prosecute a criminal

²¹ This raises the issue regarding indigent accused. One should not be denied access to the law because of poverty. See chapter 7 on "The Right to be Prepared" for a more detailed discussion about the right to adequate facilities.

²² Steytler *Constitutional criminal procedure* 397.

²³ The chapter on the "Right to be Present" (chapter 8) provides further clarification.

²⁴ 1997 (10) BCLR 1413 (CC).

²⁵ See *Cooke v Austria* (2001) 31 EHRR 11.

zealously for his criminal acts.²⁶ By the same token, one should avoid the situation where a difficult prosecution leads to the police becoming apathetic, and the community and the victims take the law into their own hands. Indeed, one must strive to avoid reverting to the barbaric and brute practices of earlier times. It is therefore, important to maintain a delicate balance.²⁷ This difficult task to maintain a proper balance between these competing interests lies with the judiciary. Therefore, the judiciary must ensure that they are sympathetic to the plight of the victim, yet at the same time mindful of the constitutional rights of the accused.

2.4 CONCLUSION

The historical perspective demonstrates that initially the accused was regarded as an object of the criminal proceedings. People were deeply religious and superstitious in primitive societies. Any crime was seen to offend the gods, and a criminal was regarded as an outcast in the community. The focus then shifted to the community, whereby an offence became regarded as a breach of peace, and thereby an offence against the community. However, the advent of wars and constant movement of people led to the creation of bigger communities, and the replacement of barbaric and primitive methods of punishment like blood-feuds and duels, with more civilised practices. The Romans and Germanic people are credited for bringing about this progressive change. The Romans developed the law as a form of social control, whilst the Germanic tribes introduced the concept of freedom as a basis for individual rights. Accordingly, the focus shifted firstly from the gods to the community, thereafter to the property of the accused, and finally to the person of the accused. Today, the accused is longer an object of the criminal proceedings, but the subject of the proceedings. The proceedings are directed towards affording greater protection of the accused's basic procedural rights. This is part of the accused's right to a fair trial.

The right to meaningful and informed participation in the criminal process therefore contextualises certain rights of the suspect or the accused in the criminal proceedings. It addresses his ability to participate in the proceedings and the extent and limitations of his participation in the criminal process. The aim is to ensure that he is treated fairly by the judicial system throughout the criminal process. To this end, an unrepresented and indigent accused must have his rights explained to him and he must be provided with legal representation at state expense.²⁸ Alternative procedures are also considered which would facilitate the accused's meaningful participation in the criminal process. Foreign jurisdictions are examined such as the United States of America, the United Kingdom, Canada, Australia, New Zealand, German Law, EU law and some Islamic legal systems to see how similar issues are addressed in those countries.²⁹ By far, our law is in line with most foreign

²⁶ The following problems arise if no balance is maintained, such as selective prosecution, and a vindictive prosecutor.

²⁷ The role of the judiciary is important in maintaining this balance.

²⁸ See s 35 of the Constitution.

²⁹ See s 39 of the Constitution which states, *inter alia*, that a court must consider international law (s 39(1)(b)), and may consider foreign law (s 39(1)(c)) in the interpretation of the Bill of Rights.

jurisdictions.³⁰ Nevertheless, important principles are to be learnt from these jurisdictions which can be applied to the South African context.³¹ The argument is often advanced that there is insufficient funding to facilitate changes in the criminal justice system. I believe that although one should be cautious about financial implications, one should not allow thoughts about dollars and rands to dominate our quest for progressive and meaningful change, to the detriment of the accused. It has been said that equal justice cannot be achieved if "the kind of trial a man gets depends on the money that is available".³²

It is hoped that this thesis will lead to a better understanding of the interaction between certain rights of the accused, and what constitutes a fair trial. It will also lead to a better understanding of the need for the protection of human rights and basic procedural rights, which is entrenched in the Constitution.³³ This is not to say that the accused's rights must be preserved at all costs. There will be times when other competing interests will prevail over the rights of the accused.³⁴ Nevertheless, one must endeavour to achieve a balance between protecting society against criminal acts and protecting the constitutional rights of the accused. If the accused is informed about the case he has to meet, and he can prepare a meaningful defence with the adequate facilities at his disposal, this will lead to his meaningful participation in the criminal process. A fair trial will thus be achieved and justice will seem to be done. Then we can proudly say that the values that underlie an open and democratic society based on human dignity, equality and freedom entrenched in our Bill of Rights have been achieved.³⁵

³⁰ The concluding chapter will elaborate on this.

³¹ In the United Kingdom, for example, mentally incompetent persons are handled under the mental health system rather than the criminal justice system as is the case in South Africa. The adoption of a similar system in South Africa, will greatly alleviate the burden on our criminal courts which are confronted with huge case backlogs on a daily basis. Obviously, structures will have to be put in place to facilitate the development of a similar mental health system.

³² See *Griffin v Illinois* 351 US 12 (1956) at 19.

³³ The Constitution merely entrenches the position in the Act.

³⁴ See chapter 9 on "The Right to Confrontation" where the competing interests of the child witness and the accused are discussed.

³⁵ See s 7, chapter 2 of the Bill of Rights.