

## PART FOUR

### CHAPTER FOUR

#### AN OVERVIEW OF THE VARIOUS SUB-RIGHTS

##### 4.1 THE CONTEXT

The components of the composite right to be discussed, such as 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 are grouped together because they all relate to the suspect or accused's ability to participate in the criminal proceedings. They are fundamental principles of the right to a fair trial. This means that any violation of these rights will possibly lead to the trial being declared an unfair or unjust trial, and the proceedings will be set aside. There is much overlapping between these sub-rights and they are all inter-related. The right to information presupposes that the accused is entitled to information in the state's possession in order to have a fair trial.<sup>1</sup> Failure to make a statement available to the defence will obstruct the defence in its cross-examination, thereby precluding a fair trial.<sup>2</sup> An accused must also be informed of his rights at all times such as, *inter alia*, the reasons for his arrest, the right to legal representation and the right to remain silent. This will enable him to exercise his rights effectively. An informed accused will be able to obtain legal representation to conduct his defence. He can prepare for his case and participate meaningfully in the criminal proceedings. Therefore, the right to information is linked to the right to be prepared, the right to present one's case and the overarching right, the right to obtain legal representation.<sup>3</sup>

It is important that an accused must be "fit" to stand trial, as a mentally incompetent person lacks comprehension and cannot be tried. This means that the accused must be "mentally" present. Once it has been established that the accused is fit, the court must determine whether he understands the court language. If he does not understand the court language, then a competent interpreter must be appointed for him.<sup>4</sup> The right to understand also means that the accused must be able to understand what he is being charged with (linked to the right to be prepared for one's trial and the right to information), he needs to be able to plead to the charge and to exercise his right of challenge (linked to the right to present one's case), he needs to understand the substantial effect of any evidence that may be given against him, and he needs to be able to make his defence or answer to the charge (linked to the right

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<sup>1</sup> See *Shabalala and Others v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC).

<sup>2</sup> See *Garfield and Andrew Peart v Jamaica* Comm Nos 464/1991 and 482/1991. Thus, the right to information is linked to the right to present one's case.

<sup>3</sup> See chapters 1 and 2 on overarching rights.

<sup>4</sup> See *S v Naidoo* 1962 (2) SA 625 (A). Also refer to chapter 6 on "The Right to Understand" for a more detailed discussion about this right.

to be prepared).<sup>5</sup>

The right to be prepared for one's trial is connected to, *inter alia*, the right to understand, the right to legal representation, the right to information and the right to present one's case.<sup>6</sup> The right to be prepared also means that an accused must be given a reasonable opportunity to weigh the case against him and to understand it and its implications, and to arrive at a mature and unhurried decision on how to plead or to conduct his case.<sup>7</sup> An accused must be adequately prepared to present his case effectively in court. If the accused is not prepared either by way of the necessary documentation or representation, then he cannot adduce and challenge the evidence. Therefore, an accused can only exercise his right to a fair trial, if he is adequately prepared. This presupposes that an accused should be furnished with necessary information when he requests it, as he will not be able to prepare an adequate defence if he is not fully informed of the case that he has to meet. Similarly, an accused is entitled to a reasonable opportunity to obtain legal representation to prepare his defence.<sup>8</sup> The right to be prepared is also linked to the "equality of arms" principle. This principle underlies the right against an unduly hasty trial and the right to adequate facilities for the preparation of a defence.

The presence of an accused is required in order for him to participate in an informed and meaningful manner in the proceedings against him.<sup>9</sup> Some of the other component rights such as the right to understand, the right to present one's case and the right to confrontation are directly connected with the right to be present. Thus, the right to be present encompasses more than simply requiring that both the trial and the court's decision should take place in the accused's presence. The accused should also be able to confront his accusers and observe their demeanour. Therefore, both the accused's right to confront the witnesses against him and his right to cross-examine presuppose the accused's presence at trial.<sup>10</sup> The right to confrontation is thus closely related to the right to be present and the right to present one's case.<sup>11</sup> The right to present one's case is also closely related to the right to be prepared for one's trial. One must be adequately prepared before one can present

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<sup>5</sup> See *R v Presser* [1958] VR 45.

<sup>6</sup> See chapter 7 on "The Right to be Prepared" for a detailed discussion about this right.

<sup>7</sup> See *S v Yantolo* 1977 (2) SA 146 (E). Therefore, if the accused understands what he is being charged with, then he can prepare accordingly for his case.

<sup>8</sup> See *S v McKenna* 1998 (1) SACR 106 (C).

<sup>9</sup> See chapter 8 on "The Right to be Present" for a more detailed discussion about the accused's presence in court.

<sup>10</sup> See *Dowdell v US* 221 US 325, 330 (1911).

<sup>11</sup> The right to challenge evidence includes the right to cross-examine evidence. Cross-examination is an example of confronting one's adversary.

one's case in court.<sup>12</sup> All these sub-rights are fundamental principles of the right to a fair trial. Therefore, any violation will lead to the proceedings possibly being set aside.

Therefore, the above sub-rights are regarded as a unit because of their interrelation, connection and overlapping with one another.<sup>13</sup> The "equality of arms" principle is also applicable to all rights; so too the right to legal representation. The one right presupposes the existence of another right, or is dependant on another right. This entails that there should be a common approach to these rights. Accordingly, the thesis examines the treatment of the accused's rights in South African law in terms of the Act and the Constitution. The exceptions to each sub-right are also examined. The study of the exceptions to each sub-right illustrates that the sub-rights are not absolute, and that exceptional circumstances allow for the accused's rights to be limited.<sup>14</sup> Foreign jurisdictions such as the United States, the United Kingdom, Canada, New Zealand, Australia, Germany, European Convention law and Islamic countries are also consulted. The study on foreign jurisdictions is intended to show the parallels and differences with South African law. Although the overarching rights such as the right to legal representation cover the entire criminal process, these sub-rights focus mainly on pre-trial and trial rights and to some extent, post-trial rights. Therefore, they should be treated differently from the overarching rights. Nevertheless, the overarching rights are also connected to these sub-rights during various stages of the criminal process.<sup>15</sup>

However, the sub-rights also differ structurally and substantively. They cover different contentious areas of law, and all the foreign jurisdictions are not necessarily discussed under each sub-right.<sup>16</sup> To illustrate this, the right to understand is linked to the right to an interpreter, and this brings the language issue into focus. Thus, the state is confronted with the issue of language and multi-cultural societies. On the other hand, the right to confrontation addresses the competing interests of the child witness and the accused. The state is also confronted with the issue of child abuse and social problems. At the end of the day, the courts have to balance the competing interests in a fair and just manner. The aim of the sub-rights is to ensure fairness to an accused in the criminal proceedings. The composite right to meaningful and informed participation in the criminal process is part of the comprehensive right to a fair trial.

The sub-rights will be discussed in the following specific order:

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<sup>12</sup> The right to present one's case further addresses a number of sub-rights such as the right to cross-examine state witnesses, the right to address the court on evidence to be adduced, the right to give and adduce evidence, the right to address the court at the conclusion of evidence and the right to address the court on sentence.

<sup>13</sup> See the preceding discussion in this regard.

<sup>14</sup> To illustrate this, the accused's presence can be excluded from the court-room where he continually disrupts the orderly conduct of the proceedings in terms of s 159 of the Act.

<sup>15</sup> To illustrate this, an accused must be given a reasonable opportunity to secure legal representation in order to prepare for his trial.

<sup>16</sup> Each chapter will discuss selected aspects of the law in foreign jurisdictions.

- 1 The right to information
- 2 The right to understand
- 3 The right to be prepared
- 4 The right to be present
- 5 The right to confrontation
- 6 The right to present one's case

The reason for this order is that it is imperative that an accused be furnished with information about the case and his rights before he can start preparing for his case. Therefore, he must for example, be furnished with witness statements in the prosecution's possession so that he can challenge such evidence. Similarly, he must be informed about the reason for his detention and the right to legal representation. Once the accused has the necessary information, the question arises whether he understands the charges against him. If he understands the charges, he is "fit" to be tried. He must also understand the language of the court proceedings. To this end, an interpreter will be provided to assist him if he does not understand the language of the court proceedings. The accused must be able to follow and comprehend the proceedings. Then, he will be able to prepare and conduct his defence effectively. However, in order to participate in the proceedings, he must be both physically and mentally present. The accused can only confront his accusers if he is present at the proceedings. Similarly, he must be able to challenge all opposing evidence and conduct his case. Accordingly, an informed accused will be able to participate meaningfully in the proceedings.