

PART FIVE

CHAPTER ELEVEN

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

11.1 INTRODUCTION

The introduction in South Africa of a supreme Constitution¹ with an entrenched bill of rights can be viewed as the most important and far-reaching event in South African legal history since 1910. The above discussion about the criminal procedural rights of the individual demonstrates that there is a duplication between the provisions of the Constitution and the Criminal Procedure Act. Indeed, the Bill of Rights is described as a consolidation or affirmation of existing principles of the law of criminal procedure.² Thus, the basic procedural rights of the accused were protected for decades by the courts, having recourse to the Act. The Constitution entrenched the position. As discussed above, the composite right to meaningful and informed participation in the criminal process is part of a comprehensive right to a fair trial. The aim of the sub-rights under the composite right are to ensure that the accused is treated fairly in criminal proceedings, in line with the right to a fair trial. However, it must be emphasised that the rights of arrested, detained and accused persons entrenched in the Bill of Rights in the Constitution also serve to uphold the integrity of the legal system. This is achieved by employing the criminal process itself to impose sanctions for violations of fundamental human rights. In other words, the criminal process is also employed to correct its own abuses.

The introductory chapter addresses, *inter alia*, the classification of criminal procedural human rights and the historical position of the accused from primitive times until modern times.³ The traditional classification in the international

¹ Constitution of the Republic of South Africa, 1996 (108 of 1996).

² The courts have expressed similar sentiments. See *Klein v Attorney-General, Witwatersrand Local Division* 1995 (2) SACR 210 (W), where the court remarked that apart from the right to legal representation at state expense, common law principles have not been expanded by the codification of the right to a fair trial in the Constitution.

³ Refer to the discussion in chapter 1, subsection 1.1.2 and s 1.2 respectively.

instruments was rather haphazard and "confused".⁴ Attempts by Steytler and Joubert have yielded a more cohesive and structured classification.⁵ The historical perspective examines the position when the accused was regarded as an object of criminal proceedings, until the present time when he is regarded as a subject of the proceedings. In primitive times, people were more superstitious. Every crime was seen as offending the gods.⁶ The fear of the curse of the gods was acute, and punishment was meted out to appease the gods. 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. The Romans are credited for developing the 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.⁷

The need arose to use the German conception of freedom as a foundation for the protection of individual rights.⁸ In German law, the focus on individual rights led to the introduction of a statute whose application prohibited any violation of individual rights.⁹ The ability to overcome tribalism led to the organisation of civilised communities.¹⁰ As a result of wars and constant movement, the small tribal groups became fused into people led by strong governments. This paved the way forward for progress. This progress became reflected in the law of the time. The bargaining

⁴ Refer to the discussion in chapter 1, subsection 1.1.2.

⁵ *Id.*

⁶ See Von Bar *op cit* 9.

⁷ See Pound *op cit* 28. It is noteworthy that the oral and formal characteristics of the accusatory procedure, became substituted by the inquisitorial procedure of the civil and canon law. 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 *op cit* 528.

⁸ See Von Bar *op cit* 204.

⁹ 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.*

¹⁰ The role of the Germanic people during the Frankish period is a case in point. By transcending the narrow limits of the tribe and merging into larger political units, this heralded a new era in European history. See Hahlo and Kahn *op cit* 400.

process replaced the blood feud and money fines began to take the place of sentences of outlawry, blood-feuds, duels, mutilation and death.¹¹ 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. The accused became an subject of the criminal process with the advent of human rights. The criminal process is directed towards protecting the basic procedural rights of the accused. Therefore, a right to a trial, even though not absolute, became the norm.

11.2 SURVEY OF VARIOUS SUB-RIGHTS AND FOREIGN JURISDICTIONS: LESSONS TO BE GLEANED?

The discussion of foreign jurisdictions under the various sub-rights reveals that by far, our law is in line with the law in those countries.¹² Nevertheless, there are some interesting and enlightening lessons to be learnt. On the other hand, the interpretation of our Constitution has led to very enlightening and progressive decisions being made by our courts. The position in other countries regarding the sub-rights is for the most part, similar to our law. It is a fundamental principle that the accused must be furnished with evidence in the state's possession before he can commence preparing for his case. Similarly, the accused must be informed about his rights such as the reason for his detention and the right to legal representation. An "informed" accused will know what case he has to meet and he can prepare accordingly. Thus, the right to adequate facilities presupposes that the accused should be provided with all relevant and/or "material" evidence in the prosecution's possession in order to prepare for trial. Denial of access to such information will violate an accused's right to a fair trial, as an accused will not be able to prepare a meaningful defence if he is not adequately informed of the case that he has to meet.¹³ The Canadian courts have held that the nature of the disclosure obligation in criminal proceedings is based on the accused's right to make "full answer and defence".¹⁴ A failure to disclose may lead to a stay of proceedings altogether in the

¹¹ Monkkonen *op cit* 502 - 506.

¹² Please refer to the discussion on foreign jurisdictions in chapters 5-10. The following jurisdictions are discussed where relevant namely, United States of America, United Kingdom, Canada, New Zealand, Australia, Germany, Islamic systems and international instruments such as the ECHR and ICCPR.

¹³ See *Shabalala v Attorney-General of the Transvaal* *supra* discussed in chapters 5 and 7, which clarified the position on the right of access to documents in the police docket in South Africa. However, it must be shown that access is necessary for purposes of a fair trial. The fair trial angle has been followed in many foreign jurisdictions, such as the European countries, Canada, United States and New Zealand. Please refer to chapter 5 on "The Right to Information" and chapter 7 on "The Right to be Prepared" for a more detailed discussion on access to information.

¹⁴ See *R v Stinchcombe* *supra* discussed in chapter 5, subsection 5.3.6.1. In the United States, due process principles dictate the right of access to "material" evidence in the prosecution's possession. See *Brady v Maryland* *supra* discussed in chapter 5, subsection 5.3.6.2. In New Zealand, s 24(d) of the New Zealand Bill of Rights Act 1990, provides the foundation for the accused's right to "adequate facilities to prepare a defence".

Canadian courts.¹⁵ Indeed, the progressive and enlightened judgments of the Canadian courts provide a useful source of doctrine for incorporation into South African law.

However, the *Shabalala* decision does not mean that the accused's rights of access are absolute. The trial court retains a discretion to decide whether refusal of access is justified for purposes of a fair trial.¹⁶ Although the decision is commended for its conformity with the right to fair trial principle, it has been criticised for its silence regarding the stage when disclosure should be made. On the other hand, the *Stinchcombe* decision is more instructive and recommends that disclosure should be made after completion of investigation but before commencement of trial.¹⁷ The *Shabalala* decision is also silent regarding the issue of reciprocal access.¹⁸ It would be advantageous for both parties to disclose their evidence simultaneously before the commencement of the trial, as this would limit the issues to be adjudicated by the court. This would lead to more efficient prosecutions without impeding the fairness of proceedings in any way.

It is generally accepted that before an accused can be tried in court, he must be "fit" to stand trial. After all, a mentally incompetent person cannot be tried in court as he lacks comprehension and will not be able to follow the criminal proceedings. The chapter on "The Right to Understand" demonstrates that an arrested, detained or accused person must be able to understand and comprehend the criminal

¹⁵ See *R v O'Connor* *supra* discussed in chapter 5, subsection 5.3.6.1 and chapter 7, subsection 7.4.2.2 respectively. This case is also instructive regarding how the Canadian courts have balanced the accused's right to a fair trial with a third party's right to privacy. South African courts may well follow the Canadian approach if they are faced with balancing the accused's right to a fair trial and a third party's right to privacy.

¹⁶ See *Shabalala v Attorney-General of the Transvaal* *supra* discussed in chapter 5, subsection 5.3.3.2, where it was held that curtailment of an accused's rights may be justified where the accused's right to a fair trial are not undermined.

¹⁷ See *R v Stinchcombe* *supra* discussed in chapter 5, subsection 5.3.6.1. It is noteworthy that this viewpoint conforms with art 4 of the Code of Conduct for Law Enforcement Officials of the United Nations which embraces the concept of maintaining confidentiality for confidential information in the possession of law enforcement officers, unless the performance of their duties or needs of justice dictate otherwise.

¹⁸ See Senatle *op cit* 73, where the writer makes a very good case for reciprocal access. Similarly, the Criminal Procedure and Investigations Act 1996 in the United Kingdom encompasses reciprocal access and is instructive in this regard. So too is the statutory reciprocal scheme in Victoria, which has been described as being more flexible than its English counterpart. See Dawkins *op cit* 48-51. However, the South African Law Commission is not in favour of reciprocal disclosure by the defence. See the *South African Law Commission (Project 73) Report "A more inquisitorial approach to criminal procedure"* *supra* at 109.

proceedings in order to make a proper defence.¹⁹ Thus, it is universally accepted that an accused is regarded as unfit to stand trial if he cannot understand and appreciate the criminal proceedings as a result of a mental defect. Such accused can be detained at a psychiatric hospital, where his mental condition is evaluated by medical experts.²⁰ The United Kingdom displays an enlightening approach regarding mentally incompetent persons. A "responsible" person or adult is required to be present when the mentally incompetent person is questioned by the police.²¹ Mentally incompetent persons also fall under the umbrella of the mental health system rather than the criminal justice system. This greatly alleviates the burden on the criminal courts. It is recommended that the South Africa criminal justice system adopt this British practice. This will greatly relieve the burden imposed on our criminal courts which are faced with huge case backlogs on a daily basis.²²

It is also universally accepted that an accused has recourse to an interpreter if he does not understand the language of the court proceedings.²³ The question of interpretation brings the issue of society's claim to be multicultural to the forefront. Man continues to move to improve his lot in life, just like his forefathers. The advent of modern means of transport, modern technology, a search for better employment opportunities and a search for a more secure environment have led to the migration of people to different areas of the globe. This has brought an influx of different cultures to different countries with much intermingling and interaction on a daily scale. Thus, multiculturalism is not unique to South Africa but to many other countries, such as the United States, United Kingdom and Australia to name a few.

¹⁹ Refer to the discussion in chapter 6.

²⁰ In South Africa, psychiatrists are appointed to evaluate the accused at an enquiry in terms of s 79 of the Act. A similar position is followed in other countries such as, Germany, the United Kingdom and Islamic countries. Although Islamic countries treat deaf and dumb persons more leniently and cautiously, they follow different schools of thought, such as the Maliki and Hanafi schools which are more lenient, and the Shafi and Hanbali schools which are more conservative. Thus, their approach would depend on which school is applicable and the issue of when the mental incapacity arises, that is, before or after the commission of the crime. See chapter 6 on "The Right to Understand" for a more detailed discussion.

²¹ This demonstrates the extreme caution exercised by the British courts regarding such persons. It is recommended that a similar position should be implemented in South Africa. The presence of a responsible person be it an attorney, family member or medical expert at the interrogation of the accused, will greatly assist the mentally impaired person in securing his rights. It will also save time for the police in that it will facilitate their efforts to investigate the matter more expeditiously.

²² The argument that it will entail additional funding, which South Africa can ill afford in light of its other social problems such as addressing the Aids epidemic, the backlog to the housing problem and issues of poverty, is not persuasive enough. By diverting the trials of mentally incompetent persons to the mental health system, the criminal courts can focus on their huge case backlogs. This will definitely save time and money in the long run.

²³ Refer to chapter 6, ss 6.3 and 6.4 respectively.

The courts in these countries have all wrestled with the question of linguistic minorities at some stage or other.²⁴ The approach of the United Nations Human Rights Committee to linguistic minorities differs from the approach followed in South Africa. The United Nations Human Rights Committee are of the view that linguistic minorities are not entitled to have proceedings conducted in the language of their choice.²⁵ However, the *Pienaar* case has made a strong statement endorsing freedom of expression and language guarantees.²⁶ This demonstrates the progressive stance taken by our courts in light of our Constitution which is respected worldwide, and merely highlights the conservative approach of other courts. Nevertheless, both the European and American courts have held that the accused is entitled to a written translation of all necessary and relevant documents in the case, in order to prepare for trial.²⁷ Although our courts have held that necessary and relevant documents should be furnished to the accused for purposes of a fair trial, they have been silent on the need to furnish translated documents.²⁸ It is recommended that a written translation of all necessary and relevant documents would greatly alleviate the burden of the defence in a country such as ours, where most accused are unrepresented, indigent and unfamiliar with the designated court language.²⁹

The issue of a lack of interpretation also comes under the spotlight. The European courts have followed a more conservative approach to the issue of a lack of interpretation. The *Kamasinski* case, which revolved around *inter alia*, the lack of interpretation of the questions of witnesses was not found to be a violation of article 6(3)(e).³⁰ On the other hand, our courts have held that a lack of interpretation is an irregularity in the proceedings, and this has led to the proceedings being set aside.³¹ The European courts have also held that an arrested person need not be informed of

²⁴ See chapter 6, s 6.3, especially the views of different writers on how the question of linguistic minorities is addressed in *inter alia*, the United States, Australia and New Zealand.

²⁵ See, *inter alia*, *Yves Cadoret v France* and *Guesdon v France* *supra* discussed in chapter 6, s 6.4.

²⁶ See *S v Pienaar* *supra* discussed in chapter 6, s 6.4.

²⁷ See, *inter alia*, *S v Luedicke, Belkacem and Koç v Germany* *supra* discussed in chapter 6, subsection 6.3.

²⁸ See *Shabalala v Attorney-General of the Transvaal* *supra* discussed in chapter 5, subsection 5.3.3.2 and chapter 7, subsection 7.4.2.2 respectively.

²⁹ The designated languages of the court proceedings are English and Afrikaans.

³⁰ See chapter 6, s 6.3.

³¹ See, *inter alia*, *S v Mafu* *supra* discussed in chapter 6, s 6.3.

the reason for the arrest in a language that he understands.³² However, both South African law and United States law maintain that an arrestee must be informed of the reasons for his arrest in a language that he understands, or an interpreter be appointed to translate such information.³³ The United States position is thus similar to our law in that an interpreter must be present at the time of the arrest. Islamic law requires two interpreters to be present. The idea behind this is to ensure the accuracy of the interpretation. This approach has been mooted by Steele.³⁴ The accused should pay the interpreter's fees if his request is made in bad faith. The principle behind this is to penalise any abuse of the right to interpreters. This approach is commendable as abuses should be stopped. This approach is followed in most countries.³⁵ Therefore, South African law demonstrates a progressive approach in its treatment of basic procedural human rights.

It is universally accepted that the accused should be given adequate time and facilities to prepare a defence. This is an important aspect of the principle of "equality of arms".³⁶ The accused's right to be prepared entails not only that the accused should be entitled to postpone the trial if more time is required to prepare his defence,³⁷ but also that he be given a reasonable opportunity to obtain legal representation.³⁸ Summary proceedings against the accused, are said to violate the right to be prepared because the accused is not given adequate time to prepare a defence.³⁹ The decisions of the United Nations HRC demonstrate that the onus rests on the attorney to seek a postponement, and any failure to do so will not lead to a

³² See *Griffin v Spain* *supra* discussed in chapter 6, s 6.3. This case demonstrates how the United Nation's HRC has addressed the accused's right to interpretation.

³³ See s 35(1)(b) of the Constitution and Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53 respectively.

³⁴ See Steele *op cit* 243-244. This idea is very interesting.

³⁵ The accused is obliged to pay the interpreter's fees where he makes an unnecessary request for an interpreter. This is the view in Germany and Canada.

³⁶ This means that the parties must come to court on an "equal" footing. Refer to the discussion in chapter 1, subsection 1.2.2 on the different legal systems.

³⁷ See, *inter alia*, *S v Nel* *supra* discussed in chapter 7, s 7.3.

³⁸ See *S v McKenna* *supra* discussed in chapter 7, s 7.3.

³⁹ See *S v Nel* *supra* discussed in chapter 7, s 7.3. However, in England summary trials favour the accused.

violation of article 14(3)(b) rights.⁴⁰ The right to prepare an adequate defence is more comprehensively interpreted by the HRC in that it embraces the right to private communication with counsel.⁴¹ This interpretation is commendable in that it embraces the right to legal representation.

The right to adequate facilities also entails that a state is obliged to furnish an indigent accused with investigative and expert services to prepare adequately for his trial.⁴² However, the courts have warned that care should be exercised in granting such applications because of financial implications.⁴³ Steytler is commended for recommending that courts should decide the types of assistance that are adequate and when they are due to the accused.⁴⁴ Nevertheless, the rights of the accused should prevail over issues of finance if the circumstances dictate it. The principle of "equality of arms" requires that both the defence and the prosecution should be given equal opportunities in court. This presupposes that just as taxpayers' monies are used to fund the prosecution's case, similarly, such funds should be diverted towards helping the accused to prepare for his case. This will ensure that justice is done.

An accused's right to be present at his trial is fundamental to a fair trial in most jurisdictions.⁴⁵ This presupposes that an accused cannot waive his right to be present either by himself or his lawyer,⁴⁶ and that a judicial officer cannot consult with

⁴⁰ See *Wright v Jamaica* *supra* discussed in chapter 7, subsection 7.3. The interpretation of what denotes "adequate time" in the International Covenant depends on the facts of each case. See chapter 7 on "The Right to be Prepared" for a detailed discussion about United Nation's HRC case law.

⁴¹ See, *inter alia*, *Gomez de Voituret v Uruguay* *supra* discussed in chapter 7, s 7.3.

⁴² See *S v Huma* *supra* discussed in chapter 7, subsection 7.4.3, where a ballistics expert was appointed for the indigent accused to facilitate the preparation of his defence. A similar position has been followed in the United States. See *Ake v Oklahoma* *supra* discussed in subsection 7.4.3, where it was held that such expert services should be provided irrespective of whether the accused can afford such services or not in terms of the Constitution! Therefore, the American position is more enlightening in that it is not limited to an indigent accused.

⁴³ *Id.* This makes the American position all the more welcome.

⁴⁴ See Steytler *Constitutional criminal procedure* 246.

⁴⁵ See, *inter alia*, *S v Roman* *supra* and *Lewis v US* *supra* discussed in chapter 8, subsection 8.2.3 and s 8.3 respectively.

⁴⁶ *Id.* Also see *Faretta v California* *supra* and *Dasher v Stripling* *supra* discussed in chapter 8, subsection 8.2.3 and s 8.3 respectively.

a witness in the absence of both parties.⁴⁷ This also entails that indigent accused should be provided with subsistence and travel costs to get to court provided the state has the necessary funds.⁴⁸ However, an accused can be excluded from an appeal hearing.⁴⁹ Nevertheless, the American courts require the accused to be present at all stages of the court proceedings.⁵⁰ This demonstrates that the accused's presence is not limited to a particular stage of the proceedings.

An accused's right to be present is not absolute. There are exceptional circumstances when an accused's presence may be dispensed with, such as for example, where he disrupts the court's proceedings by his unruly behaviour, or voluntary waiver.⁵¹ South Africa does not accommodate trials *in absentia*.⁵² Those countries that accommodate trials *in absentia* impose positive obligations on the state to ensure fairness during trials, such as informing the accused about the case against him, safeguarding the right to legal representation and furnishing the accused with evidence against him.⁵³ It is thus imperative that those countries that accommodate trials *in absentia*, protect the rights of the accused. I agree with Marauhn that trials *in absentia* can be held for minor offences where there is no threat of imprisonment.⁵⁴ It is recommended that the accused should be present from the beginning of the trial until his conviction, to avoid detention by the police. The

⁴⁷ See, *inter alia*, *S v Rousseau supra* discussed in chapter 8, s 8.2.

⁴⁸ See *S v Maki and Others supra* discussed in chapter 8, subsection 8.2.4.

⁴⁹ See *S v Pennington supra*. A similar position has been followed by the European courts in *Kamasinski v Austria supra*. However, see *Cooke v Austria supra*, where the European Court held that the accused's presence at the appeal hearing was essential to the fairness of the proceedings. Please refer to chapter 8, subsection 8.2.2 for a discussion about these cases.

⁵⁰ See, *inter alia*, *Lewis v US supra* discussed in chapter 8, s 8.2. Also see Rule 43(a) of the Federal Rules of Criminal Procedure.

⁵¹ See s 159(1) of the Act, which provides that if the accused's refusal to plead is accompanied by such improper behaviour that it obstructs the conduct of the court proceedings, the court may order him to be removed and may direct the trial to proceed in his absence. Also see *Illinois v Allen supra*, where the accused lost his right as a result of improper conduct at trial. South African courts recommend that a warning should be given to the accused about the consequences of his disruption, in order to influence him to change his mind. See *S v Mokoa supra* at 350 discussed in chapter 8, subsection 8.3.1.

⁵² Unlike the United States, certain Islamic countries and certain European countries do accommodate trials *in absentia* as the discussion in chapter 8 on "The Right to be Present" illustrates.

⁵³ See Marauhn "The right of an accused" in Weissbrodt and Wolfrum (1998) *op cit* 773.

⁵⁴ *Ibid* at 776.

right to be present should also embrace the right to be summoned as an accused needs to be fully informed of the case that he has to meet. However, where the accused's presence is dispensed with, a special procedure should exist to preserve evidence. Nevertheless, trials held in the absence of the accused should be the exception and not the norm.

The accused's right to be present also encompasses the right to confront his accusers and observe their demeanour. It is a fundamental principle that the trial should take place in open court, and the accused has the right to see and know his accusers.⁵⁵ It is universally accepted that any violation of the right to confrontation will amount to an irregularity, and lead to the setting aside of the proceedings.⁵⁶ However, the right to confrontation is not absolute and there are exceptional circumstances where compelling reasons of public policy will prevail over the right to confrontation. The major exceptions to the right to confrontation are evidence given by child witnesses (s 170A), evidence by commission (s 171)⁵⁷ and hearsay evidence.⁵⁸ Therefore, where there is a conflict between the protection of a vulnerable witness and the requirement of a face-to-face confrontation, the former will prevail. In South Africa, section 170A was introduced to protect child witnesses, whereby the witness may give evidence with the aid of an intermediary via closed-circuit television. Confrontation between the accused and child witness was thus excluded to reduce the emotional stress and suffering of the child witness. The constitutionality of this section was challenged in *Klink v Regional Magistrate NO*,⁵⁹ where the court found that section 170 was not unconstitutional and that the use of

⁵⁵ The right of confrontation is said to be important because reliable results are said to be more likely when there is confrontation as the witness is less likely to lie in the accused's presence. The court can also observe the witness's demeanour and judge their credibility. See *Conklin op cit* 325. Also see the discussion in chapter 9 on the accused's right to confrontation.

⁵⁶ See, *inter alia*, *S v Motlatla supra*, *Kostovski v The Netherlands supra* and *Chambers v Mississippi supra* in chapter 9, s 9.2.

⁵⁷ Section 171 of the Act provides for evidence on commission in the interests of justice, where the witness is unavailable and his attendance cannot be obtained in court. The taking of criminal depositions in terms of Rule 15 of the Federal Rules of Criminal Procedure in the US, has similar characteristics to s 171. Refer to chapter 9 "The Right to Confrontation", particularly subsection 9.3.2 for a more detailed discussion about s 171.

⁵⁸ Hearsay evidence is generally excluded unless it falls under one of the recognised exceptions. Refer to chapter 10 "The Right to Present One's Case", particularly subsection 10.2.5.2 for a more detailed discussion about hearsay evidence.

⁵⁹ See *Klink v Regional Court Magistrate NO supra* at 402. Also see *S v Mathebula* and *S v Stefaans supra* which are instructive regarding the appointment of an intermediary in terms of s 170A. The South African Law Commission's proposals regarding the appointment of an intermediary for adult persons and the use of support persons in criminal proceedings involving sexual crimes are also instructive. See *South African Law Commission Project 107 "Sexual offences: process and procedure"* *supra* at 44 and 49 respectively. Refer to chapter 9, subsection 9.3.1.2 and chapter 10, subsection 10.2.5.1 for a discussion about these cases.

an intermediary did not affect the fundamental fairness of the criminal process. Nevertheless, section 158 has also been mooted as an improved alternative to section 170A.⁶⁰

Foreign jurisdictions have also introduced protective measures for victims of child abuse. In the United States, *Maryland v Craig* and subsequent case law have established that when a judge determines that a child witness will be traumatised by the presence of the

accused in the courtroom, the court should allow the child to testify away from the accused's presence.⁶¹ The Canadian, British and Australian courts have all come out in favour of protecting the rights of youthful witnesses over the accused.⁶² Such protective measures not only protect the child witness, but they also enhance the truth-finding process which is part and parcel of the confrontation principle. Section 170A is said to be more comprehensive in that it leaves the door open for the courts to appoint an intermediary even in the case of minor witnesses rather than minor victims.⁶³ Therefore, if witnesses cannot attend a trial, or they are children who might be emotionally damaged by attending, procedures exist that will allow them to testify, and to do so electronically if necessary.⁶⁴ Thus, our law conforms with trends in these other countries, by recognising that although the right to confront adverse witnesses is not absolute, it is nevertheless an important component of a right to a fair trial.

The right to present one's case encapsulates the right to adduce and challenge evidence, the right to call witnesses, and the right to address the court on evidence

⁶⁰ Section 158 makes it possible for people to give evidence via electronic means without actually being present in court. For a detailed discussion about the advantages about s 158, see Müller and Tait *op cit* 59. The recent proposal to use modern technology such as audio-visual link to postpone criminal proceedings against awaiting-trial prisoners is commendable and innovative. See *South African Law Commission Project 113 "The use of electronic equipment"* *supra* at 57.

⁶¹ Refer to chapter 9 on "The Right to Confrontation", particularly subsection 9.3.1.2 for a more detailed discussion about the development of the case law and legal literature in American law.

⁶² See, *inter alia*, *R v Levogiannis* *supra* regarding the Canadian position, *R v Lynch* and the YJCEA 1999 regarding the British position and Palmer *op cit* 185-187 regarding the Australian position respectively. Protective measures for child victims of sexual abuse have been introduced in all these jurisdictions. Refer to chapter 9, subsection 9.3.1.2 for a discussion about these protective measures.

⁶³ Section 170A refers to "any witness". In *Gonzales v State* *supra* discussed in chapter 9, subsection 9.3.1.2, the closed-circuit procedure was used to protect a minor witness rather than a minor victim. This decision has been criticised by Stacey Jones as extending the exception in American law. See Jones *op cit* 969. Similarly, protective measures in other American states have been used to protect minor witnesses and adult witnesses. See *State v Blume* and *Gilpin v McCormick* *supra* discussed in chapter 9, subsection 9.3.1.2.

⁶⁴ See, *inter alia*, s 170A and s 158 of the Act and *Maryland v Craig* *supra* discussed in chapter 9, subsection 9.3.1.2.

and on sentence. The right to present one's case obviously presupposes an accused's presence at the trial. The accused must also be prepared for his trial before he can present his case. This entails that he must be furnished with the necessary information and facilities to prepare for his trial. The accused's right to "challenge" evidence includes the right to cross-examine evidence.⁶⁵ Cross-examination is regarded as the principal method of testing the veracity and reliability of evidence. An unrepresented and an illiterate accused is entitled to the court's assistance in presenting his defence by way of cross-examination.⁶⁶ However, like the other sub-rights, the right to cross-examination is not absolute.⁶⁷ This means that a judicial officer has a discretion to control improper cross-examination, and may disallow questions that are irrelevant, vexatious, abusive, oppressive and discourteous.⁶⁸ A *prima facie* limitation of this right occurs when the cross-examiner is substituted by an intermediary, and the child witness is screened from the courtroom.⁶⁹ Therefore, the right to cross-examination must also yield to the considerations of public policy and the interests of the child witness.⁷⁰

Hearsay evidence also denies the accused the right to cross-examine evidence. Hearsay evidence is usually excluded because of its general unreliability, unless it fall under one of the of the common law or statutory exceptions.⁷¹ The courts are

⁶⁵ See s 166 of the Act. Also see s 35(3)(i) of the Act. The British criminal justice system also demonstrates that an accused has the right to cross-examine witnesses and to be present in the courtroom. See *R v Hilton* *supra* discussed in chapter 10, subsection 10.2.1.

⁶⁶ See *S v Sebatana* *supra* discussed in chapter 10, subsection 10.2.2.

⁶⁷ Also see *Klink v Regional Court Magistrate No* *supra* discussed in chapter 9, subsection 9.3.1.2 and chapter 10, subsection 10.2.5, where the court remarked that the right to cross-examination is not absolute.

⁶⁸ See, *inter alia*, *S v Cele* and *S v Mayiya* *supra* discussed in chapter 10, subsection 10.2.5.

⁶⁹ See *Klink v Regional Magistrate* *supra* discussed in subsections 9.3.1.2 and 10.2.5, where the court endorsed the position of the intermediary, and held that the accused's right to cross-examine was not violated by s 170A of the Act, which allows for the appointment of the intermediary.

⁷⁰ A similar approach has been followed in foreign jurisdictions. Refer to chapter 9 on "The Right to Confrontation" for a detailed discussion about protective measures for child witnesses in other countries. Indeed, in *R v Levogiannis* *supra* discussed in chapter 9, subsection 9.3.1.2, the Canadian court held that the placing of a screen between the accused and the complainant does not undermine the presumption of innocence, or hamper cross-examination.

⁷¹ Statutory hearsay is regulated by the Evidence Amendment Act 45 of 1988. Refer to chapter 10 on "The Right to Present One's Case" for a more detailed discussion about hearsay evidence. The Confrontation Clause also prevents the use of hearsay evidence against the accused, unless the statement is sufficiently reliable. See *Ohio v Roberts* *supra* discussed in chapter 10, subsection 10.2.5.2.

generally reluctant to use the exceptions lightly in criminal cases against the accused, but it is more readily used when it is admitted by the accused.⁷² The furnishing of expert documentary evidence in the form of an affidavit or certificate does not curtail the right to cross-examination.⁷³ Thus, the exceptions to the right to cross-examination are the interests of child witnesses in terms of section 170A, hearsay evidence and expert documentary evidence.

The accused has a right to adduce evidence for purposes of trial.⁷⁴ Section 196(1) of the Act embodies the accused's right to testify in his own defence, and to call witnesses for the defence. The right to call witnesses is regarded as absolute in South African courts.⁷⁵ A somewhat different approach is followed in other jurisdictions.⁷⁶ A court may refuse to allow an accused to call a witness where the witness "cannot possibly give relevant evidence" in terms of the common law. Nevertheless, the court has to be "exceptionally careful" in arriving at such a conclusion.⁷⁷ Therefore, a presiding officer must be cautious when he refuses to allow an accused to call a witness, as a miscarriage of justice may occur as a result of his refusal, and this will lead to the proceedings being set aside.⁷⁸ The right to compel the attendance of witnesses is entrenched in section 179(1) of the Act. Similarly, an accused's right to compel witnesses for the defence is entrenched in the ICCPR and ECHR.⁷⁹ In the United States, the Sixth Amendment guarantees to

⁷² See, *inter alia*, *S v Cekiso* *supra* discussed in chapter 10, subsection 10.2.5.2.

⁷³ See *S v Van der Sandt* *supra* discussed in chapter 10, subsection 10.2.5.3.

⁷⁴ A presiding officer is obliged to explain the accused's right to adduce evidence in terms of s 151 of the Act. See *S v Motaung* *supra* at 131 discussed in chapter 10, subsection 10.4.2. Also see s 35(3)(i) of the Constitution.

⁷⁵ See *S v Gwala* *supra* discussed in chapter 10, s 10.4.

⁷⁶ See *Engel et al v The Netherlands* *supra* discussed in chapter 10, subsection 10.4.1, where the European Court held that the right to call defence witnesses is not absolute. The right is subject to the principle of "equality of arms". A similar view has been held in *Taylor v Illinois* *supra* discussed in chapter 10, subsection 10.4.1.

⁷⁷ See, *inter alia*, *S v Selamana* and *S v Tembani* *supra*. Similarly, it has been held in *US v Valenzuela-Bernal* *supra*, that the particular witness testimony must be material and favourable to the defence in order to be constitutionally protected. Please refer to chapter 10, subsection 10.4.4 for a discussion about these cases.

⁷⁸ See, *inter alia*, *S v Hlongwane*, *S v Levin* and *Rex v Hatch* *supra* discussed in chapter 10, subsection 10.4.1.

⁷⁹ See art 14(3) of the ICCPR and art 6(3)(d) of the ECHR respectively. Both these articles also state that an accused's right to compulsory process should apply under the same conditions as state witnesses. These articles are more progressive and comprehensive than s 179(1) of the Act, which prefers state witnesses over witnesses for the defence. Clearly, s 179(1) does not

all defendants the right of "compulsory process" to compel the attendance and testimony of witnesses for the defence.⁸⁰ The right to compel the attendance of witnesses now has constitutional status.⁸¹ A court should assist the accused in securing the attendance of witnesses.⁸² Similarly, it has been held in *Lloyd v Jamaica* that the court is entitled to secure the attendance of witnesses.⁸³ However, the right to adduce evidence is not absolute.⁸⁴ An accused's actions may also be regarded as a valid waiver of the right to adduce evidence where he has made no concerted effort to get a particular witness to court.⁸⁵

An accused has a right to address the court in terms of section 175 of the Act. The case law demonstrates that judicial officers should not deprive the accused of this opportunity unnecessarily.⁸⁶ Any failure on the part of the judicial officer, will lead to the proceedings being set aside. There seems to be a tendency to regard the failure of a court to afford an accused an opportunity to address the court as a gross and fatal irregularity.⁸⁷ This failure is said to constitute a violation of the accused's right to a fair trial.⁸⁸ An accused also has the right to address the court on sentence in terms

comply with the "equality of arms" principle.

⁸⁰ This also entitles the defendants to the production of documents in the possession of a witness. This right is the same as the prosecution's right to summon trial witnesses and to obtain the production of physical evidence.

⁸¹ See *Pennington v Minister of Justice* *supra* at 279 discussed in chapter 10, subsection 10.4.3.

⁸² See *S v Hlongwane* *supra* discussed in chapter 10, subsection 10.4.3.

⁸³ See *Lloyd v Jamaica* at No 351/1988 *supra*. Also see *Barber v Page* *supra*. Please refer to chapter 10, subsection 10.4.3 for a discussion about these cases.

⁸⁴ See for example, s 342A of the Act.

⁸⁵ See, *inter alia*, *Perera v Australia* *supra* discussed in chapter 10, subsection 10.4.4.

⁸⁶ See, *inter alia*, *R v Parmanand*, *R v Cooke* and *S v Brand* *supra* discussed in chapter 10, s 10.5.

⁸⁷ See *S v Mabote* *supra* at 745. However, a somewhat different view was taken in *S v Vermaas* *supra* at 454, where the court held that although any denial of the right of address will be regarded as a gross irregularity, an accused is not obliged to address the court. As long as the accused is given the opportunity to make the address, any subsequent refusal or failure on the accused's part, will mean that the right has been either abandoned or lost. Please refer to chapter 10, s 10.5 for a discussion about these cases.

⁸⁸ See *S v Zingilo* *supra* at 1186, and *S v Mbeje* *supra* at 252 respectively. Please refer to chapter 10, s 10.5 for a discussion about these cases.

of section 274(2) of the Act.⁸⁹ Therefore, an accused must be given a reasonable opportunity to present his case effectively in court. This will ensure that he has participated meaningfully in the proceedings.

11.3 RECOMMENDATIONS

Thus, by far our law is in line with international trends. The accused must be "present" at both a physical and mental level at the trial in order to prepare a meaningful defence.⁹⁰ The ideal is to ensure that the accused is able to understand the criminal proceedings and communicate and consult with his legal representative. This will impact on his right to a fair trial and on other constitutional protections, such as the right to be prepared and the right to information. An accused can only be adequately prepared for his trial if he is adequately informed. This means that he must be furnished with all relevant and material evidence in order to prepare a meaningful and adequate defence. Similarly, the accused should be furnished with expert and investigative services to facilitate the preparation of his defence where the circumstances warrant it. An informed accused will be able to prepare for his trial. This will enable him to adduce and challenge evidence in court, and thus facilitate the presentation of his case.

However, the intrusion of the internet and the television camera into the courtroom has introduced the idea of the accused's "virtual" presence versus his physical presence.⁹¹ Therefore courts need to embrace the forces of technological change in today's electronic age. According to Meintjes-Van der Walt, the criminal process needs to deal with technological and scientific development.⁹² A balance should be maintained between technological changes and the constitutional rights of the accused. To this end, the law should develop adequate ways to deal with advancing science without compromising justice, and move ahead with the times.

Justice in today's multi-cultural societies can only be achieved if the accused and witnesses who are unfamiliar with the court language are entitled to interpreters. Therefore, countries with multi-cultural societies must strive to improve the fairness of their criminal justice systems for all cultures. Countries should also move away from holding trials *in absentia*. If trials are held in the accused's absence, then special attention must be given to protect the accused's rights, such as affording him the right to legal representation, providing him with a transcript of the proceedings and

⁸⁹ See *S v Louw* *supra* discussed in chapter 10, s 10.6.

⁹⁰ Therefore, the right to be present is linked to the right to understand.

⁹¹ See Davis *op cit* 26 for a detailed discussion about virtual reality and the accused's presence in court.

⁹² See Meintjes-Van der Walt (SACJ) *op cit* 367. The *South African Law Commission Project 113 "The use of electronic equipment in court proceedings"* *supra* is a step in the right direction.

informing him about the case against him. However, the ideal should be to prevent the condemnation of a person without giving him an adequate opportunity to make his case in person.

Courts should move cautiously when an individual's constitutional rights are at stake so as not to allow the exceptions to overtake the rule. The judicial system should be reformed by introducing judicial procedures that can achieve a sensitive balance between the competing interests of the child victim, society and the rights of the accused. The courts should thus look into alternatives to avoid violating the accused's right to confrontation, such as moving proceedings out of the courtroom, making courtrooms more "friendly" to children, using "child interpreters" or intermediaries, and recommending other trauma reducing measures.⁹³ The judicial system also needs to address the social problems that give rise to child abuse.

The presiding officer is also obliged to explain the rights to an unrepresented and illiterate accused. He may put questions to the accused during the trial to clarify matters. However, it is undesirable that he should participate extensively in the questioning of the witness, as his task is not to try the case.⁹⁴ The judge's task is merely to rule on various evidentiary matters and to ensure that both parties conduct their cases according to the relevant procedural rules.⁹⁵ However, he must also make a concerted effort to find a better balance between the rights of the accused and the interests of society.⁹⁶ To achieve this, he must not be dictated by reasons of convenience or public sentiment, but by the principles and values enshrined in the Constitution.

Indeed, courts face a dilemma when they are confronted with serious forms of crime. On the one hand, they are responsible for the protection of society and its citizens; on the other hand, they must respect the constitutional rights of the accused. When the level of crime is perceived to threaten the public order and safety of its citizens, pressure is exerted on the courts to take repressive measures at the expense of human rights. This is when vigilance is called for as there is a risk that individual rights are abused and on a larger scale in extraordinary situations than in normal

⁹³ See the views of Fuhriman and Bell in this regard. See Fuhriman *op cit* 46-47 and Bell *op cit* 375-376.

⁹⁴ See *S v Adriantos supra* discussed in chapter 10, subsection 10.4.6. It is noteworthy that this is in line with the accusatorial system followed by our courts.

⁹⁵ Nevertheless, the presiding officer may try to obtain favourable information from the accused for the purpose of sentencing. See *S v Sithole supra* discussed in chapter 10, subsection 10.4.6.

⁹⁶ To illustrate this, see *Jasper v UK supra* and *Fitt v UK* (29777/96), where the European Court held that the applicant's rights under Art 6 had not been violated because the handicaps under which the defendant laboured in not having access to relevant undisclosed material were sufficiently counterbalanced by the procedure adopted by the judicial authorities.

times.⁹⁷ The court's difficult task is to ensure that a proper balance between the means necessary to protect democracy and the demands of the protection of individual rights is maintained. Therefore, officers of the court (including prosecutors and defence attorneys) should be trained to balance the competing demands made upon them by the system and become objective, yet vigilant advocates. Objectivity does not mean that you cannot be sympathetic to the plight of those who have been harmed, just as vigilance does not mean that you cannot be fair to those who have been accused.⁹⁸

The discussion on the various sub-rights reveals that our courts have risen well to the challenge in balancing the competing interests between the rights and interests of society and the constitutional rights of the accused.⁹⁹ The Constitutional Court decision in *Shabalala v Attorney-General of the Transvaal* clarified the position on police docket privilege in South Africa.¹⁰⁰ The decision to base the prosecutorial duty to disclose on the right to a fair trial, conforms with international and comparative jurisprudence.¹⁰¹ The *Shabalala* decision heralded a new era for access to information in South Africa, and a welcome shift from the past when South Africa was seen as a "closed and secretive society".¹⁰² Similarly, our courts have come out strongly in favour of the right to interpretation and language guarantees.¹⁰³ Indeed, the *Pienaar* decision highlights the right to freedom of expression and language guarantees enshrined in the Constitution.¹⁰⁴ The courts have also highlighted the

⁹⁷ Indeed, history demonstrates that the right to confrontation is usually threatened when to do so is politically expedient in serving the ends of a majority at the expense of minority interests. See Boyce *op cit* 73 and Pollitt *op cit* 413 respectively. The experience in the United States after 11th September 2001 also illustrates this.

⁹⁸ Taylor and Byrne *op cit* 330.

⁹⁹ See the discussion in chapters 5 -10.

¹⁰⁰ See the case discussion in chapter 5, subsection 5.3.3.2 and chapter 7, subsection 7.4.2.2 respectively.

¹⁰¹ See chapter 10, subsection 5.3.6 for a discussion on access to information in foreign jurisdictions.

¹⁰² The advent of the Promotion of Access to Information Act 2 of 2000 also enhances this culture of transparency and accountability. See chapter 5, subsection 5.3.5 for a discussion about this Act.

¹⁰³ See chapter 6, ss 6.3 and 6.4 respectively.

¹⁰⁴ See chapter 6, s 6.4 for a discussion about the *Pienaar* case.

need to protect the rights of indigent and unrepresented accused.¹⁰⁵ However, the rights of victims have not been ignored. The decision in *Klink v Regional Court Magistrate* illustrates the courts' protective stance towards victims of sexual abuse.¹⁰⁶ Therefore, the court decisions demonstrate how seriously the courts are taking their role as guardians of the Constitution.

Nevertheless, the court decisions have been criticised as being too soft on crime and leaning too heavily on the rights of the accused. However, the recent South African Law Commission reports indicate a future trend towards victim rights, counselling for victims of crime, greater involvement of police and social agencies, increased training of various role players in the criminal justice system and the need to embrace the forces of technological change.¹⁰⁷ The courts as guardians of the Constitution will no doubt embrace these sentiments in their decisions. The past nine years since the inception of the Interim Constitution in 1994, demonstrate that progressive changes have been made. Nevertheless, the quest for "better justice" is a ceaseless quest and there is still a long road ahead. Therefore, we must constantly strive to re-examine our premises to achieve "better justice" for all.

The credit for our progress 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.¹⁰⁸ 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 basic procedural rights are properly protected. However, adequate steps should also be taken to establish the financial and administrative structures necessary to give effect to the principles enshrined in the Constitution. To merely inform the accused of their rights in the Constitution is an empty gesture and makes a mockery of the Constitution if it isn't backed by adequate mechanisms to enforce those rights.¹⁰⁹ Accordingly, the criminal justice system should be fair and just, and not encroach much on the liberties of citizens.¹¹⁰

¹⁰⁵ See for example, *S v Huma* discussed in chapter 7, subsection 7.4.3 and *S v Sebatana* discussed in chapter 10, subsection 10.2.2. Similarly, the courts have stressed the need to assist accused in securing the attendance of witnesses in court. See *inter alia*, *S v Hlongwane* discussed in chapter 10, subsection 10.4.3. These cases illustrate how vigilant the courts are in protecting the constitutional rights of the accused.

¹⁰⁶ See chapter 9, subsection 9.3.1.2 and chapter 10, subsection 10.2.5.1.

¹⁰⁷ See, *inter alia*, the South African Law Commission Reports on "A more inquisitorial approach to criminal procedure", "Sexual offences" and "The use of electronic equipment" discussed in chapters 5-10.

¹⁰⁸ Bauman *op cit* 1.

¹⁰⁹ See the comments of Didcott J in *S v Vermaas, S v Du Plessis* 1995 (7) BCLR 851 (CC) at 860.

¹¹⁰ Hall *op cit* 735.

Then only can we proudly say that the spirit of the Twelve Tables has been sustained. Justice must be seen to be done.