

## CHAPTER 2

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## 2.1 INTRODUCTION

An understanding of the principles and purpose of bail within the criminal process is in the first instance necessary before a pronouncement can be made on whether bail is currently granted injudiciously under South African law. However, there is no unanimity regarding these principles, and the role that bail must fulfil. It is expected that an investigation into the origins and development of these principles will provide some clarity. It therefore remains important to investigate the origin and development of these principles.

The historical overview will also help to establish whether bail is currently being granted too freely under South African law in view of the prevailing circumstances. This chapter considers the balance that existed at different times between the individual's right to freedom and security, and the interests of society. It also identifies some of the principles that have been recognised in history.

My research shows that the principles of bail under South African law stem from Roman, Roman-Dutch and English roots. Roman-Dutch principles were applied following the occupation of the Cape in 1652 by the Dutch East India Company. After the second British occupation in 1806 English law was introduced. As a result a system began to develop that embraced elements of both these systems. The Roman, Roman-Dutch and English roots are described as a background to the overview of the development of the principles on bail under South African law up to 30 June 1999.

The principles of bail as at 30 June 1999 under South African law are only stated briefly in this chapter. Although this study concentrates on particular comparisons, a summary of the present position is necessary to be able to

make a general comparison of the law pertaining to bail under South African and Canadian law. The comparisons and analysis are left for later chapters.

This chapter also shows why there is a need for the constitutional protection of a threshold right to bail.

## 2.2 ROMAN LAW

### 2.2.1 Introduction

A survey of ancient Roman law<sup>1</sup> reveals no true criminal law as we understand it today. Each household was united under its own *paterfamilias*. If any offence was committed against a member of a group,<sup>2</sup> that group avenged the wrong.<sup>3</sup> There was therefore no clear distinction between public and private law. Offences, which are today prosecuted as criminal offences, resulted in private disputes.

State intervention only existed in as far as the submission of disputes to a central authority was regulated.<sup>4</sup> Buckland refers to it as “state regulation of self-help”.<sup>5</sup> As such, bail was unknown. An offence could only be prosecuted

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<sup>1</sup> It is not clear when the Roman society started as there is nearly a total lack of documentary evidence of the time before 450 BC. According to word of mouth Roman society existed as far back as the eight century BC. See Van Zyl (1983) 3. However, it seems that the history I describe dates back to at least some time before the composition of the Twelve Tables in 451 - 450 BC.

<sup>2</sup> By a member of another group.

<sup>3</sup> Maine (1861) 369.

<sup>4</sup> Buckland (1963) 606.

<sup>5</sup> *Ibid.*

by the injured party and the punishment was left to the injured party or his kin. The notion of injury to the community had little to do with the earliest interference by the state.<sup>6</sup> According to Maine the magistrate simulated the role of a private arbitrator.<sup>7</sup> Mommsen describes this role as follows:<sup>8</sup>

The magistrate here interposes between the contending parties as a mediator: on the one hand he settles or causes to be settled the question of fact; on the other hand, when a wrong has been proved, he either gives self-help its course, or else enjoins the injured party to renounce it on consideration of receiving compensation.<sup>9</sup>

This practice did not survive legislation indefinitely. The state either undertook to punish the crimes as was done with certain crimes<sup>10</sup> under the Twelve Tables<sup>11</sup> or private vengeance gave way to compulsory compensation prescribed by the state.<sup>12</sup> However, as Kunkel explains, the Twelve Tables was still largely based on the right of an injured party to private vengeance.<sup>13</sup> Punishment was inflicted by the state only in limited instances. In all other

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<sup>6</sup> Maine (1861) 374. This lack of any clear distinction between criminal law and law pertaining to delicts subsisted even until the era of Roman-Dutch law. See Du Plessis (1990) 16.

<sup>7</sup> (1861) 378.

<sup>8</sup> (1899) 905.

<sup>9</sup> My translation.

<sup>10</sup> Such as high treason (*perduello*) and perhaps in the case of certain grave crimes of a sacral kind. See Kunkel (1973) 27.

<sup>11</sup> *Lex Duodecim Tabularum*.

<sup>12</sup> Strachan-Davidson (1969) 42.

<sup>13</sup> (1973) 27.

instances, including murder, punishment was left to the injured party or his kin.<sup>14</sup>

It is not difficult to understand why private vengeance gave way to compulsory compensation in the private criminal suit. The task of private vengeance was without doubt a heavy task on the injured, the weak, the indigent and those without influence. This was an even more daunting task when the culprit had strong family connections or was strong of body or both. It is therefore not surprising that when the state emerged from anarchy, a magisterial hand was extended to help the weak.<sup>15</sup>

The culprit was fined a definite sum. The plaintiff was now in the position of a judgment creditor who may proceed *per manus injectionem*.<sup>16</sup> This was again self-help for it may be initiated *non expectata iudicis auctoritate*.<sup>17</sup> The advantage of having first obtained a judgment lay therein that in the unadjudicated cases the defendant could resist seizure,<sup>18</sup> but not so with decided cases.<sup>19</sup> Where a judgment has first been obtained Gaius tells us “*nec*

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<sup>14</sup> Caecilius argued that the permission of *talio* in the Twelve Tables was only granted when the culprit refused a proper reparation. The injured party could therefore not refuse reasonable satisfaction. See Strachan-Davidson (1969) 42.

<sup>15</sup> Strachan-Davidson *ibid* 43 indicates that there is no record that the authorities dealt out the punishment or that the private person was assisted in his vengeance. However, he reminds us that no specific instance of vengeance being carried out was ever recorded.

<sup>16</sup> The plaintiff could seize the defendant.

<sup>17</sup> Without the expected authority of the judge (without a warrant of arrest).

<sup>18</sup> *Manum depellere*.

<sup>19</sup> Here the formula runs *tibi pro iudicato manum injicio*.

*licebat judicato manum depellere*".<sup>20</sup> According to Strachan-Davidson this can only mean that in the case of resistance the state will lend its force to compel submission.<sup>21</sup>

The changes to the judicial practice is aptly summarised by Mommsen as follows:<sup>22</sup>

From that time forward capital punishment by private suit is set aside, and never reappears. The conception of ransom money, which has from the first entered with effect into the procedure for crimes against individuals, henceforth reigns supreme in this sphere.

The crimes that the Romans wanted to punish other than by pecuniary means were removed to the sphere of public justice.<sup>23</sup>

In the long evolution of the Roman law the forms of legal redress also underwent fundamental changes.<sup>24</sup> State regulation of self-help gave way to three systems of litigation that succeed each other in time. They were:<sup>25</sup>

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<sup>20</sup> I 4 21 - 25.

<sup>21</sup> (1969) 44.

<sup>22</sup> (1899) 941 (translation by Strachan-Davidson 45).

<sup>23</sup> See Strachan-Davidson (1969) 45. The "private criminal law" of the Twelve Tables proved increasingly inadequate as Rome grew into a metropolis accompanied by a rise in crime. In the course of the third century BC a drastic police-jurisdiction arose directed against crimes such as arson, poisoning and theft. An arrested person was punished officially though the procedure could be initiated by a private citizen by means of the giving of information (*nominis delatio*).

<sup>24</sup> Buckland (1963) 607.

<sup>25</sup> Primitive institutions excluded.

- *legis actio*
- *formula* and
- *cognitio extraordinaria*<sup>26</sup>

These three systems are now discussed and the origins and development of the principles of bail are identified.

### 2.2.2 The *legis actio*-procedure<sup>27</sup>

The earliest roots of bail in Roman law can already be found in this procedure. With the increasing level of civilisation a system developed whereby the state satisfied itself that there was an issue (*lis*) between the parties and the dispute was submitted to a peer as a peaceful alternative to self-help.<sup>28</sup> The procedure was accordingly divided into two stages:

- the assertion of the claim before the magistrate *in iure*; and
- the actual hearing and decision of the case *apud iudicem* by the judge.<sup>29</sup>

For the procedure to work, both parties had to appear before the magistrate and play their part when the claim was asserted *in iure*.<sup>30</sup> The plaintiff was

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<sup>26</sup> See Buckland (1963) 607; Thomas (1976) 119; Strachan-Davidson (1969) 46 and further.

<sup>27</sup> Modern knowledge of this ancient procedure is derived principally from Gaius book IV. See Thomas *ibid* 73.

<sup>28</sup> Thomas *ibid* 70.

<sup>29</sup> *Ibid*.

<sup>30</sup> See G 4 183 and De Zulueta (1967) 301. See also Buckland (1963) 610 with regard to the *sacramentum*.



responsible to get the defendant before the magistrate.<sup>31</sup> This was done by oral summons (*in ius vocatio*), of which the prescribed form (if there was one) is unknown.<sup>32</sup> The defendant either had to obey the summons by going to court or give a surety (*vindex*) who would be responsible for his appearance.<sup>33</sup> If the defendant did neither, the plaintiff having called someone to witness, could then arrest the defendant and drag him to court by force if necessary. Although uncertain, it seems that one might have been excused from attending in certain circumstances for example *morbis santicus*<sup>34</sup> when the case will be postponed.<sup>35</sup>

The magistrate had to go through a set of rituals comprising specific acts and declarations (*actiones*). These formalities had to be strictly complied with since the slightest deviation could nullify the procedure.<sup>36</sup>

The term *actio* refers to the acts and declarations that the plaintiff had to execute to assert his claim. There appears to have been an appropriate *legis*

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<sup>31</sup> See *ibid* and Borkowski (1994) 61.

<sup>32</sup> XII Tab 1 1. See also Van Warmelo (1970) 297; De Zulueta and Borkowski *ibid* and Buckland (1963) 610 with regard to the *sacramentum*.

<sup>33</sup> Even though direct evidence of there having been a *vindex* in this period is lacking, the weight of authority and argument seems to favour this view. *Vindex* could not have been an invention of the formulary period (see G 4 46). See Van Warmelo, De Zulueta and Borkowski *ibid*. See also Buckland *ibid* 613 with regard to the *sacramentum*. What the exact function of the *vindex* in this period was is not altogether clear. See Buckland (1963) 613 and De Zulueta (1967) 302 footnote 3.

<sup>34</sup> This refers to a serious disorder that excuses one from duty.

<sup>35</sup> See Buckland (1963) 610 with regard to the *sacramentum*. Borkowski (1994) 61 indicates that if the defendant was sick or infirm through age transport had to be arranged for him.

<sup>36</sup> See Buckland *ibid* 610 - 611 and Van Zyl (1983) 368.

*actio* for each wrong, but Gaius indicates that there were but five moulds into which every *legis actio* (the one or the other) was cast.<sup>37</sup> The *sacramentum* was a general action applicable in all cases where no special procedure was prescribed.<sup>38</sup> Although not altogether clear, the *sacramentum* was probably an oath which each party took to the righteousness of his plea. A false oath would render him *sacer* to the God invoked.<sup>39</sup> Initially, this led to the death of the liar but later on extenuating circumstances were taken into account. Each party therefore beforehand gave beasts or money, which shall cleanse him from guilt in case he turns out to have sworn wrongly. At an even later stage security of a specific amount was taken depending on the nature of the case and the amount involved.<sup>40</sup>

The next step was to appoint a *iudex*, originally immediately, but after an uncertain date,<sup>41</sup> after 30 days<sup>42</sup> delay, to give the parties time to settle their dispute.<sup>43</sup>

The magistrate could not proceed if the *in ius vocatus* refused to co-operate after he had been brought to court. The case could not be adjudicated.<sup>44</sup> As

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<sup>37</sup> G 4 12. *Sacramentum, iudicis arbitrive, postulatio, condictio, manus iniectio* and *pignoris capio*. The first three *actiones* were directed at resolving the dispute between the parties. The last two were applied for purposes of executing a judgment. See Van Warmelo (1970) 233 and Van Zyl *ibid*.

<sup>38</sup> G 4 13.

<sup>39</sup> See Thomas (1976) 74 and De Zulueta (1967) 235.

<sup>40</sup> A sum of 50 asses if the matter was worth less than 1000 or it was a question of liberty, in other cases 500. See Buckland (1963) 611.

<sup>41</sup> *L Pinaria* of uncertain date.

<sup>42</sup> G 4 15.

<sup>43</sup> See Buckland (1963) 611.

the proceedings might not finish in one day and there was a delay of 30 days to appoint a *iudex*,<sup>45</sup> the presence of the summoned party during these adjournments also had to be ensured. Security for the defendant's reappearance *in iure* could be given by *vadimonium*.<sup>46</sup> *Vadimonium* could be used for all adjournments of the *legis actio*,<sup>47</sup> even for the transfer from *ius* to hearing.<sup>48</sup> If postponement of the *iudicium* was needed *vadimonium* was not used and it seems that judgment went by default.<sup>49</sup>

Where the action was for a judgment debt or on a payment made by a sponsor,<sup>50</sup> *vadimonium* was taken equal to the sum being claimed. In other cases the *vadimonium* was limited to half the amount claimed not exceeding 100 000 sesterces.<sup>51</sup> *Vadimonium* also took various forms. Sometimes it was with surety, sometimes a mere promise and sometimes it was under oath.<sup>52</sup> In some cases the *vades* gave security by *subvades*.<sup>53</sup>

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<sup>44</sup> Buckland *ibid* 613 and De Zulueta (1967) 302.

<sup>45</sup> The *iudex* did not act at once. There was a delay to the third day on which the hearing began. See Buckland *ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> Aul Gell 6 1 9.

<sup>48</sup> G 3 224; 4 15.

<sup>49</sup> This point is controverted *inter alia* by Bertolini *Il Processo Civile* 1 96.

<sup>50</sup> Although direct evidence is slight it seems that a sponsor's earliest function was the acceptance of *obligatio* on behalf of another. The term therefore denotes a guarantor. See De Zulueta (1967) 152.

<sup>51</sup> G 4 186.

<sup>52</sup> G 4 185.

<sup>53</sup> Aul Gell 16 10 8.

The earliest roots of bail therefore stems from the fact that the summoned party could guarantee his appearance *in iure* in the form of a *vindex*, or his reappearance *in iure* by way of *vadimonium*.

### 2.2.3 The *formulae*-procedure

Although the old practice of allowing a summoned party to guarantee his appearance *in iure* in the form of a *vindex*, or for his reappearance *in iure* by way of *vadimonium* was carried forward into this classic form, certain changes were effected that concern bail under this system.

This new system of procedure to resolve disputes between citizens was in use by the second half of the second century BC.<sup>54</sup> The *legis actiones* gradually fell into disfavour as a result of their exaggerated formalism, archaic nature and limited effectiveness and it seems that suitors could proceed by either the *legis actio* or the *formulae* until two *Leges Iulia* of 17 BC swept away the *legis actio* altogether.<sup>55</sup>

The formulary system was essentially a modification of the *legis actiones*.<sup>56</sup> The proceedings generally started with an *in ius vocatio* and the proceedings

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<sup>54</sup> G 4 30; See Buckland (1963) 628 and Thomas (1969) 84. Even though it was legitimated by a *lex Aebutia* of the second century BC *formulae* were probably in use before this enactment. See Thomas *ibid* and Watson (1963) 9 *RIDA* 431.

<sup>55</sup> See Wlassak (1888 - 1891) Vol 1 9 - 10 and Van Zyl (1983) 372. Gaius 4 30, 31 tells us that it survived in the case of *damnum infectum* and where the case was to go before the *centumviri*, in which case it had to be tried by *sacramentum*. It seems that this procedure was dominant in approximately the first three and a half centuries AD.

<sup>56</sup> Mackenzie (1991) 362 remarks that this system was a modification of the preceding one, freed from its mysterious and sacramental forms. The initiative

were still divided into two stages - that *in iure* before the magistrate and the actual trial *apud iudicem*. However, instead of the oral declaration of *certa verba in iure*, proceedings before the magistrate were directed at obtaining a written *formula* to be addressed to the proposed judge<sup>57</sup> with instructions on how he was to adjudicate.<sup>58</sup>

The formula usually consisted of three distinct parts called the *demonstratio*, the *intentio*, and the *condemnatio*. The *demonstratio* briefly stated the facts that gave rise to the litigation.<sup>59</sup> The *intentio* set forth the plaintiff's claim, and the question that the *iudex* had to decide. The *condemnatio* gave the judge the power to acquit or condemn the defendant after he had examined the matter.

The magistrate had greater powers than under the *legis actio*-procedure. Instead of only submitting an "unjust" or "just" *sacramentum* to the *iudex* the magistrate defined more closely in the written document what precise issues had to be decided, and what effect these decisions were to have on the final verdict.<sup>60</sup> The magistrate could create new actions and defences and could refuse actions where civil law allowed them.<sup>61</sup> These rights or the refusal thereof were then inserted in the *formula* in the imperative mode. The *intentio* was always stated as a hypothesis: "If it should appear ...".<sup>62</sup> As Mommsen

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remained with the parties to the dispute, even though the power of the praetor was considerably enhanced in consequence of the *lex Aebutia*.

<sup>57</sup> Said to be a lay person.

<sup>58</sup> See Buckland (1963) 627 and Thomas (1969) 84.

<sup>59</sup> *Res de qua agitur*.

<sup>60</sup> Strachan-Davidson (1969) 67.

<sup>61</sup> See Buckland (1963) 627.

<sup>62</sup> See Strachan-Davidson (1969) 67 and Van Zyl (1983) 374 - 375.

explained, when the praetor says to the *iudex*, "*si paret ... condemna*", this is only a polite way of saying "*si tibi paret, ego condemno*".<sup>63</sup>

The normal course was still to begin the action with an *in ius vocatio* which meant that the defendant had to appear or give a *vindex*. The *vindex* was liable to an action *in factum* if he did not produce his principal *in iure*,<sup>64</sup> and the defendant himself was liable to an action *in factum* and to *missio in possessionem* if he neither appeared nor gave a *vindex*.<sup>65</sup>

The old right of taking the defendant by force before the magistrate remained if he refused to come before the magistrate or give a *vindex*, but there was an alternative to the *in ius vocatio*.<sup>66</sup> *Vadimonium*, which was used to ensure the attendance of a party, should a postponement become necessary, could also be used by agreement as a substitute for the *in ius vocatio* to secure a first appearance.<sup>67</sup> In this period *vadimonium* consisted in the defendant binding himself to appear *in iure* by way of a verbal contract.<sup>68</sup> In the event of non-appearance the penal sum was as stated previously, and had in some cases to be supported by sureties or otherwise.<sup>69</sup>

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<sup>63</sup> (1899) 176, note 4. Translated it reads "if it be proved ... condemn" and "if it is proved to you, I condemn".

<sup>64</sup> To declare the law.

<sup>65</sup> The plaintiff could be authorised to take over his property, as would be the case if the defendant went into hiding to avoid his summons. See Buckland (1963) 631 and Thomas (1969) 85.

<sup>66</sup> Buckland *ibid*.

<sup>67</sup> See Cicero, *pro Quinctio*, 19 61 and Buckland *ibid*.

<sup>68</sup> G 4 184.

<sup>69</sup> See par 2.2.2 (G 4 185 -186). *Vadimonium* used to start proceedings was

The system of *formulae* was increasingly superseded and eventually replaced by the *cognitio* system. However, many traces of it could still be found in the *Digest*.<sup>70</sup>

#### 2.2.4 *Cognitio extraordinaria*<sup>71</sup>

##### 2.2.4.1 Introduction

This process became increasingly prominent, even though Augustus virtually made the *formula* the exclusive form of litigation in Italy.<sup>72</sup> In 342 AD the *formula* was formally abolished by Constantinus II.<sup>73</sup>

The *cognitio*-procedure was often referred to as *extra ordinem*, signifying its distinctness from the formulary system of classical times.<sup>74</sup> The development of an extensive bureaucracy procedure during the post-classical times to a certain extent led to the imposition of this procedure.<sup>75</sup> It was *par excellence* a procedure of the Roman Empire which also blended in with the new approach

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extra-judicial and because it was a matter of agreement there was no general rule regarding surety. See also Buckland *ibid*, De Zulueta (1967) 302 and Borkowski (1994) 66.

<sup>70</sup> Mommsen, Kreuger & Watson (1985) xv.

<sup>71</sup> It seems that this type of procedure had its inception in approximately the second half of the third century AD.

<sup>72</sup> Thomas (1976) 120.

<sup>73</sup> C 2 57 1.

<sup>74</sup> See Van Zyl (1983) 384 and Van Warmelo (1970) 323.

<sup>75</sup> See Van Zyl and Van Warmelo *ibid* and Borkowski (1994) 73.



to legal matters.<sup>76</sup> The imperial autocracy was not conducive to the survival of the lay judge. Under this system, the proceedings from beginning to end took place before an imperial magistrate, or his appointed deputy, who was more independent than under the *legis actio*.<sup>77</sup> The magistrate controlled the whole procedure. There was no division of proceedings and the initiative or jurisdiction no longer rested on the agreement of the parties.<sup>78</sup> In accordance with this the security to ensure the appearance and attendance during proceedings had to be made to the state. As such the process reminds much more of a modern legal system than anything used previously in Roman law.

#### 2.2.4.2 Before Justinian<sup>79</sup>

The plaintiff submitted his written complaint or statement of claim<sup>80</sup> to the magistrate, which was communicated<sup>81</sup> to the defendant by an official. The defendant was also summonsed to appear on a date not less than 10 days later<sup>82</sup> and to before then, enter a defence.<sup>83</sup>

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<sup>76</sup> The starting-point was no longer the process in which framework the law was built up. More, as in modern times, the legal rule rather acted as the starting point to be applied in the legal process. See Van Warmelo *ibid*.

<sup>77</sup> The administration of justice was just another aspect of government where the emperor through his appointed officials resolved the disputes of his subjects. See Van Zyl (1983) 384, Van Warmelo *ibid* and Borkowski (1994) 73.

<sup>78</sup> Thomas (1976) 120; Mommsen, Kreuger & Watson (1985) xii.

<sup>79</sup> Nov 53 3. This period refers to the latter part of post-classical era up to the governance of Justinian in 527 - 565 AD.

<sup>80</sup> *Libellus conventionis*.

<sup>81</sup> Thomas (1976) 120 says that a copy was sent to the defendant.

<sup>82</sup> Nov 53 3 2. Under Justinian the period was 20 days.

<sup>83</sup> *Libellus contradictionis*.



Security was required to secure the attendance of the defendant.<sup>84</sup> Du Plessis points out the following:<sup>85</sup>

- The security went to the court and not to the plaintiff as in the case of *vindex* and *vadimonium*.
- A defendant who denied the allegations against him had to give a *cautio iudicio sisti* with sureties.<sup>86</sup>
- If the defendant refused or neglected to give his *cautio* he could be arrested by the *executor* and be held in gaol until the end of the trial.

#### 2.2.4.3 Justinian law<sup>87</sup>

Under Justinian the process was begun not by *in ius vocatio* or by *vadimonium* but by *litis denuntiatio*<sup>88</sup> issued under the authority of the magistrate.<sup>89</sup> A complaint was lodged with the magistrate who in turn submitted it to the defendant.<sup>90</sup>

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<sup>84</sup> Thomas (1976) 120; Buckland (1963) 665.

<sup>85</sup> (1990) 22.

<sup>86</sup> A bond, security or guarantee had to be given along with sureties to ensure his appearance.

<sup>87</sup> Justinian governed the Roman Empire from 527 to 565 AD. See Van Zyl (1983) 8.

<sup>88</sup> C Th 2 4.

<sup>89</sup> C Th 2 4 2. At first *denuntiatio* may have been a private act, like in *ius vocatio*, but early in the fourth century AD the intervention of the authorities was required.

<sup>90</sup> Buckland (1963) 665 is of the opinion that it had to be in writing.

After this the plaintiff had four months to submit his statement of case,<sup>91</sup> and another four months could be obtained for cause. There was an automatic extension of time in certain cases<sup>92</sup> and a further postponement of not more than two months could be arranged by consent.<sup>93</sup>

During this period the defendant always had to furnish security for his appearance.<sup>94</sup> This was merely a modernised form of *vadimonium* and *cautio iudicio sisti* and it was sometimes by oath, for example for those *in sacro scrinio militantes*<sup>95</sup> or by mere promise, as in the case of *illustres*, or in ordinary cases by *satisdatio*,<sup>96</sup> varying with the status of the parties.<sup>97</sup>

Ulpian<sup>98</sup> tells us that the Proconsul decided on the custody of accused persons.<sup>99</sup> He decided whether an accused would be held in prison, handed

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<sup>91</sup>     Mitteis *Grundzüge der Papyrusf* 2 1 40 as cited by Buckland (1963) *ibid*.

<sup>92</sup>     C Th 2 6 1.

<sup>93</sup>     C Th 11 33 1.

<sup>94</sup>     I 4 11 2.

<sup>95</sup>     C 12 19 12. This category comprised persons employed in the offices of the Imperial Secretaries, as well as their wives, parents and children. It also included the tenants, serfs and slaves of the persons employed in the offices of the Imperial Secretaries that reside in Rome, and the ordinary employees.

<sup>96</sup>     The giving of bail or security.

<sup>97</sup>     D 2 6; D 2 11.

<sup>98</sup>     Ulpian is one of the most illustrious names in Roman Jurisprudence. See Salmon (1968) 311 and Nicholas (1962) 30. He held the post of Prefect of the Praetorian Guard under Alexander Severus (222 - 235 AD) as was murdered by his own troops in 223 AD. See Nicholas (1962) 30.

<sup>99</sup>     D 48 3 1 (Duties of Proconsul, book 2)

over to the military, be entrusted to sureties or be freed on his own recognisance. This decision depended on the nature of the charge brought, the status,<sup>100</sup> the wealth, the harmlessness, or the rank of the accused.

In reply to a letter from the inhabitants of Antioch, Pius sent a rescript in Greek indicating that a person prepared to give sureties should not be put in chains, unless it is agreed that the crime is of such a serious nature that he should not be entrusted to a surety, or to soldiers, but should suffer imprisonment even before punishment.<sup>101</sup>

If the plaintiff did not appear on the arranged date, his claim was dismissed.<sup>102</sup> However, he could renew his action as there had been no *litis contestatio*.<sup>103</sup> If the defendant was absent his sureties might be proceeded against.<sup>104</sup> The magistrate could also decide to fine<sup>105</sup> the defendant or compel his attendance by force.<sup>106</sup>

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<sup>100</sup> Sallustius *Bellum Catilinae sive de Conjuratione Catilinae* (1825) *Cap xxx*; Sigonius *De Iudiciis Lib 2 Cap 3*. In the case of honourable people a type of house arrest was used. The person was kept in the house of a magistrate or a private person. In the latter instance it was called *custodia liberae*.

<sup>101</sup> D 48 3 3 (Duties of Proconsul, book 7).

<sup>102</sup> C Th 2 6 1.

<sup>103</sup> Under Justinian there was an elaborate machinery, that depending on the cause, gave different results.

<sup>104</sup> Ulpian D 48 3 4 (Duties of Proconsul, book 9) writes that if the surety failed to produce the insured he suffered a monetary penalty. If the surety connived not to produce the suspect, he is also liable to condemnation *extra ordinem*. If a fixed sum has not been decided upon, or a sum had not been fixed by the governor's decree, and a custom does not exist which provides a set form, the governor shall decide which amount has to be paid.

<sup>105</sup> *Multare*.

<sup>106</sup> Thomas (1976) 120 mentions the possibility of judgment being given against

In the case of women and slaves somewhat different rules applied. Du Plessis states that women were not normally held in prison even where the offence merited incarceration.<sup>107</sup> If a surety could be found, she was released into his care and if she swore under oath that she could not find a surety, she was allowed to take an oath that she would appear when called upon.<sup>108</sup> If a slave was accused of a capital offence, bail had to be pledged for his appearance, by either his master or another. If he was not defended, he had to be submitted to prison to stand his trial in chains.<sup>109</sup>

It was frequently asked whether a master could subsequently put up bail and so have his slave released.<sup>110</sup> An Edict of Domitian provided that amnesty could not be given to these slaves and furthermore forbade release before the slave had been tried.<sup>111</sup> It thus seems doubtful. Papinian<sup>112</sup> argued that this

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the defendant in his absence.

<sup>107</sup> (1990) 25. In the event of a very serious crime she had to be held at a convent or in the care of a woman. Constantine decided that when held in a prison a woman may not be kept in the same cell as a man (C 9 4 3). Constantine governed the Roman Empire in the period 306 - 337 AD. See Van Zyl (1983) 8.

<sup>108</sup> Nov 134 9.

<sup>109</sup> Papinian D 48 3 2 (Adulteries, book 1). Du Plessis (1990) 26 indicates that bail could even be given by a foreigner.

<sup>110</sup> Papinian *ibid.*

<sup>111</sup> Papinian *ibid.*

<sup>112</sup> Papinian is considered to be one of the greatest Roman jurists. See Salmon (1968) 311 and Nicholas (1962) 30. He is first heard of as head of the department of the imperial chancery which dealt with petitions by individuals. From 203 AD until 212 AD he held the most powerful appointment in the empire, that of Prefect of the Praetorian Guard. In 212 AD he was put to death by Aurelius Antoninus (Caracalla). See Nicholas (1962) 30.

was excessively severe on a slave whose master was away, or temporarily did not have the means to put up surety, nor could it be said that the slave was without a master or without a defence.<sup>113</sup>

By the end of the reign of Justinian the principles of bail had therefore already undergone much development. The principles that had evolved were a mixture of general principles and casuistic rules.

## 2.3 ROMAN-DUTCH LAW<sup>114</sup>

### 2.3.1 Introduction

From the works of the famous Roman-Dutch authors such as Van der Keessel,<sup>115</sup> Voet,<sup>116</sup> Matthaeus<sup>117</sup> and Van Leeuwen<sup>118</sup> it is evident that many of the principles of bail under Roman-Dutch law had already crystallised under Justinian law. As under Justinian law, the presiding officer for example decided on the custody of accused persons. He could commit the accused to prison, hand him over for military custody, entrust him to sureties or free him on his

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<sup>113</sup> Papinian D 48 3 2 (Adulteries, book 1).

<sup>114</sup> Simon van Leeuwen was the first to use the phrase Roman-Dutch law when he used it as the sub-title to his work titled *Paratitla Juris Novissimi* published in 1652. The phrase describes the system of law that existed in the province of Holland from the middle of the fifteenth century to the beginning of the nineteenth century. The general reception of the Roman law in Holland completed a process, which by various means and passages, had been at work for more than a thousand years. See Lee (1953) 2 & 3.

<sup>115</sup> Trans Beinart & Van Warmelo 1972.

<sup>116</sup> Trans Gane 1955; 1957.

<sup>117</sup> Trans Hewett & Stoop 1994.

<sup>118</sup> Trans Kotze 1886.

own recognisance. This decision depended on factors including the nature of the crime and the status of the accused. Security went to the court and a surety could be proceeded against.

Van der Keessel, when discussing the production or transfer of accused persons, points out that the accused must be produced to the prosecutor, so that he can join issue with the accused.<sup>119</sup> An absent person in the case of a capital offence cannot be prosecuted,<sup>120</sup> nor can he be convicted.<sup>121</sup>

The judge, in accordance with the nature of the crime, the quality and standing of the person and his position and means had the discretion to do the following:<sup>122</sup>

- He could commit the apprehended person to gaol.
- He could hand him over for military custody.
- He could release him on his mere promise.
- He could release him to a surety.<sup>123</sup>

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<sup>119</sup> (Trans Beinart & Van Warmelo 1972) *praefatio ad* 48 3.

<sup>120</sup> *Ibid* relying on C 9 2 6.

<sup>121</sup> *Ibid* relying on D 48 19 5.

<sup>122</sup> *Ibid* 48 3 3 relying on D 48 3 1; D 48 3 3 and 14; C 9 4 1 and 3; the *authentica bodie*; C 9 4 6; C 12 1 16 and 17; Nov 134 9; Acts of the Apostles, ch 28 verse 16, and ch 12 verse 4 *et seq.* However, Voet (trans Gane 1957) 48 3 3(a) indicates the factors to be taken into account as:

- the seriousness of the crime;
- the position of the accused; and
- "whether heavier or lighter presumptions fight against him."

<sup>123</sup> According to Matthaeus (trans Hewett & Stoop 1994) 48 14 2 2 the accused had to be taken to prison for more serious crimes. The latter three options thus normally only presented themselves in the case of less serious offences.

As the fourth option is akin to bail and therefore of special relevance this option is discussed in more depth. The other possibilities are dealt with more briefly.

### 2.3.2 Imprisonment<sup>124</sup>

In accordance with the Justinian law an accused had to be placed in prison in the following instances:

- where the accused has confessed to the crime;<sup>125</sup>
- where the accused has been convicted of a crime;<sup>126</sup>
- where the crime is of a serious nature and military custody is not secure enough or appropriate;<sup>127</sup> and
- where a slave has been charged with a capital offence and he is not defended.<sup>128</sup>

Because military custody came to be used less frequently, and prisons were built more in accordance with the norms prescribed by Constantine the

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<sup>124</sup> For a complete discussion see Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3; Matthaeus (trans Hewett & Stoop 1994) 48 14 2 and further; Voet (trans Gane 1957) 48 3.

<sup>125</sup> D 48 3 5. D 48 5 4 *pr in fine*.

<sup>126</sup> C 9 3 2; C 9 4 2.

<sup>127</sup> D 48 3 3.

<sup>128</sup> D 48 3 2; *Heraldus, De rerum judicatarum auctoritate*, bk 1 ch 12.

Great,<sup>129</sup> Van der Keessel proposed that greater use should be made of imprisonment instead of military incarceration.<sup>130</sup>

Van der Keessel also indicates that:<sup>131</sup>

- an accused should not be lodged in prison unless there is sufficient proof;
- an accused can only be jailed for serious offences; and
- because imprisonment constitutes a serious breach of a person's freedom it must only be considered when necessary.

Although the latest law under Justinian prohibited the lodging of women in gaol,<sup>132</sup> Voet confirms that the earlier civil law was introduced under which women were delivered to prison just as much as men, provided that they had bolted chambers.<sup>133</sup>

### 2.3.3 Military custody<sup>134</sup>

Military custody had application:<sup>135</sup>

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<sup>129</sup> The norms can be found in C 9 4 1.

<sup>130</sup> (Trans Beinart & Van Warmelo 1972) 48 3 3.

<sup>131</sup> *Ibid* 48 3 4 relying on D 48 3 3.

<sup>132</sup> See the discussion on Justinian law.

<sup>133</sup> (Trans Gane 1957) 48 3 5.

<sup>134</sup> For a complete discussion see Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 and further.

<sup>135</sup> *Ibid*.



- in the case of crimes where a surety could be allowed but one could not be found; or
- where it was a crime for which the accused had to be held in prison and the probabilities militated in favour of the accused.
- in the case of more serious offences and when it was appropriate and adequate.

The accused was committed to a soldier either:

- in chains; or
- free of chains in which case it was called free custody;<sup>136</sup> or
- tied by a fairly loose chain by his right hand to the left hand of the soldier.<sup>137</sup>

Van der Keessel indicates that there formerly existed another type of free custody where especially persons of honourable rank used to be placed under house arrest with private persons or magistrates.<sup>138</sup>

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<sup>136</sup> This is the manner in which the apostle Paul was guarded at Rome (Acts, ch 28, verse 16).

<sup>137</sup> Voet (trans Gane 1957) 48 3 10 distinguishes between the following three types of military custody:

- “free military custody” which is closely watched but not fastened to the soldiers by bonds or chains as in the case of the Apostle Paul.
- “open military custody” which is outside prison but fastened to two soldiers.
- “close military custody” which is in prison fastened to two soldiers as appears to have happened to the Apostle Peter.

<sup>138</sup> (Trans Beinart & Van Warmelo 1972) 48 3 3.

### 2.3.4 Recognisance<sup>139</sup>

The accused could be released on recognisance where:<sup>140</sup>

- the arguments and probabilities in favour of innocence were evident;<sup>141</sup> or
- the offence was not of a serious nature, and the punishment therefore was of a pecuniary nature, and the accused was possessed of ample means;<sup>142</sup> or
- the accused was of illustrious rank and the crime was not a heinous one, in which event he must be allowed to give a guarantee under oath.<sup>143</sup>

### 2.3.5 Release to sureties

Persons who occupied lesser positions were committed to sureties.<sup>144</sup> To this group Matthaeus adds persons whose good character and innocence “are presumed from a life previously led”.<sup>145</sup>

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<sup>139</sup> For a complete discussion see Voet (trans Gane 1957) 48 3 14; Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 and further.

<sup>140</sup> Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3.

<sup>141</sup> As Cujacius *Paratitla ad C 9 4* interprets the words “according to the innocence of the person in D 48 3 1”. See Van der Keessel *ibid*.

<sup>142</sup> Relying on D 48 3 1.

<sup>143</sup> Relying on C 12 1 17. For a discussion as to who are persons of illustrious rank see Matthaeus (trans Hewett & Stoop 1994) 48 14 2 3. (People of high rank as well as professors and doctors seem to have fallen in this category.)

<sup>144</sup> Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 relying on C 12 1 6.

<sup>145</sup> (Trans Hewett & Stoop 1994) 48 14 2 16. For the position on women see the discussion on Roman law under Justinian.

Once the judge in a criminal trial had decreed that an accused could be released to sureties, a surety could intervene on behalf of the accused. The surety guaranteed that the accused would attend his trial by either promising a fixed sum of money or without specifying an amount, merely guarantees that he will stand his trial.<sup>146</sup>

If the surety failed to produce the accused at the hearing, and he was without intent, he was liable for the fixed amount that he promised, or for the amount that the governor had set when he decreed that the accused could be released to sureties. If no amount has been specified and no usage indicated which determines a fixed scale, the surety was liable for a discretionary sum.<sup>147</sup> On the other hand if the surety intentionally failed to secure the attendance of the accused, he could in extraordinary proceedings be subjected to physical punishment.<sup>148</sup>

However, the surety is not punished immediately when the accused does not present himself for trial, but is granted grace for the same amount of time that the accused had to appear.<sup>149</sup> If the accused died in the first period that the

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<sup>146</sup> Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 relying on D 48 3 4. Matthaeus (trans Hewett & Stoop 1994) 48 14 2 13, stated that it was not absolutely necessary for a fixed sum to be stated in the stipulation.

Similar principles are still applied under modern Dutch law. A surety under contemporary Dutch law can support the undertaking of the applicant for bail to comply with the conditions of release by providing security for the accused's appearance, or by merely vouching that the accused will stand his trial (see *Uit Beijerse* (1998) 164).

<sup>147</sup> Van der Keessel *ibid.*

<sup>148</sup> *Ibid.* However, see Matthaeus (trans Hewett & Stoop 1994) 48 14 2 14 who is of a different opinion.

<sup>149</sup> Voet (trans Gane 1957) 48 3 13 (not for longer than six months).

accused had to appear, the surety was protected from the penalty, but not so if the accused died in the second period.<sup>150</sup>

Voet mentions that once the surety has taken up the defence of the accused, either during the first or the second of the periods of grace, and then abandons the defence, the surety cannot be released from the penalty by producing the accused.<sup>151</sup> It seems that if the surety takes up the defence and carries it through, he has fulfilled his duty. But if the defence was taken up in the second period, and this period lapses, the surety will in every way be held liable, even though the defence is not abandoned.<sup>152</sup>

The Roman-Dutch law followed the Roman principle that criminal cases had to be finalised in two years from the date of joinder of issue. If the case was not finalised the accused was acquitted.<sup>153</sup> From this it followed that the surety could neither be bound for the appearance of the accused beyond the period of two years.

The obligation of security is extinguished if the accused is convicted or acquitted.<sup>154</sup> Where the accused did not appear the surety is released when the penalty has been paid.

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<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.* See also C 8 40 26.

<sup>152</sup> Voet *ibid.*

<sup>153</sup> *Ibid.* Also see C 8 1 17; Dig 48 3 1.

<sup>154</sup> Voet (trans Gane 1955) 2 8 11; (trans Gane 1957) 48 3 13.

It appears that a person in the Roman-Dutch period could only be granted bail (in a certain sum) in respect of less serious offences.<sup>155</sup> Van Leeuwen says that security could only be given for petty and minor offences, for which the punishment is not corporal.<sup>156</sup> In an ordinance issued by King Philip II in 1570, it is indicated that if the case is not too serious the accused shall be released to appear upon bail *fide jussor* or *juratoir* taking into account “the degree of the person and the crime.”<sup>157</sup>

Van Leeuwen explains the reasoning behind the rule that security may only be given for less serious offences:<sup>158</sup>

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<sup>155</sup> See D 48 3 1, 2, 3, 4. In the year 1387 it was granted to the people of Amsterdam by the charter of Duke Albrecht of Batavia:

That the officers may not for any delicts or wrongful acts which a free citizen of Amsterdam may have committed, imprison, apprehend, hinder, or injure such citizen in life or property, if he can give sufficient security, in the discretion of the Aldermen, that he will abide by what the officers have to charge him, excepting, however, murder, arson, rape, robbery, and where the citizen takes up arms against the government, or commits a crime within the ditch Reygersbroek at the old Amstel, and against the Duke’s rabbits in Gooyland.

<sup>156</sup> (Trans Kotze 1886) 4 4 6.

In spite of of these words Van Leeuwen *ibid* refers to the *Costuymen of Utrecht* rubric 36 art 1 - “that in all delicts, the punishment for which is life, limb, public punishment on the scaffold, whipping, and the like, the accused shall not be let out on bail unless the officer has shaped his demand civilly, and the judge considers that it ought to be so.”

<sup>157</sup> Art 52. On 9 July 1570 King Phillip II of Spain issued the Criminal Procedure Ordinance which formed the basis of the criminal procedure of the Netherlands during the seventeenth and eighteenth centuries. See Dugard (1977) 5.

<sup>158</sup> (Trans Kotze 1886) 4 4 6.

- The person who undertakes to deliver the offender subjects himself to that of which the latter himself is guilty, in the event of non-appearance of the offender.<sup>159</sup>
- Because of this the surety would be as difficult to find as the offender himself and the crime would go unpunished.

Due to this, bail was not allowed except in cases where pecuniary fines would be inflicted, or where the sheriff could not impose any further punishment.<sup>160</sup>

There is an indication that bail could be decided only after the accused on his own recognisance appears in court, or a person that has been jailed is brought before court.<sup>161</sup> This happened respectively where in the first instance the accuser asked that the accused be given to sureties and in the second instance if the jailed accused requested to be given to sureties.<sup>162</sup> The decision to free an accused on bail rested exclusively with “the public authority” of the judge.<sup>163</sup>

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<sup>159</sup> *Ibid.* According to Matthaeus (trans Hewett & Stoop 1994) 48 14 2 14 and 15 the surety could not promise to undergo the penalty of death or other punishment affecting his body in the event that the accused did not stand his trial. This was contrary to the purpose of punishment and the surety could not dispose of his life and limbs in this manner. Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 is of the opinion that the surety should also not be allowed to accept the penalty of banishment or exile on behalf of the accused but Matthaeus (trans Hewett & Stoop 1994) 48 14 2 16 disagrees in this regard. Voet (trans Gane 1957) 48 3 12, again is of the opinion that suretyship should be allowed in the case of banishment, but only if he is banished from a certain place and not banished to a certain place.

<sup>160</sup> Van Leeuwen *ibid.*

<sup>161</sup> See art 28 *et seqq* and arts 52 and 53 Criminal Procedure Ordinance of 1570, *Groot Placaet-Boeck*, Vol 2 1051 and 1055 - 1056.

<sup>162</sup> And it is so decided.

<sup>163</sup> See art 31 and art 53 Criminal Procedure Ordinance of 1570, *Groot Placaet-Boeck*, Vol 2 1051 and 1055.

The rules concerning the production of accused persons for trial including bail therefore underwent further refinement under Roman-Dutch law. One of the notable changes effected was that imprisonment came to be preferred above military custody.

## 2.4 ENGLISH LAW

Bailing suspected criminals was already an ancient practice in the time of the reign of Queen Elizabeth I<sup>164</sup> and may be traced back to the English Kings Hlothaere<sup>165</sup> and Eadric.<sup>166</sup> Accused persons were required to pay a sum of money called "borh"<sup>167</sup> to the alleged victim of the crime to temporarily satisfy the accuser and to prevent a feud between the families of the parties.<sup>168</sup> The money was refunded if the accused was found innocent. In the very early times an accused person was arrested in some instances without a preliminary investigation. In serious cases this meant that the accused had to wait until the arrival of the justices.<sup>169</sup> In some cases this delay went on for years and it became important for the accused to be released from custody. Due to this, the concept of "borh" was modified.

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<sup>164</sup> Elizabeth I ruled Great Britain during 1558 - 1603. See Meiklejohn (1897) 336.

<sup>165</sup> 673 - 685 AD. See Dow (1981) 59.

<sup>166</sup> 685 - 687 AD.

<sup>167</sup> Van der Berg (1986) 2 makes a connection between this term and the Afrikaans word "*borg*".

<sup>168</sup> Dow (1981) 59.

<sup>169</sup> Donovan (1981) 23.



Prior to the Norman conquest in 1066 a system was introduced whereby the accused was allowed to pay a sum of money to the sheriff to avoid pre-trial incarceration.<sup>170</sup> At the time the emphasis of bail shifted to make sure that the accused would attend his trial.<sup>171</sup> Accused persons were released into the custody of their friends or relatives who convinced the court that the accused would stand trial and who undertook to surrender themselves in the event that the accused absconded.<sup>172</sup> It appears that in the early days, those people who offered themselves, literally bound themselves body for body. However, Holdsworth indicates that in the thirteenth century these sureties were only liable to amercement if they allowed their prisoner to escape.<sup>173</sup> At a later stage, both the promise to pay a sum at the non-production of the prisoner and the surrender of their bodies were used separately or combined. If the accused was committed to the custody of the surety he was the bail of the surety, and if the surety merely gave security for his appearance, he was said to give "mainprize" and to be a "mainpernor".<sup>174</sup>

The right to be released from custody on bail was recognised by Glanville<sup>175</sup> and Bracton during approximately 1176 - 1239 in the golden period of medieval justice.<sup>176</sup> Bracton indicates that the sheriff needed to be able to

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<sup>170</sup> See Dow (1981) 59; Pollock (1898) xiv *LQR* 291 296 - 7.

<sup>171</sup> See Hampton (1982) 91.

<sup>172</sup> See Freed & Wald (1964) *Yale LJ* 966 and Kerper (1979) 269.

<sup>173</sup> (1937) 525.

<sup>174</sup> *Ibid* 525 - 528.

<sup>175</sup> (LIB xvi c) 1.

<sup>176</sup> See Donovan (1981) 23 as to bail. Turner (1985) 1 and further informs us that Glanville and Bracton were two prominent royal justices in a new system of professional public servants. King Henry II created a new machinery of justice for his subjects and in doing so revived the practice of sending itinerant



exercise a discretion in regard to the bailing of accused persons, having regard to the importance of the charge, character of the person and the gravity or the evidence against him.<sup>177</sup> The sheriff was the local representative of the Crown and the administrator of criminal justice. It was he who would free an accused on bail if he thought proper.<sup>178</sup> The sheriff could also decide if he wanted to take bail or mainprize. It was apparently only in the event that homicide was averred that the sheriff did not have a discretion.

At a later stage the list of non-bailable offences and where mainprize could not be given were extended to include offences against the forest law and arrest by special command of the King. The sheriff had the discretion to refuse bail when it ought to be refused and it was thought to include crimes punishable by death or mutilation. However, this discretion led to abuses but these were dealt with in the Statute of Westminster I.<sup>179</sup> This Act provided that certain categories of people could not get bail.<sup>180</sup> They were as follows:

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commissioners to the counties. Ranulph de Glanville first served as itinerant justice as head of one of the three circuits and later as justiciar of the justiciar's court. While Glanville is also suggested to be the author of two other works, his best known work is probably *Tractatus de legibus et consuetudinibus regni Angliae*. Henricus de Bracton was the Justice of Assize in 1245, the chancellor of Exeter Cathedral and by special dispensation held three ecclesiastical benefices at the same time. His famous work *De legibus et consuetudinibus Angliae libri V: in varios tractatus distincti, ad diversorum et vetustissimorum codices collationem typis vulgati* which was compiled around the 1220s - 1230s remains uncompleted. It has been suggested that this work was compiled a little bit later, somewhere between 1250 - 1256. See Roberts (1942) 59.

<sup>177</sup> *De Corena* ii, 261, 283, 287 - 9 and 293.

<sup>178</sup> The writ by which the sheriff could be compelled to release the prisoner on bail or "mainprize" was the writ *de homine replegiando*.

<sup>179</sup> III Edw 1,c XII, 1275.

<sup>180</sup> Donovan (1981) 24.

- prisoners outlawed;
- men who had abjured the realm;
- approvers (who had confessed);
- such as to be taken with the manour;
- those who had broken the King's prison;
- thieves openly defamed and known;
- such as were taken for felonious arson;
- or for false money;
- for counterfeiting the King's Seal;
- or persons excommunicate taken at the request of the Bishop;
- or for manifest offences;
- or for treason touching the King himself.

The Act further provided that certain people could be bailed:<sup>181</sup>

- people indicted in larceny;
- or of light suspicion;
- or of petty larceny not above the value of 12d;
- guilty of receipt of felons, (accessories in general);
- guilty of some other trespass;
- a man appealed by the prover after the death of the prover.

It can be agreed with Donovan that the two categories seem to be based on the seriousness of the offence, the likelihood of conviction and the "outlawed status" of the offender.<sup>182</sup>

However, Samaha indicates that under the Statute of Westminster I all forms of homicide were also not susceptible to bail.<sup>183</sup> There existed much controversy on this aspect and different views were put forward by the learned

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<sup>181</sup> During 1444 this statute was supplemented by a provision that the sheriff must, bar certain exceptions, grant bail to all persons in custody by reason of any personal action, or by reason of any indictment for trespass.

<sup>182</sup> See Donovan (1981) 24.

<sup>183</sup> (1981) 25 *AJLH* 190.

English jurists.<sup>184</sup> The Elizabethan jurist Lambard indicated that a distinction must be drawn between murder and manslaughter.<sup>185</sup> Bail is only excluded in the case of premeditated murder.<sup>186</sup> During the reign of King Charles I<sup>187</sup> a conference of judges disagreed - "a man is not entitled to bail for manslaughter".<sup>188</sup> Dalton, at around 1630, only conditionally agreed with Lambard.<sup>189</sup> Lord Hale in the seventeenth century asserted that bail could not be given by the justices for murder, although it could be done by the King's bench. In the case of manslaughter two justices of the peace, of which one is of the *quorum*, if the matter be doubtful and uncertain, may bail that man.<sup>190</sup>

After 1275 the power to grant bail was to a great extent transferred to the justices of the peace by a series of statutes.<sup>191</sup> It is thought that this power was transferred to the justices in certain cases by the statutes of Edward III. However, it is certain that it was conferred by statute in general terms in 1483 - 1484.<sup>192</sup> In 1486 it was recognised that bail should be granted by justices of the peace and it was further indicated that bail had to be granted by two justices.<sup>193</sup>

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<sup>184</sup> *Ibid.*

<sup>185</sup> Lambard (1972) 254 - 257.

<sup>186</sup> *Ibid.*

<sup>187</sup> 1625 - 1649. See Meiklejohn (1897) 385.

<sup>188</sup> Hale (1736) 138 - 139.

<sup>189</sup> Samaha (1981) 25 *AJLH* 190.

<sup>190</sup> Hale (1736) 139.

<sup>191</sup> Du Plessis (1990) 48.

<sup>192</sup> Holdsworth (1937) 525 - 528.

<sup>193</sup> By the statute of 3 Hen VII, 3.

With the advent of the Tudors,<sup>194</sup> stricter control was kept over the way these powers were exercised. In 1487 a statute determined that bail had to be granted by two justices, one of whom was to be of the *quorum*, and that the prisoners that they bailed had to be certified at the next general sessions of the peace or sessions of gaol delivery. However, this statute did not stop the misuse of these powers and in 1554 it was stated that one justice in the name of himself, and another who knew nothing of the case, by “sinister labour and means” set at large notable offenders.<sup>195</sup>

These practices led to the imposition of further rules, namely:

- bail can only be granted to someone bailable under the 1275 statute;
- accused must be bailed in open session ;
- at least two justices must be present when bail is granted;
- one justice must be of *quorum*;
- a certificate must be made to the next sessions of gaol delivery.<sup>196</sup>

Even though later statutes were enacted to ensure that justices were persons of substance and to guard against collusion between justices and prisoners, the

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<sup>194</sup> Henry the Seventh (Henry Tudor of Richmond) succeeded in 1485. See Meiklejohn (1897) 277.

<sup>195</sup> Many examples of the inconsistent rendering of bail are given by Samaha (1981) 25 *AJLH* 190 192. In one instance one Alice Neath was committed to gaol to await trial on overwhelming evidence that she stabbed her sister in law to death and one Lambert Hewson was given bail in the face of strong evidence that he had murdered his infant daughter.

<sup>196</sup> The justices of gaol delivery were given power to fine justices for breach of these provisions.

statute of 1275 as to bailable offences, and the 1554 statute as to the procedure, remained the basis of the law on this subject until 1826.<sup>197</sup>

In 1826 a general provision on bail was passed which repealed all the previous statutes.<sup>198</sup> This provision was again superseded by various Acts in the reign of Victoria.<sup>199</sup> In terms of these provisions the committing justice may, at his discretion, admit to bail any person charged with a felony or with any of a listed number of misdemeanours. However, bail could not be granted for libel, conspiracies, unlawful assembly, night poaching and seditious offences. In certain cases bail could not be refused.<sup>200</sup>

These Acts remained in force until they were replaced by the Bail Act of 1976.<sup>201</sup>

## **2.5 SOUTH AFRICAN LAW BEFORE THE INTERIM CONSTITUTION**

### **2.5.1 South African law before unification**

The early development of the law on bail in South Africa can roughly be divided into two different periods. The first period spanned from 1652 to 1828 when the Roman-Dutch principles of criminal procedure were applied, and the second the years after 1828, when these principles were substituted under

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<sup>197</sup> Holdsworth (1937) 525 - 528. See also McCall (1979) 71.

<sup>198</sup> 7 Geo IV c 64.

<sup>199</sup> 11 and 12 Vic c 52, section 23. See Du Plessis (1990) 49. Victoria ruled Great Britain during 1837 - 1901. See Meiklejohn (1897) 589.

<sup>200</sup> Donovan (1981) 25.

<sup>201</sup> 1976 Statutes c 63. See Du Plessis (1990) 50.

British rule by two ordinances, up to 1910.<sup>202</sup> The Republics of the Transvaal and the Orange Free State, and the colony of Natal, only came into being after 1828 and therefore fall under the second period.<sup>203</sup>

#### 2.5.1.1 The position in the Cape during the period 1652 - 1828

With the arrival of Jan van Riebeeck in 1652, the Cape came under the control of the Dutch East India Company. In its Charter<sup>204</sup> the Company was authorised to maintain law and order in the areas under its authority. This led to the application of the Roman-Dutch law in the Cape.<sup>205</sup> Dugard is of the opinion that it is the same system of criminal procedure embodied in the Criminal Procedure Ordinance of 1570 that was in force subject to certain modifications.<sup>206</sup> This system remained in force throughout the time of the Dutch East India Company (1652 - 1795), the first British occupation (1795 - 1803), and the rule of the Batavian Republic (1803 - 1806). The Roman-Dutch law remained the law of the day until the criminal procedure in the Cape was

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<sup>202</sup> The South African Law Commission (1994) 9 divides the early development of the law on bail into three different periods:

- The period 1652 - 1806;
- The period 1806 - 1878;
- The period 1827 - 1910.

<sup>203</sup> The administration of justice in the early territories of the Voortrekkers in Transvaal seem to have come about in the early 1840s. The Orange Free State Republic was constituted at the Bloemfontein Convention of 1854 providing *inter alia* for a legal system. Shortly before 1845 Natal became a dependency or "district" of the Cape and in 1857 acquired representative government. See Dugard (1977) Vol 4 28 - 33.

<sup>204</sup> "Oktrooi".

<sup>205</sup> Dugard (1977) Vol 4 1 - 56; Van Zyl & Van der Vyver (1982) 205 and further.

<sup>206</sup> Dugard *ibid* 18.

substituted by Ordinance 40 of 1828 and the law of evidence was substituted by Ordinance 72 of 1830.<sup>207</sup>

In accordance with the Roman-Dutch law bail was only allowed in respect of less serious offences and it was in the sole discretion of the magistrate. In the event of a more serious offence the accused was detained from the date of his arrest until the conclusion of the trial. According to Dugard it was not undesirable at the time to use torture to extract a confession from an accused. The procedure used to decide whether bail should be granted was inquisitorial.<sup>208</sup>

#### 2.5.1.2 The position in the Cape during the period 1828 - 1910

After the demise of the Roman-Dutch law, the proceedings in a criminal trial were governed by Ordinance 30 of 1828 and the First Charter of Justice which empowered the supreme court to issue the rules of court, and Ordinance 72 of 1830 which regulated the evidence.<sup>209</sup> The 1830 Ordinance was a codification of the rules of evidence that existed in the early 19th century in England. However, some of the rules were apparently too complicated to codify. In those instances the law that applied in "His Majesty's Courts of Record at

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<sup>207</sup> See Du Plessis (1990) 50 and Dugard (1977) 25. In 1823 a two-man commission consisting of 2 gentleman, Biggy and Colebrooke, was appointed by the British Government to investigate affairs regarding the legal system and to make any recommendations they deemed necessary. The recommendations of the commission was substantially accepted by the British government and led to the imposition of large scale reforms in the fields of the administration of justice by the First Charter of Justice, and the anglicization of the criminal procedure and evidence by the ordinances mentioned. See also Botha (1923) 40 *SALJ* 396.

<sup>208</sup> South African Law Commission (1994) 9.

<sup>209</sup> See South African Law Commission *ibid*; Dugard (1977) 19 and further.



Westminster” prevailed.<sup>210</sup> These reforms effectively put an end to the inquisitorial system and replaced it with an accusatorial English procedure.

In this time a system of pre-trial investigation that was held *in camera*, and during which information regarding the alleged offence was gathered, was begun.<sup>211</sup> On the basis of this information the courts could order that an accused be arrested and brought before them, or in the case of a less serious offence or uncertain evidence implicating the accused, a summons to this effect could be issued.<sup>212</sup> An indictment<sup>213</sup> containing details of the offence with which he was charged was issued to the accused at least three days before the trial and the accused had to be tried within eight days. If the accused objected to the indictment, he was obliged to answer the questions by the prosecutor. On the other hand if the accused refused to answer the questions put to him, this was seen as contempt of court and he was detained for the duration of the trial. This in effect amounted to a refusal of bail.<sup>214</sup>

If the innocence of the accused was established, he was acquitted, but if the evidence was insufficient he was provisionally set free after giving security for

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<sup>210</sup> See Schmidt (1989) 13.

<sup>211</sup> Preparatory “informations” were taken from witnesses on oath.

<sup>212</sup> Bail was still only allowed in the case of less serious offences.

<sup>213</sup> Based on the information taken at the preparatory examination.

<sup>214</sup> South African Law Commission (1994) 9. Dugard (1977) 21 seem to indicate that the accused was immediately interrogated, and if he refused to answer the questions put to him, he was incarcerated for the duration of the trial irrespective of the fact that he objected to the charge or not.



his reappearance. In the absence of other evidence in the following twelve months implicating him, he had to be acquitted.<sup>215</sup>

In terms of Ordinance 40 of 1828 and Ordinance 72 of 1830, a right to bail before the conclusion of the preliminary examination was not recognised. However, bail could be granted at the discretion of the magistrate. Once the preliminary investigation had been completed the accused could be released on bail by the court with the approval of the attorney-general. After an accused had been committed for trial, he was entitled to bail except in the case of capital offences. In respect of these offences the supreme court could grant bail.<sup>216</sup>

### 2.5.1.3 The position in the Transvaal Republic

The criminal procedure in the Transvaal was regulated by Ordinance 5 of 1864 and Ordinance 9 of 1866 and was largely based on the law that applied in the Cape.<sup>217</sup> The attorney-general had a discretion to grant bail.<sup>218</sup> It was only in 1903 that the most comprehensive criminal code in Southern Africa was adopted in the Transvaal.<sup>219</sup> This ordinance was based on the law that applied in the Cape and English law and also showed influences of the criminal codes of Canada (1892), Queensland (1899), and India (1898).<sup>220</sup>

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<sup>215</sup> Dugard (1977) 22.

<sup>216</sup> South African Law Commission (1994) 9 - 10.

<sup>217</sup> Strauss (1960) *Acta Juridica* 157.

<sup>218</sup> In terms of section 66, Ordinance 5 of 1864 and an amending provision in section 2, Act 7 of 1896. See also *Hildebrand v The Attorney-General* 1897 (4) OR 120.

<sup>219</sup> Ordinance to Establish a Code of Criminal Procedure 1 of 1903.

<sup>220</sup> Dugard (1977) 31.

In terms of chapter VIII<sup>221</sup> of the 1903 Ordinance all accused persons (except in the case of murder and high treason) were entitled to bail as soon as they were committed for trial.<sup>222</sup> At the time of the committal an application could verbally be made for bail<sup>223</sup> and thereafter the bail application had to be made in writing, to the appropriate magistrate or judge of the supreme court.<sup>224</sup> The magistrate had twenty-four hours in which to decide whether bail should be granted or not, and if so what the amount of bail was. Application for bail was decided on the facts as they appeared in the warrant of committal for trial.<sup>225</sup> The supreme court had the power to grant bail at any stage of the proceedings and in respect of any offence.<sup>226</sup> The bail amount could not be excessive and an accused could take the decision as to the amount of bail on appeal to the supreme court.<sup>227</sup> Bail could be lodged by the accused himself or by a surety. Only cash was accepted and the guarantee given by the surety was that the accused would appear at the set time and place of the hearing. If conditions as to bail were set they could be amended at any time.<sup>228</sup> Bail could also be withdrawn at any stage.<sup>229</sup>

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<sup>221</sup> Sections 97 - 113.

<sup>222</sup> Section 97.

<sup>223</sup> Section 98.

<sup>224</sup> Section 99.

<sup>225</sup> Section 100.

<sup>226</sup> Section 101.

<sup>227</sup> Sections 103 and 104.

<sup>228</sup> Section 105.

<sup>229</sup> Section 110.

The appeal in a criminal case did not suspend the execution of a sentence,<sup>230</sup> unless the court against whose judgment or sentence the appeal was made, had released the accused on bail.<sup>231</sup>

#### 2.5.1.4 The position in the Orange Free State Republic

The law in this republic was also largely based on the law that applied in the Cape and was regulated by the Ordinance as to Criminal Procedure 12 of 1902.<sup>232</sup> Bail could not be granted before the preliminary examination had been completed and was in the discretion of the magistrate. With the exception of a capital offence an accused was entitled to bail after he had been committed for trial. Before committal for trial the application could be made verbally and after this it had to be made in writing. Again the amount of bail was in the discretion of the court and an excessive amount was not permitted. As in the Transvaal Republic the decision regarding bail had to be made within twenty-four hours by the magistrate. If the accused failed to meet the requirements of bail a fine of 100 pounds could be imposed.<sup>233</sup> A decision as to the granting of bail or not, and the amount set could be taken on appeal to a higher court. In its discretion the supreme court had the power to grant bail in all cases.

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<sup>230</sup> Except capital or corporal punishment.

<sup>231</sup> Section 271.

<sup>232</sup> See Strauss (1960) *Acta Juridica* 157 and South African Law Commission (1994) 11.

<sup>233</sup> *Ordonnantie, Wijzigende de Manier van Procederen in Crimineele Zaken in den Oranje-Vrijstaat 4 van 1856* (Ordinance 4 of 1856).

#### 2.5.1.5 The position in Natal

In Natal the criminal procedure and the law of evidence was based on the two Cape Ordinances<sup>234</sup> and was accepted in Natal by Ordinance 18 of 1845.<sup>235</sup>

### 2.5.2 South African law after unification

#### 2.5.2.1 The period 1910 - 1955

At the time of the unification in South Africa there was no uniform Criminal Procedure Act. All four the provinces had statutory provisions based on the two Cape Ordinances for the granting of bail.<sup>236</sup> It was only in 1917 that an uniform arrangement was made for the Union when the Criminal Procedure and Evidence Act of 1917 was adopted.<sup>237</sup> Ordinance 1 of 1903, the code accepted in the Transvaal, formed the basis because it was the most sophisticated codification.

The Act provided that a magistrate had the discretion to release an accused on bail even before the end of the preliminary investigation,<sup>238</sup> except in the case

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<sup>234</sup> Ordinance 40 of 1828 and Ordinance 72 of 1830.

<sup>235</sup> Ordinance for regulating the manner of the proceeding in criminal cases in the district of Natal. See Du Plessis (1990) 50; South African Law Commission (1994) 11.

<sup>236</sup> Ordinance 40 of 1828 and Ordinance 72 of 1830. See Dugard (1977) 33 and South African Law Commission (1994) 11.

<sup>237</sup> Act 31 of 1917. Bail was regulated by sections 86 and 99 to 117 of the Act.

<sup>238</sup> Preparatory examinations remained a prerequisite for superior court trials and only minor changes were instituted in respect of this procedure. See section 92 of Act 31 of 1917.

of murder, treason or rape.<sup>239</sup> After the case had been referred for trial, the accused was entitled to be granted bail, except in the case of murder, treason or rape.<sup>240</sup> The supreme court had the power to grant bail in respect of all offences and at any stage of the proceedings.

At the trial itself the accused could verbally apply for bail to the magistrate.<sup>241</sup> If the amount of surety was set too high or the application was unsuccessful it could be taken on appeal to a higher court.<sup>242</sup> It was also expressly stated that an excessive amount may not be fixed.<sup>243</sup> Bail in the form of a surety could either be given by the accused himself or by him and another or more persons in order to gain freedom.<sup>244</sup>

In the case of minor offences,<sup>245</sup> a police official with the rank of sergeant or higher was allowed to release an accused on cash bail.<sup>246</sup>

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<sup>239</sup> Section 86 of Act 31 of 1917.

<sup>240</sup> Section 99 of Act 31 of 1917.

<sup>241</sup> South African Law Commission (1994) 12.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> According to Du Plessis (1990) 54 these were offences with the exception of sedition, murder, rape, robbery, assault where a dangerous wound was inflicted, arson, housebreaking with the intention to commit a crime be that at common law or statute, theft, receiving stolen property knowing it to be stolen, fraud, forgery and uttering if the amount applicable is more than 100 pounds, any offence under any Act that deals with the illegal possession or trafficking with gems or any precious metals, any offence that has to do with the production of money, any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

<sup>246</sup> Section 116(2) of Act 31 of 1917 read with part two of the second schedule to the Act.

An accused who had been sentenced and who appealed against the decision of a lower court, was entitled to have bail set.<sup>247</sup> Execution of his sentence would not be suspended unless he was released on bail. A convicted person who appealed against the decision of a superior court could request his release on bail from such court.<sup>248</sup> The execution of his sentence was not suspended by the making of an appeal unless such application for bail was granted.

In 1926 the magistrate was given the discretion to grant bail to an accused for the crime of rape, and murder by a mother of her “newly born child” or where the accused was under 16 years of age.<sup>249</sup>

In 1955 the authority of the magistrate was further extended in that he could now refuse bail, after the accused was referred for trial, if there was reason to believe that the accused would not comply with his bail conditions.<sup>250</sup>

In the same year the Criminal Procedure Act 56 of 1955 repealed and replaced the 1917 Act.<sup>251</sup> The numerous amendments to the 1917 Act, as well as the fact that the 1917 Act was in English and Dutch only, without there being an official Afrikaans version, gave rise to the 1955 Act.<sup>252</sup> It was a consolidating

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<sup>247</sup> Section 98 of the Magistrates’ Courts Act 32 of 1917.

<sup>248</sup> Section 373 of Act 31 of 1917.

<sup>249</sup> In terms of section 16 of Criminal and Magistrate’s Courts Procedure Amendment Act 39 of 1926 the power of the magistrate to grant bail was extended.

<sup>250</sup> Section 18 of the Criminal Procedure and Evidence Amendment Act 29 of 1955.

<sup>251</sup> South African Law Commission (1994) 12.

<sup>252</sup> House of Assembly debates Volume 87 col 1405 (21 February 1955).

statute in its strictest sense<sup>253</sup> and followed the same pattern as its predecessor. In terms of this Act release of a person on bail was essentially a judicial power. The wide powers regarding bail that were conferred upon the supreme court by the 1917 Act<sup>254</sup> were re-enacted.<sup>255</sup> A superior court that had jurisdiction in respect of an offence, could grant bail at any stage of the proceedings in any court. The execution of a sentence, passed by such court pending an appeal, could also be suspended by the superior court, by releasing the accused on bail.<sup>256</sup>

However, after the adoption of the 1955 Criminal Procedure Act numerous changes were legislated which tipped the balance that existed between the accuser and the accused at the pre-trial stage, including bail, towards the state. These enactments were for the greatest part the result of the struggle between the legitimate social and political aspirations of the black people of South Africa, and the ruling whites who saw their salvation in their protection from evil forces bent on the destruction of society in its present form.<sup>257</sup>

The South African legislature acted on the premise that the established principles were inadequate for the task of ensuring order in contemporary circumstances. In the ensuing decades the National Party government passed draconian laws, mainly against the opponents of the "apartheid state", and in the process made drastic inroads into the freedom and security of the

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<sup>253</sup> House of Assembly debates Volume 88 col 7563 - 5 (13 June 1955).

<sup>254</sup> Section 109.

<sup>255</sup> By way of section 90(a).

<sup>256</sup> Section 368 of the 1955 Act.

<sup>257</sup> See also section 13 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 where it was not politically motivated.



opponents of the government of the day. It marks a dark period in our country's history and should be a reminder to those that choose to ignore fundamental rights under the guise of a limitation because of pressing issues. The discussion shows how concepts such as the "public interest" and "public safety" were manipulated to advance the interests and safety of the unelected governing minority as opposed to the interests or safety of the public in general. I will now discuss these legislative changes and the developments leading up to the 1977 Criminal Procedure Act.

#### 2.5.2.2 The period 1955 - 1977: Statutory inroads into the right to bail

The changes were brought about by amendments to the 1955 Criminal Procedure Act and by way of other Acts. For the biggest part the legislative changes had one thing in common. They usurped the powers of the judiciary to release on bail under certain circumstances.<sup>258</sup>

The first of these amendments empowered the attorney-general to prohibit the release of an accused on bail for twelve days where public safety was threatened.<sup>259</sup> A certificate could be issued to this effect but only in the event of more serious offences such as murder and arson.<sup>260</sup> This emergency power to refuse bail was initially only valid for one year but was thereafter extended

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<sup>258</sup> In the Roman-Dutch, English and South African law this power was previously regarded as essentially in the judicial domain.

<sup>259</sup> Section 108*bis* was included in the 1955 Act by way of section 4 of the General Amendment Act 39 of 1961.

<sup>260</sup> The offences were listed in part II *Bis* of the second schedule to the Act. The offences were sedition, murder, arson, kidnapping, child-stealing, certain offences under the Suppression of Communism Act, sabotage, treason, robbery and housebreaking with aggravating circumstances and also where the attorney-general considered it in the interests of justice or the administration of justice.

every year<sup>261</sup> until it became a permanent fixture in 1965.<sup>262</sup> The powers of the presiding officers were expressly subjected to the overriding discretion of the attorney-general.<sup>263</sup>

The second of the legislative changes was the so-called “90 day” determination in the General Law Amendment Act of 1963.<sup>264</sup> Section 17 of the 1963 amendment provided for the incarceration of people, suspected of having committed or intending to commit the crime of sabotage or any offence under the Internal Security Act,<sup>265</sup> or the Unlawful Organizations Act.<sup>266</sup> The incarceration was at the instance of a commissioned officer for a period of 90 days “on any particular occasion” without bail for “interrogation purposes” and until he has to the satisfaction of the Commissioner of the South African Police replied to all the questions asked. However, this provision was repealed by way of a proclamation of the State President in 1964.<sup>267</sup>

The third of these changes provided that a witness for the state could be held for 180 days or until the conclusion of the trial in terms of a warrant of arrest from the attorney-general.<sup>268</sup> In practice witnesses, as well as potential

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<sup>261</sup> By section 17 of Act 76 of 1962, section 9 of Act 37 of 1963 and section 23 of Act 80 of 1964.

<sup>262</sup> Section 6(a) of Act 96 of 1965.

<sup>263</sup> In terms of sections 87, 88 and 98 of the 1955 Act.

<sup>264</sup> Act 37 of 1963.

<sup>265</sup> 44 of 1950. This Act was eventually repealed by the Internal Security Act 74 of 1982.

<sup>266</sup> 34 of 1960.

<sup>267</sup> Published as Proclamation R320 of 1964 on 11 January 1965. By way of Extraordinary Government Gazette No 960 of 30 November 1964.

<sup>268</sup> Section 215*bis*, which was inserted by section 7 of the Criminal Procedure

accused, were held under this provision. The provision was primarily used for offences under the Internal Security Act but could also be used by the attorney-general for certain serious offences of a non-political nature.<sup>269</sup>

The powers of the police to deny bail were extended by the General Law Amendment Act of 1966.<sup>270</sup> This Act authorised incarceration by a commissioned officer above the rank of lieutenant-colonel of anyone “he has reason to believe” to be a terrorist, or has committed the crime of sabotage or an offence under the Internal Security Act.<sup>271</sup> Someone who “intends to commit such an offence” could similarly be arrested without a warrant and be detained without trial for a period not exceeding fourteen days. The Commissioner of Police could apply to a judge to have the detention extended for further periods. Written submissions could be made by the detainee to counteract the request for further incarceration.<sup>272</sup> Apart from this the jurisdiction of the court was excluded.

The Terrorism Act also deviated from the procedural norm and excluded bail to a person charged under the Act unless the attorney-general consented to his release.<sup>273</sup> Arrest could be effected by a commissioned officer above the rank of lieutenant-colonel without a warrant on the belief that someone was a terrorist, or was withholding information relating to terrorists or to offences

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Amendment Act 96 of 1965.

<sup>269</sup> See Dugard (1977) 48 and further.

<sup>270</sup> 62 of 1966.

<sup>271</sup> Section 22.

<sup>272</sup> See Matthews (1971) 155.

<sup>273</sup> Section 5(f) and 6 of Act 83 of 1967. This Act was also repealed by the Internal Security Act 74 of 1982.

under the Act. What makes the situation worse is that one could be detained for interrogation until the questions had been satisfactory answered to the satisfaction of the Commissioner of Police, or that no useful purpose would be served by further detention. In practice this meant that detainees were held for long times, some for more than a year without the courts being able to pronounce on the validity thereof.<sup>274</sup>

During 1968 magistrates were granted the power to grant bail for all offences.<sup>275</sup> However, in practice this did not improve their powers significantly as the attorney-general usually exercised his powers in terms of section 108*bis* in the case of murder or treason.<sup>276</sup>

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<sup>274</sup> While the Criminal Procedure Act thus authorised the detention of certain suspects much along the same lines, these other Acts compromised the freedom from arbitrary arrest and detention existing under the normal rules by *inter alia* disposing of:

- The procedure of arrest by warrant.
- The right of a person arrested without a warrant to be informed of the cause of arrest.
- The right to be brought before a court within forty-eight hours.
- The relief provided by the writ of *habeus corpus* or the *interdictum de homine libero exhibendo*.
- Access to a legal advisor.

The last-mentioned Acts even authorised interrogation in solitary confinement before the arrested was brought to trial. Unfortunately the interrogation was not subject to judicial control and the detainee was not represented.

<sup>275</sup> Sections 3 and 4 of Act 9 of 1968, amending sections 87 and 88 of Act 56 of 1955.

<sup>276</sup> In 1970 the State President appointed a commission of enquiry into the law of criminal procedure and evidence in South Africa, with Botha J of the Appellate Division as its sole member. In 1971 Botha submitted a report that had a great influence on the future course of criminal procedure in South Africa (Dugard (1977) 51 - 52). The increased powers of the attorney-general in respect of bail and the detention of witnesses was also examined by Botha. He recommended that the great powers of the attorney-general to withhold bail be restricted to cases affecting public safety and the maintenance of public order. Although he

In 1976 the Suppression of Communism Act was renamed as the Internal Security Act, and by way of the Internal Security Amendment Act of 1976<sup>277</sup> new sections on bail and the detention of witnesses that were fundamentally the same as sections 108*bis* and 215*bis* of the Criminal Procedure Act of 1955, were inserted.<sup>278</sup> An attorney-general, if he considered it necessary “in the interest of the safety of the State or the maintenance of public order”, could issue an order that a person arrested on a charge of having committed sedition, treason, sabotage, terrorism or certain offences under the Internal Security Act, not be released on bail before sentence has been passed, or before he has been discharged.<sup>279</sup>

#### 2.5.2.3 The period 1977 - 1994: The Criminal Procedure Act 51 of 1977

In 1977 the present Criminal Procedure Act was placed on the statute book. In terms of this Act, the preparatory examination disappeared, except when

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did not propose the scrapping of section 108*bis* of the Criminal Procedure Act, he advocated a return to the position before 1968 where the attorney-general could refuse bail “in the interests of justice”. With regard to section 215*bis* of the Criminal Procedure Act he recommended that the attorney-general’s decision be subject to judicial control by way of a procedure that obliged the attorney-general to apply for permission from a judge in chambers when he wanted to hold a witness (Dugard (1977) 53). Botha also proposed that the provisions relating to sureties should lapse and that a person should only be released on bail if the decided amount is deposited in cash (RP 78/1971, 51 (11.15.1). Although the main recommendations of this report received attention (see Dugard (1977) 54 - 56), it seems that little came of the recommendations regarding bail.

<sup>277</sup> Act 79 of 1976, amending Act 44 of 1950.

<sup>278</sup> These new sections as before also referred to the detention of witnesses.

<sup>279</sup> Section 12A of the Internal Security Act. Section 12B of the Act simply repeated the provisions of section 215*bis* in respect of serious political offences. See Dugard (1977) 55.

requested by an attorney-general. This resulted in important changes to the system, as the 1955 Act provided for a system that was premised on the existence of a preparatory examination. In terms of the 1955 Act an accused was entitled to be released on bail, subject to a number of exceptions once he was committed for trial or sentence. No such right existed while the accused was attending a preparatory examination.<sup>280</sup> Under the 1977 Act these distinctions between the various stages of the process based on the preliminary examination disappeared.

Although the 1977 Act repealed the 1955 Criminal Procedure Act, the new Act did not change the position regarding bail radically.<sup>281</sup> In case of less serious crimes an accused could be released on bail before his first appearance in the lower court by a senior police official once a sum of money determined by that official was deposited.<sup>282</sup> The presiding officer in a lower, or the supreme court, had the power to release the accused on his application on any charge pending before such court. An amount of bail fixed by the court had to be deposited with the required authority, or on good cause shown the court could permit an accused to furnish a guarantee, with or without sureties, that he will pay and forfeit to the state the sum set by the court.<sup>283</sup>

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<sup>280</sup> Sections 87 and 88 of Act 56 of 1955.

<sup>281</sup> Dugard (1977) 73; South African Law Commission (1994) 13.

<sup>282</sup> Section 59.

<sup>283</sup> Section 60. The recommendation by the Botha report (see footnote 276) that an accused should only be released on bail if he deposits a fixed amount of money in cash, and that sureties be abolished, was not taken up in this Act. In terms of the report it was indicated that nobody accepted sureties anymore, and that this ruling would bring the theory into line with practice.



However, bail could only be granted to the accused subject to the provisions of section 61.<sup>284</sup> In terms of this provision the court was obliged to refuse an application for bail where the attorney-general objects to the granting of bail and informs the court that information was available to him which in his opinion:

- cannot be disclosed without prejudice to the public interest or the administration of justice;
- shows that the release of the accused on bail is likely to affect the administration of justice adversely or to constitute a threat to the safety of the public or the maintenance of the public order.<sup>285</sup>

The attorney-general's decision could not be tested in a court of law until ninety days had lapsed. If no evidence was brought against the accused within 90 days after his arrest, he could apply to the court to be released on bail and the normal principles relating to the release on bail applied. Even though the

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<sup>284</sup> The attorney-general could only exercise his power under section 61 in respect of offences listed in part 3 of schedule 2.

<sup>285</sup> Section 61 essentially replaced section 108*bis* of the 1955 Criminal Procedure Act. Section 108*bis* authorised an attorney-general to withhold bail for 90 days in respect of certain serious offences of both a political and non-political nature if the attorney-general considered it necessary "in the interest of the administration of justice or the safety of the public or the maintenance of public order".

The Botha Commission (see footnote 276) considered section 108*bis* and concluded that it deviated from the basic rule that the granting or refusal of bail was a judicial function. According to Botha it could only be justified in the case of politically subversive activities that is in the interest of public safety or the maintenance of public order. Botha further commented that as far as the withholding of bail "in the interest of the administration of justice" was concerned, the withholding of bail by an attorney-general could never be in the interest of the administration of justice. Botha proposed that the phrase "in the interest of the administration of justice" be deleted from section 108*bis*. This recommendation was not accepted. See Dugard (1977) 75.



powers conferred on the attorney-general in terms of section 61 was a serious departure from the general principles it was not as serious as the corresponding measures in terms of section 12A of the Internal Security Act which was inserted in 1976.<sup>286</sup> Under section 12A there was no limitation of 90 days on the order of the attorney-general. The court's discretion to grant bail was therefore completely excluded under section 12A.

If the court granted bail, it could impose conditions, which may be varied or amended at any stage of the proceedings.<sup>287</sup>

The accused could appeal to the superior court against the decision of a lower court:

- refusing bail; or
- against the amount of bail fixed by that court; or
- against the conditions of bail imposed.<sup>288</sup>

In terms of the 1955 Act a superior court could entertain an application for bail which has failed in the lower court, other than by means of an appeal.<sup>289</sup> This power was abolished by the 1977 Act.<sup>290</sup>

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<sup>286</sup> By section 6 of Act 79 of 1976. In par 2.5.2.2 I indicated that section 12A authorised an attorney-general to issue an order that a person arrested on a charge of having committed sedition, treason, sabotage, terrorism or certain offences under the Internal Security Act, not be released on bail before sentence has been passed, or before he has been discharged if he considered it necessary "in the interest of the safety of the State or the maintenance of public order".

<sup>287</sup> Sections 62 and 63.

<sup>288</sup> Section 55.

<sup>289</sup> Section 98.

If the accused failed to meet the conditions of bail, the court could cancel the bail and declare the money deposited forfeited to the state.<sup>291</sup> If the accused failed to appear at the place and time set for his next appearance the court could cancel bail, declare the bail money forfeited to the state and issue a warrant for the arrest of the accused.<sup>292</sup> Where evidence was presented to the court by the state that the accused is about to abscond the court was empowered to order the bail to be cancelled, and that the accused be arrested and detained until the conclusion of the proceedings.<sup>293</sup>

A different position applied to juveniles, that is, persons under the age of eighteen. The court had the option of releasing the juvenile accused or detaining him in a place of custody as defined in the Children's Act.<sup>294</sup>

Although the Criminal Procedure Act of 1955 made no provision for an accused to be released on his own responsibility, a practice in favour of such a form of release developed in the lower courts.<sup>295</sup> However, this practice was criticised in 1967 on the ground that it had no basis in the Criminal Procedure Act.<sup>296</sup> However, the new Criminal Procedure Act gave statutory form to this

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<sup>290</sup> The Minister of Justice refused to reinstate a section 98 type provision in the new Act. See House of Assembly debates, columns 3453 - 7 (11 March 1977).

<sup>291</sup> Section 66.

<sup>292</sup> Section 67.

<sup>293</sup> Section 68.

<sup>294</sup> Section 71.

<sup>295</sup> Scholtemeyer (1964) 27 *THRHR* 219; Van Greunen (1969) 86 *SALJ* 93.

<sup>296</sup> See *S v O'Neill* 1967 (4) SA 84 (SWA).

practice in section 72.<sup>297</sup> The section provided that the court or a police official may instead of bail, release the accused from custody and warn him to appear at the next specified time of hearing, and to remain in attendance at the proceedings. If the person was under the age of eighteen years and was released in this way, he could be placed in the care of the person in whose custody he was and the warning extended to that person. Failure to appear at the hearing as warned, or to produce the juvenile entrusted to one's care, constituted a criminal offence.

The first appearance of the accused was not necessarily within office hours but could be requested by the accused after hours.<sup>298</sup>

With the advent of the Interim Constitution<sup>299</sup> the position with regards to bail was mainly regulated by sections 58 to 71 of the Criminal Procedure Act 51 of 1977. The Internal Security Act of 1982<sup>300</sup> provided for the refusal of bail in certain circumstances until 31 July 1992 when section 30(1) was repealed by the Criminal Law Second Amendment Act of 1992.<sup>301</sup> However, the legal position on bail was not found exclusively in the existing legislation but also in decisions relating to this aspect of the law.<sup>302</sup>

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<sup>297</sup> Pursuant to the recommendation of the Botha Commission.

<sup>298</sup> *Twayie v Minister of Justice* 1986 (2) SA 101 (O).

<sup>299</sup> Act 200 of 1993 which commenced on 27 April 1994.

<sup>300</sup> Act 74 of 1982.

<sup>301</sup> Act 126 of 1992.

<sup>302</sup> Nel (1987) 1.

The Criminal Procedure Act provided for the granting of bail in the following situations:

- By a lower court pending the finalisation of a review by a provincial division of the supreme court.<sup>303</sup>
- By a provincial division as a result of review.<sup>304</sup>
- By a lower court pending the disposal of an appeal to the provincial division.<sup>305</sup>
- By a provincial division after an appeal.<sup>306</sup>
- By a provincial division as trial court of first instance pending an appeal to the Appellate Division (or to a full bench of the provincial division).<sup>307</sup>

However, the wide powers of a division of the supreme court having jurisdiction in respect of an offence to grant bail at any stage of the proceedings, was not incorporated in the 1977 Act.<sup>308</sup>

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<sup>303</sup> Section 307.

<sup>304</sup> Sections 304(2), 3), (4).

<sup>305</sup> Section 309(4)(b) read with section 307.

<sup>306</sup> Section 309(3) read with section 304(2)(c)(vi).

<sup>307</sup> Section 321(1)(b) and (2).

<sup>308</sup> South African Law Commission (1994) 14.

## 2.6 SOUTH AFRICAN LAW IN THE CONSTITUTIONAL ERA AFTER 1994

### 2.6.1 Introduction

Langa indicates that South Africans are distinguished tellers of horror stories not so much because of collective imagination but because of stories that can be dredged from the past.<sup>309</sup> The stories of incarceration at the hands of the previous government are undeniably part hereof. It seems reasonable to say that barely 15 years ago most South Africans would have thought it far-fetched that South Africa would undergo the monumental constitutional change that it has. South Africa has a history of perceived conflict of interests and violent confrontations. But the change did not come all of a sudden and can be roughly divided into four stages.<sup>310</sup>

- The pre-negotiating stage which were “negotiations about negotiations” from September 1985 to December 1991.
- The negotiation stage which were substantive negotiations from December 1991 to November 1993.<sup>311</sup>
- The post-negotiating stage from December 1993 until May 1994. The first South African democratic election took place on 27 April 1994. On the same date negotiated outcomes were implemented by way of the Interim Constitution.

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<sup>309</sup> In Bell (1997) 8. He is a poet, writer and was the president of the Congress of the South African Writers in 1997.

<sup>310</sup> See Hough & Du Plessis (1994) 1 where they categorise the first three stages.

<sup>311</sup> All-party negotiations formally began when the Conference for a Democratic South Africa (CODESA) was convened on 20 December 1991. The negotiations culminated in a forum called the Multi-Party Negotiation Process (MPNP). Some information on the Multi-Party Negotiations is provided in footnote 315.

- The drafting of the Final Constitution in accordance with the constitutional principles in the two years following 10 May 1994 and the certification thereof by the Constitutional Court during the second part of 1996.<sup>312</sup>

There was especially a flurry of activity from the unbanning of the national liberation movements and the release of Nelson Mandela from prison in 1990. Members of the legal fraternity travelled to every corner of the earth studying different constitutions. But if the politics was encouraging the result was not. Violence and crime in general soon got out of hand. A new source of horror stories was born.

In spite of the two incessant themes of sovereignty and individual freedom that marked the history of South Africa, the negotiations continued.<sup>313</sup> These themes were matched by the determination of many in the previous government to stay in power.<sup>314</sup> Taking this into account, what happened at the World Trade Centre at Kempton Park between 1992 and 1993, and the Constitutional Assembly between 1994 and 1996 is remarkable.

The Bill of Rights and the underlying philosophy of human rights was meant to achieve social justice for all in the country.<sup>315</sup> Although not the longest chapter

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<sup>312</sup> Some information on the drafting of the Final Constitution and the certification process is provided in footnote 315.

<sup>313</sup> Effectively the battle for civil rights started as far back as the rule of the Dutch East India Company.

<sup>314</sup> See Bell (1997) 12.

<sup>315</sup> By the end of April 1993 the Negotiating Council at the Multi-Party Negotiations decided to appoint seven technical committees to assist it in formulating proposals for the Interim Constitution. One of these committees dealt with fundamental rights and was called the Technical Committee on Fundamental Rights. At the insistence of the ANC who primarily wanted to ensure a fair election this committee initially only dealt with political rights. In

in the Constitution, it created more public debate than all the other chapters put together. This was where the individual sought protection against the abuse of power by the state. It had to establish the duties of government towards the people.

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the end it dealt with all the rights and reported to the council on a weekly basis. In formulating their proposals it relied on the agreements reached at CODESA and the Multi-Party Negotiating Process, written submissions made by participants in the MPNP and feedback from the discussion of their reports in the Negotiating Council. On this basis the rights were developed. Some problem areas were referred to the Ad Hoc Committee on Fundamental Rights, which comprised also of representatives of the political parties. Evidence of interaction between these two committees can be found. During this time many of the differences were solved by bilateral and informal discussions between the parties which were then conveyed to the Ad Hoc Committee. See also Du Plessis & Cordier (1994) 8.

Some of the main functional bodies at the drafting of the Final Constitution were:

- The Constitutional Committee under Cyril Rhamaphosa, which was the engine room.
- The Management Committee which concentrated on the procedural aspects also under Cyril Rhamaphosa; and
- The officials of the Constitutional Assembly.

Theme committees were established to work on different parts of the Constitution. Theme Committee 4 dealt with fundamental rights. A technical committee consisting of specialists in particular fields supported each theme committee. The theme committees had to ensure the inclusive nature of the constitution making process. In approximately October 1995 a draft was submitted and published for input in December 1995 even though there were still disagreement on some aspects. The comments were taken into account and many progress reports were submitted to the Constitutional Committee. At a point Theme Committee 4 ceased to function and the Constitutional Committee carried on with negotiations. Many issues were solved in bilateral and in informal discussions. In the end the Technical Refinement Team refined the text of the Constitution. But, the Constitutional Court was still required to certify that all the provisions complied with the constitutional principles. The Constitutional Court at first referred some provisions back to the Constitutional Assembly, but the text was finally certified by way of "the second certification judgment" in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC). See also Ebrahim (1998) 180 and further.



However, it seems to have been commonly understood that the road ahead would not be an easy one. While the Bill of Rights would point the way, it could not provide all the answers. New structures would have to be built and new mechanisms would have to be implemented to give life and meaning to it.

The Interim Constitution did away with the Westminster-style of sovereignty where legal positivism flourished side by side with ideological bigotry. From the Multi-Party Negotiations emerged a federal state with a distribution of powers and functions among different levels of government. The Preamble to the Interim Constitution made it clear that the 1994 Constitution was a transitional Constitution which provided for the continued governance of the country while an elected Constitutional Assembly draws up the Final Constitution.

The Interim Constitution, which included a Bill of Rights, bound all legislative, executive and judicial organs and was upheld by an independent judiciary. The fundamental rights were spelled out with some measure of exactitude and any law inconsistent therewith was unconstitutional. These themes were carried into the Final Constitution in accordance with a "solemn pact" recorded as the 34 Constitutional Principles.<sup>316</sup>

### **2.6.2 The period 1994 - 30 June 1999**

It was against the background of unacceptable incarceration policies by the previous government that the citizens of South Africa drafted the right to be

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<sup>316</sup> The Constitutional Principles are contained in schedule 4 to the Interim Constitution.

released from detention with or without bail, unless the interests of justice require otherwise in the Interim Constitution.<sup>317</sup>

But the authorities soon hereafter started to water down the right to bail. Certain changes were made to the position regarding bail in the Criminal Procedure Act by way of the Criminal Procedure Second Amendment Act 75 of 1995.<sup>318</sup> Notwithstanding the fact that the new section 60(1)(a) of the Criminal Procedure Act echoed the right contained in section 25(2)(d) of the Interim Constitution, the changes may be seen as an attempt on the part of the legislature to clarify, tighten up and align the principles of bail with the constitutional norm in section 25(2)(d). This was followed by the introduction of the Final Constitution.<sup>319</sup>

The higher level of protection afforded to the right to bail under the Interim Constitution, fell away under the Final Constitution. The infringement of the right to bail therefore does not have to be “necessary” any more.<sup>320</sup> In terms of section 35(1)(f) of the Final Constitution everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

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<sup>317</sup> Section 25(2)(d) provided that every person arrested for the alleged commission of an offence shall in addition to the rights which he has as a detained person, have the right to be released from detention with or without bail, unless the interests of justice require otherwise.

<sup>318</sup> It commenced on 21 September 1995.

<sup>319</sup> Act 108 of 1996. The Final Constitution was signed by Nelson Mandela at Sharpsville on 4 February 1997.

<sup>320</sup> See chapter 8 footnote 162.

Soon hereafter the Criminal Procedure Second Amendment Act 85 of 1997 followed.<sup>321</sup> It too was generally aimed at tightening up bail requirements and procedures.

### **2.6.3 A summary of the position as at 30 June 1999**

#### **2.6.3.1 General**

Section 35(1)(f) in the Constitution is the primary provision regarding bail. After the changes referred to above, the Criminal Procedure Act 51 of 1977 provides for the granting of bail in the following situations:

- For less serious offences, before the first appearance in a lower court, by a police official of or above the rank of non-commissioned officer in consultation with the police official charged with the investigation;<sup>322</sup>
- By an attorney-general or duly authorised prosecutor in respect of offences referred to in schedule 7 and in consultation with the police official charged with the investigation;<sup>323</sup>
- By a court at any stage preceding the conviction;<sup>324</sup>
- By a provincial or local division as a result of a review;<sup>325</sup>

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<sup>321</sup> As amended by the Judicial Matters Amendment Act 34 of 1998. The Act commenced on 1 August 1998.

<sup>322</sup> Section 59.

<sup>323</sup> Section 59A. This bail may of course also be granted outside office hours. Notwithstanding the so called "police bail" under section 59 and "prosecutors bail" under the new section 59A the granting or refusal of bail is primarily a judicial function.

<sup>324</sup> Section 60.

<sup>325</sup> Section 304(2)(c)(vi); (4).

- By the court that imposed the sentence pending review in terms of section 307(2)(b);
- By the court that imposed the sentence pending review<sup>326</sup> in terms of section 308A(a);
- By the court that imposed the sentence pending appeal in terms of section 309(4)(b) read with section 307;<sup>327</sup>
- By the supreme court giving the decision on appeal in terms of sections 309(5)/309(3) read with section 304(2)(vi).
- By a superior court as trial court of first instance pending an appeal.<sup>328</sup>

Section 77(8) of the Criminal Procedure Act makes provision for the granting of bail to a person found capable of understanding the proceedings<sup>329</sup> and who is convicted, or not capable of understanding the proceedings,<sup>330</sup> and who appeals the finding. The appeal is to be made in the same manner, and subject to the same conditions, as an appeal against a conviction from a lower

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<sup>326</sup> Under section 304(4).

<sup>327</sup> In terms of Government Gazette No 20036 dated 30 April 1999, sections 1 and 3 of the Criminal Procedure Amendment Act (Act 76 of 1997) commenced on 28 May 1999. Magistrates now have to grant leave to appeal. However, the question arises whether reasonable prospects of success have to be taken into account for purposes of granting bail. The application for bail will in many instances also be heard before the request for leave. In *S v De Villiers* 1999 (1) SACR 297 (O) Hancke and Cillié JJ on 27 October 1998 indicated that the prospects of success should not be taken into account by magistrates except in the clearest circumstances. This was said because magistrates had not been trained in this skill, and it was not acquired overnight. See also *S v Hudson* 1996 (1) SACR 431 (W) where all the relevant cases are mentioned and discussed. This does not bode well for the whole process.

<sup>328</sup> Sections 321(1)(b) and (2).

<sup>329</sup> In terms of subsection (5).

<sup>330</sup> In terms of subsection (6). And against whom the finding is not made in consequence of an allegation by the accused. See section 77(8)(ii).

court.<sup>331</sup> Bail can also be provided where a court in terms of section 78(6) finds that an accused committed the act, but that he at the time of the commission by reason of mental illness or defect is not criminally responsible and that decision is appealed. The appeal is also to be made in the same manner, and subject to the same conditions, as an appeal against a conviction from a lower court.<sup>332</sup>

Inasmuch as it is clear from all these provisions that the forfeiture of freedom may be sanctioned by society pending the determination of guilt, or the next step in the criminal process, such forfeiture of freedom is subject to judicial supervision and control.<sup>333</sup> While some principles that influence an applicant's right to bail are found under the principles of arrest, the effect, rules and consequences of bail can primarily be found under the principles governing release on bail before conviction. These principles are now discussed.

#### 2.6.3.2 Arrest as method of securing the attendance of an accused in court

Section 40 of the Criminal Procedure Act provides that arrest may only be effected in certain instances without a warrant. An arrested person shall, if not released otherwise, be brought before a lower court as soon as reasonably possible, but not later than forty-eight hours after the arrest. If the forty-eight hours expires outside normal court hours or on a day that is not an ordinary

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<sup>331</sup> In *S v Malcolm* 1999 (1) SACR 49 (SE) it was indicated that even if no power was implied by section 77(8), the high court would have inherent power to grant bail to the accused pending such appeal. See also *S v Hlongwane* 1989 (4) SA 79 (T).

<sup>332</sup> Section 78(8)(b).

<sup>333</sup> See also Joubert (1998) 136 and further, and Neveling and Bezuidenhout in Nel & Bezuidenhout (1997) 279 and further for concise expositions of the principles.

court day, the accused shall be brought before a lower court not later than the end of the first court day.<sup>334</sup>

Any person who is arrested with or without a warrant for allegedly committing an offence, must be informed by the court of the reason for his further detention, or be charged and be entitled to apply to be released on bail.<sup>335</sup> If the accused is not so informed or charged he shall be released.

A person arrested with or without a warrant, is not entitled to be brought to court outside ordinary court hours, as was previously the case.<sup>336</sup>

The lower court hearing the application may postpone such proceedings or application to any date or court for a period not exceeding seven days at a time

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<sup>334</sup> Section 50(1). In *Garces v Fouche* 1998 (2) SACR 451 (Nm) the full bench held that the mere fact that section 50(1) authorised detention for forty-eight hours, did not mean that an accused arrested on a criminal charge, could not bring himself before court before the forty-eight hours expired. Because this section set the maximum time and not the minimum, nothing precluded him from doing so. However, real urgency on a case by case basis has to be determined before a court will hear a bail application outside hours. This view is also held by Du Toit *et al* (1987) 5 - 34B.

<sup>335</sup> Section 50(6)(a). In terms of the Final Constitution the arrested person is of course entitled to apply for bail before he is charged. See par 7.3.3.2.

<sup>336</sup> Section 50(6)(b). The relationship between the "right to bail" and the "right to liberty" before the advent of the fundamental rights era, led the courts to allow bail applications at all hours. See *Twayie v Minister of Justice* 1986 (2) SA 101 (O) 104E - F:

*Elke verhoorafwagende is 'n potensiële onskuldige, en onnodige inperking van die burger se vryheid druis teen alle beskaafde gevoel in ... . Teen die agtergrond van hierdie algemene beginsels sal al bevredigende antwoord wees dat beide die Hooggeregshof sowel as die laerhove 'n gearresterde, wat hom oor sy arrestasie beswaard voel, te enige tyd, op sy aansoek, sal aanhoor en dit wel uit hoofde van voormelde artikel 60 [of the Criminal Procedure Act before amendment] ten einde die werking van hierdie artikel ten volle effektief te maak.*

and on conditions which are not inconsistent with the provisions of the Criminal Procedure Act.<sup>337</sup>

### 2.6.3.3 The granting of bail before conviction

#### 2.6.3.3.a General

Chapter 9 of the Criminal Procedure Act provides a comprehensive framework for the granting of bail before conviction. In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*<sup>338</sup> the Constitutional Court observed that the chapter created a complex and comprehensive interlocking mechanism that was designed to govern the whole procedure whereby an arrested person will be released from custody. It is therefore necessary to briefly describe the provisions of chapter 9.

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<sup>337</sup> Section 50(6)(d). The court may only do so if:

- (i) The court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
- (ii) The prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60(11A);
- (iii) The prosecutor informs the court that the person is going to be charged with an offence referred to in Schedule 6 and that the bail application is to be heard by a regional court;
- (iv) It appears to the court that it is necessary to provide the State with a reasonable opportunity to -
  - (aa) procure material evidence that may be lost if bail is granted;
  - (bb) perform the functions referred to in section 37; or
- (v) It appears to the court that it is necessary in the interests of justice to do so.

<sup>338</sup> 1999 (7) BCLR 771 (CC).



#### 2.6.3.3.b The effect and conditions of bail

Section 58 describes the effect of bail and sets out the peremptory conditions. Discretionary conditions of bail may be added.<sup>339</sup> On application by the prosecutor, any court before which a charge is pending and where bail has been granted, may add any of the conditions of bail set out in section 62. Where bail has been granted the prosecutor or accused may apply to have the amount of bail increased or reduced or the bail conditions amended.<sup>340</sup>

#### 2.6.3.3.c Bail before first appearance of accused in lower court

Section 59 provides that bail may be granted by certain police officials in respect of certain less serious offences.<sup>341</sup> In terms of section 59A the attorney-general or an authorised prosecutor may release a suspect arrested for certain more serious offences on bail.<sup>342</sup> If bail is not granted as envisaged by section 59 of 59A he must be brought before a lower court as soon as reasonably possible but not later than forty-eight hours after arrest.<sup>343</sup> Bail will then be considered as envisaged in section 60.

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<sup>339</sup> See sections 59A(3)(b) (attorney-general) and 60(12) (court). A police official who acts in terms of section 59 does not have the power to determine special conditions of bail. See in general *S v Cronje* 1983 (3) SA 739 (W) 742C.

<sup>340</sup> Section 63.

<sup>341</sup> Section 59(1)(a) provides that bail may not be granted for the more serious offences listed in part II or part III of schedule 2 of the CPA.

<sup>342</sup> Section 59A(1) limits the offences to those listed in schedule 7 of the CPA.

<sup>343</sup> Subject to section 50(1)(d). See also par 2.6.3.2.

#### 2.6.3.3.d Bail application in court

Section 60 of the Criminal Procedure Act was substituted by section 3 of the Criminal Procedure Second Amendment Act 75 of 1995,<sup>344</sup> and further amended by the Criminal Procedure Second Amendment Act 85 of 1997. The new section 60 contains procedural and evidentiary rules concerning bail applications and identifies various factors which the court should consider in deciding whether one or more of the grounds referred to in sections 60(4)(a) to 60(4)(e) are present.<sup>345</sup> These factors which are now contained in sections 60(5) to 60(8A) were formally found in the case law, common law and common sense.<sup>346</sup> Cowling is of the opinion that the factors listed, or identified in support of a particular ground, may equally be relevant to the establishment of other grounds.<sup>347</sup>

Except for the fact that section 60(1)(a) is limited to the period before conviction, the wording seems to be in line with the Interim Constitution. However, this right to be released prior to conviction is subject to the provisions of section 50(6) of the Act.<sup>348</sup> A person's right to institute bail proceedings are regulated and qualified by section 50(6). A person arrested for

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<sup>344</sup> Before this amendment this section stood unamended since its inception in 1977.

<sup>345</sup> There is precedent in comparable democracies other than under Canadian law for providing courts with such guidelines. See section 32 of the Australian Bail Act, 1978 and schedule 1 par 9 of the 1976 English Bail Act.

<sup>346</sup> The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 40 indicated that these factors could in the main be traced back to case law. See also Van der Merwe in Du Toit *et al* (1987) 9 - 17 with regard to the grounds referred to in sections 60(4)(a) - (d).

<sup>347</sup> (1996) SACJ 50 75.

<sup>348</sup> See par 2.6.3.2.

the alleged commission of an offence must as soon as possible be informed of the right to apply for bail.<sup>349</sup>

In terms of section 60(1)(b), the court referring an accused to any other court for trial or sentencing, retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act, until the accused appears in such other court for the first time.

It is now expected of the presiding officer to act inquisitorially and not as a passive umpire. If the question of bail is not raised by the accused or the prosecutor, the court must ascertain whether he wishes that question be considered by the court.<sup>350</sup> In *S v Ngwenya*<sup>351</sup> it was held that a judicial officer has a duty to inform an unrepresented accused of his right to apply for bail, and of the nature of the procedure to be followed.

In respect of matters that are not in dispute between the accused and the prosecutor, the presiding officer may in an inquisitorial and informal manner acquire the information that it is needed for its decision or order regarding bail.<sup>352</sup> It is submitted that the court is not bound by the normal evidentiary rules governing bail applications in this regard, and may rely on statements from the bar, or on statements of fact drawn up by the parties.<sup>353</sup>

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<sup>349</sup> Section 50(1)(b).

<sup>350</sup> Section 60(1)(c).

<sup>351</sup> 1991 (2) SACR 520 (T).

<sup>352</sup> Section 60(2)(b).

<sup>353</sup> See Van der Merwe in Du Toit *et al* (1987) 9 - 16.

With regards to matters that are in dispute between the parties, the prosecutor or the accused as the case may be, may be required to adduce evidence.<sup>354</sup>

It is furthermore submitted that the word “evidence” in section 60(2)(c) does not require oral evidence, but also other forms of evidence which have been traditionally applied in bail applications. Affidavits can for example be received.<sup>355</sup> Even though it is intended to be a formal court procedure it is considerably less formal than a trial because of the interlocutory and inherent urgent nature of the proceedings.

If the court has acquired the information that is not in dispute, and has taken cognisance of the evidence submitted by the prosecutor and the accused, and is of the opinion that it does not have sufficient or reliable evidence at its disposal, or lacks certain information, the presiding officer must order that such information or evidence be placed before the court.<sup>356</sup>

Section 60(9) provides that the “interests of justice”<sup>357</sup> be weighed against the right of the accused to his personal freedom and in particular the prejudice that the accused is likely to suffer if detained in custody.<sup>358</sup> This balanced approach

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<sup>354</sup> Section 60(2)(c). Van der Merwe in Du Toit *et al* (1987) 9 - 16 submits that this subparagraph empowers the court to decide who has the duty to lead evidence first. He does not see it as a mechanism to allocate an onus proper.

<sup>355</sup> See *S v Pienaar* 1992 (1) SACR 178 (W).

<sup>356</sup> Section 60(3). It is submitted that the normal procedure when bail is contested would be to call on the party that is burdened with the “onus” to begin. See chapter 8.

<sup>357</sup> See par 7.3.5 for a discussion as to the meaning of the term “interests of justice” as used in the Constitution and in the various subsections of section 60 of the Criminal Procedure Act.

<sup>358</sup> The factors to be taken into account are:

was put forward by Mahomed J in *S v Acheson*<sup>359</sup> and codifies the common law approach.

It is furthermore provided in section 60(10) that the court has to weigh the personal interests of the accused against the interests of justice notwithstanding the fact that the prosecution does not oppose the granting of bail. Thus even where the prosecution concedes bail the court must still make up its own mind. Edeling J in *Prokureur-Generaal Vrystaat v Ramokosi*<sup>360</sup> clearly states that sections 60(3) and 60(10) provide for bail procedures to be inquisitorial in nature. Logic dictates that the presiding officer should first call upon the prosecution to indicate why bail is not opposed. If the court needs further information to reach a decision on bail the court can order that such information be placed before the court in terms of section 60(3).

The Act also provides for two instances in section 60(11)(a) and section 60(11)(b) where the court must order that the accused be kept in custody,

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- (a) The period for which the accused has already been in custody since his or her arrest;
  - (b) A probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
  - (c) The reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
  - (d) Any financial loss which the accused may suffer owing to his or her detention;
  - (e) Any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
  - (f) The state of health of the accused;
  - (g) Any other factor which in the opinion of the Court should be taken into account.

<sup>359</sup> 1991 (2) SA 805 (Nm) 823.

<sup>360</sup> 1997 (1) SACR 127 (O).

unless the accused, having been given a reasonable opportunity to do so, satisfies the court that the interests of justice permit his release.<sup>361</sup>

Section 60(11B) compels the accused or his legal advisor to inform the court whether the accused has previously been convicted of any offence or has any charges pending against him. The accused or advisor must also inform the court whether he has been released on bail in respect of those charges. The refusal to supply the information or the supply of false information is an offence. Section 60(11B)(c) also provides that the record of the bail proceedings, except the information as to previous convictions or other pending charges, will form part of any trial that may follow upon the bail application.<sup>362</sup>

In terms of section 60(14) no accused shall for the purposes of the bail proceedings have access to any information in the police docket, unless otherwise directed by the prosecutor.<sup>363</sup>

#### 2.6.3.3.e Appeal to superior court with regard to bail

In terms of section 65 an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail.<sup>364</sup> Conversely section 65A makes it possible for the attorney-general to appeal to a superior court having jurisdiction against the decision of a lower court to release the accused on bail,

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<sup>361</sup> See par 8.3.3.3 and further.

<sup>362</sup> See chapter 9.

<sup>363</sup> See chapter 10.

<sup>364</sup> The superior court may consist of a single judge.

or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible.<sup>365</sup> There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

#### 2.6.3.3.f Failure to observe conditions of bail

When an accused has been released on bail subject to conditions under sections 60 or 62, including an amendment or supplementation under section 63, and the prosecutor applies to lead evidence to prove that the accused has failed to comply with such condition, the court shall if the accused is present and denies that he failed to comply with such condition or that his failure was due to his fault proceed to hear such evidence as the prosecutor and accused may place before it.<sup>366</sup>

If the accused is not present when the prosecutor applies to lead evidence that the conditions of bail have been breached, the court may issue a warrant for the arrest of the accused. When the accused appears before court and denies

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<sup>365</sup> See in general *S v Maliwa* 1986 (3) SA 721 (A).

<sup>366</sup> Section 66(1). The state bears the onus to prove on a balance of probabilities that the accused has breached the conditions of bail due to fault on his part. See *Sebe v Magistrate, Zwelitsha* 1984 (3) SA 885 (Ck) 890B. The state therefore has to bring the matter within the provisions of section 66. See also *Ayob v Minister of Justice* 1963 (1) SA 775 (T) 781E - F. Once the state has proved that the conditions of bail are breached there is a burden upon the accused to prove on a balance of probabilities "such facts as are relevant to persuade the Court not to withdraw the bail or declare it forfeited to the State". See *Sebe v Magistrate, Zwelitsha* 1984 (3) SA 885 (Ck) 890B - C.



that he failed to comply with the condition in question, the court proceeds to hear such evidence as the prosecutor and the accused may place before it. If it is found that the failure to comply with the condition is due to the fault of the accused, the court may cancel the bail and declare the money forfeited to the state.<sup>367</sup> It seems that the court has to apply its mind and exercise its discretion in respect of two distinct and separate issues.<sup>368</sup> Once it has been decided to cancel bail, the court has to consider as a separate matter the question as to whether or not the bail money should be forfeited to the State.<sup>369</sup>

#### 2.6.3.3.g Failure of accused on bail to appear

A court is compelled to provisionally cancel bail, declare it provisionally forfeited to the state and to issue a warrant if an accused who is on bail fails to appear at the time and date appointed for his trial, or to which the proceedings are adjourned or fails to remain in attendance at such trial or at such proceedings.<sup>370</sup>

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<sup>367</sup> *Mens rea* in the form of *dolus* or *culpa* is required before the bail can be cancelled and the money declared forfeited to the state. See *Jack v Vermeulen* 1979 (1) SA 659 (C) 660D - G. See also generally *S v Swartboo*i 1991 (2) SACR 54 (Nm).

<sup>368</sup> *Sebe v Magistrate Zwelitsha* 1984 (3) SA 885 (Ck).

<sup>369</sup> The weight of authority favours the view that proceedings in terms of section 66 are only reviewable and not appealable. See generally *Ex Parte Estate Phillips: In re R v Phillips* 1958 (1) SA 803 (N); *Pillay v Regional Magistrate, Pretoria* 1977 (1) SA 533 (T); *Jack v Vermeulen* 1979 (1) SA 659 (C) and *Sebe v Magistrate Zwelitsha* 1984 (3) SA 885 (Ck).

<sup>370</sup> Section 67(1). See also *S v Cronje* 1983 (3) SA 739 (W) 741A and *S v Mudau* 1999 (1) SACR 636 (W).

If the accused does not appear within fourteen days of his failure, the provisional cancellation of bail and the provisional forfeiture of bail shall become final.

If the accused appears within the fourteen days since the issue of warrant, the court shall confirm the provisional cancellation of bail and provisional forfeiture, unless the accused satisfies the court that his failure to appear or remain in attendance was not due to his fault.<sup>371</sup>

Since 1995 and against the backdrop of cases like *S v Sibuya*,<sup>372</sup> *S v Ndwayana*,<sup>373</sup> *S v Nkosi*<sup>374</sup> and *S v Bobani*,<sup>375</sup> the non-compliance with conditions of bail or failure to appear has been criminalised. Section 67A creates a statutory offence and the normal rules and standards should apply. The burden of proof beyond a reasonable doubt is on the prosecution who has to prove the absence of good cause.<sup>376</sup>

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<sup>371</sup> See *S v Cronje* *ibid* 741G. It is submitted that the civil standard of proof should be applied. See also *S v Mudau* *ibid* where the court points to the amended section 70 that now also enables the court to remit the whole of the bail money forfeited.

<sup>372</sup> 1979 (3) SA 192 (T).

<sup>373</sup> 1983 (1) PH H93 (E).

<sup>374</sup> 1987 (1) SA 581 (T).

<sup>375</sup> 1990 (2) SACR 187 (T).

<sup>376</sup> Section 67A does not require the accused to show good cause or satisfy the court of the presence of good cause. However, see Cowling's interpretation of section 67A in (1996) SACJ 50 59.

#### 2.6.3.3.h Cancellation of bail

Section 68 of the Act also provides for the cancellation of bail by the court before which the charge is pending, where there is information upon oath that the accused:

- is about to evade justice or about to abscond in order to evade justice; or
- interferes (or threatens or attempts to interfere) with witnesses; or
- defeats or attempts to defeat the ends of justice; or
- poses a threat to the safety of the public (or of a particular person); or
- has not correctly disclosed all his previous convictions in the bail proceedings or where his true convictions has come to light; or where
- further evidence has come to light including that the accused has supplied false evidence which might have affected the decision to grant bail; or
- it is in the interests of justice.

The court may issue a warrant for the arrest of the accused and make any order it deems fit, including an order that the accused be committed to prison until the conclusion of the criminal proceedings.<sup>377</sup>

The accused may apply for the cancellation of his bail where:

- he is in custody on any other charge;
- where he is serving a sentence.

This is done by way of an application in terms of section 68A.

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<sup>377</sup> It is submitted that the state has to prove on a balance of probabilities that there are sufficient grounds for cancellation in terms of section 68. Section 68 applies *mutatis mutandis* to bail pending a review in terms of section 307 or an appeal in terms of section 309. See *Allie v De Vries* 1982 (1) SA 774 (T).

## 2.7 CONCLUSION

Since the earliest times the question has been asked in all criminal justice systems: What must be done with the accused, whose guilt has not been proved, between arrest and final adjudication? To a large extent this vexing question was answered by the development of the principles on bail.

In most primitive societies self-help and tribal vengeance took the place of the trial. Trials are the hallmark of advanced societies. The progress along the evolutionary scale can thus be measured by the extent to which a society accepts the trial procedure instead of arbitrary methods of self-help.<sup>378</sup>

The principles regarding bail in South Africa can be traced back to the legal principles regarding *vindex* and *vadimonium* in Roman law, surety under Roman-Dutch law, and “borh” under English law. From these histories much can be learnt about the purpose and principles of bail, and the balance that has existed in history between the individual’s right to liberty and the interests of society.

History shows that bail has long since evolved into a contract in terms of which a detained person is set at liberty upon his payment or furnishing of a guarantee to pay a fixed sum of money. The state, on the other hand, undertakes to respect his liberty if the conditions of bail are met. Bail acts as a reconciling mechanism to accommodate both the defendant’s interest in his liberty, and society’s interest in assuring the defendant’s presence at trial. The

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<sup>378</sup> See Wigmore JH, (1941) *A Kaleidoscope of Justice* 715 as cited by Dugard (1977) 1. See also Maine (1890) chapters IX and X for the history of procedural systems in primitive societies.

purpose of bail in general is to minimise the loss of freedom to the accused where he has not been convicted.

There are many examples where bail could only be granted in respect of certain and usually less serious offences. Roman-Dutch, and early South African law are cases in point. Early English law under the Statute of Westminster I refused bail in the event of homicide and the list of non-bailable offences was extended from time to time.

However, the not too distant South African history has caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or "political" offences effectively removing that decision from the discretion of the court. The individual was thus effectively at the mercy of the state which led to government heavy-handedness that in some instances ran along political or racial lines and brought great hardship. This led to the realisation that the decision whether bail should be granted or not could not be subject to what the government of the day thought was necessary to maintain law and order.

The idea that a person should only be entitled to bail once enough information has been gathered regarding his transgression, is not new to our law but was introduced by Ordinances 30 of 1828 and 72 of 1830 along with the introduction of the preliminary investigation. This was done by conferring a right to bail only once the preliminary investigation has been completed. However, the magistrate had the discretion to grant bail. After completion of the preliminary investigation, but before committal for trial, the attorney-general had to approve the release.

From this time and into the Union the principle existed that only once the case had been committed to trial, the accused was entitled to bail. The Criminal Procedure and Evidence Act of 1917 again made the granting of bail possible before the facts of the case had been adequately considered, except in the case of certain serious offences. However, the entitlement to bail still only arose after committal for trial and then only the supreme court could grant bail for certain serious offences. Still, bail could be granted by the supreme court at any stage of the proceedings.

However, an accused was entitled to be brought before a court at his request to pursue his release in the previous era at any time, even after hours. There was also no provision enabling the state to postpone an application for bail in order to gather information.

A greater responsibility was furthermore recently cast upon the presiding officer, in that he is obliged to act inquisitorially. Yet, this idea is not new under South African law. We have already seen that the procedure to determine bail in the time period 1652 until 1806 had been inquisitorial.

Under present South African law the regional court has to consider the granting of bail for the "most serious" offences mentioned in schedule 6. The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is thereafter instituted. On the same principle the regional court would also have to consider the bail application for a "lesser" offence once the case has been transferred to it. The Criminal Procedure and Evidence Act of 1917 went further in that it limited the granting of bail for certain serious offences to the supreme court.

Even though objections have been raised under recent South African law against the propensity to commit crimes as being preventative detention, this objective has been recognised as a legitimate objective of pre-trial detention at common law, along with the danger of the offender to society. The strength of the case, and the nature of the offence against the offender, have similarly been determining factors, although the nature of the offence seems to have in some instances been incorrectly used as punishment. Even under Roman-Dutch law it was understood that an offender (or the surety) would be less willing to stand trial in view of the harsh punishment that could be imposed.