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THE QUEST TO CONSIGN APARTHEID TO THE DUSTBIN OF HISTORY: PROCEDURAL HUMAN RIGHTS IN CRIMINAL JUSTICE IN THE FINAL CONSTITUTION OF SOUTH AFRICA

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INTRODUCTION

History will record that the first democratic Constitution of South Africa came into force on the 27th day of April 1994. Officially titled the Constitution of South Africa, Act 200 of 1993, it generally became known alternately as the interim or transitional Constitution. It gave way to a "final" Constitution, which was drafted by a Constitutional Assembly elected in terms of the interim Constitution. President Mandela signed the final Constitution at Sharpeville, near Johannesburg, on 10 December 1996. That date, the anniversary of the United Nations Human Rights Day, marked yet another milestone in the constitutional transformation of South Africa.

The advent of the interim Constitution in 1994 offered an opportunity for South Africans to review and reform the legal order bequeathed on the country by the inhuman system of apartheid. That legal order found prominent expression in the system of criminal justice. It was inevitable that the new Constitutional order would seek to make significant changes to the criminal justice system. The instrument by which this was attempted is the Bill of Rights, first introduced as Chapter 3 of the interim Constitution, and perpetuated, as Chapter 2, by the final Constitution.

Chapter 2 of the final Constitution incorporates certain procedural rights tenable in criminal justice. As was the case with its predecessor, the Bill of Rights in the final Constitution does not classify rights in any chronological or hierarchical order. Neither does it select and group the rights available in criminal justice. One has to read the Bill as a whole to distil them.

There are certain qualities by which procedural rights in criminal justice in the Constitution are identifiable. If one adopts the conventional classification method, one would characterize them as first generation rights. By definition, first generation rights are premised on the libertarian notion of individual freedom from interference by the state.¹ In the Bill of Rights these rights are available to at least three broad categories of beneficiaries. Firstly those suspected or accused of having committed a crime. Secondly, those affected by crime. Finally, there are rights for the benefit of witnesses to crime.

THE CONCEPT OF PROCEDURAL RIGHTS

In the context of criminal justice, procedural human rights have been defined as "a set of legal rules which lay down the basic standards of conduct to be observed by state officials in the course of the administration of (criminal) justice. These rules of conduct prescribe the conditions and manner of arrests and detention both of suspects awaiting trial and of

1 See Du Plessis & Corder: *Understanding South Africa's Transitional Bill of Rights* (1994) Chapter 2.

sentenced criminals, and also the procedural requirements of a fair trial and the nature and extent of humane forms of punishment."²

Procedural human rights in the sense in which they are defined here have found their way into constitutional documentation since the age of the Magna Carta in the early thirteenth century. Subsequently they have been documented in the Charter of King Eric Glipping of Denmark of 1282, the English petition of Rights of 1627, the Bill of Rights 1688, the French Declaration of Human Rights of 1789 and the American Bill of Rights of 1791.³ Since the Second World War, human rights have assumed an international dimension. The result has been the production of well known documents such as the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the International Covenant on Civil and Political Rights (1966). At the same time the protection of fundamental rights in national constitutions has continued. Only a few can be referred to in this essay. In Germany, the Basic law was enacted in 1949; in Zimbabwe the Independence Constitution (1980) contained a Declaration of Rights; in Canada the Charter of Rights and Freedoms came into force in 1982, and in Namibia eight years later the newly independent state adopted a Constitution which had a Bill of Rights as its cornerstone. As many commentators have observed, South Africa had the advantage of having at its disposal the accumulated wisdom generated by these human rights instruments. It is therefore not surprising that the first Bill of Rights in the history of South Africa (which I shall call the transitional Bill) was inspired by, and in some cases modelled on, enduring international and national human rights instruments.⁴ The Bill of Rights under discussion (the final Bill) was based on the transitional Bill. In terms of the Constitutional Principles, (which were inviolable) which were annexed to the transitional Constitution, the final Bill had to be drafted "after having given due consideration to . . . the fundamental rights contained in Chapter 3 of this Constitution."⁵ In this essay occasional references will be made to the provisions of the transitional Bill. This should not be taken to mean that these provisions have been duplicated in the final Constitution.

UNIVERSAL PROCEDURAL RIGHTS

The final Bill makes provision for certain rights which are available generally to all three categories of actors in the criminal justice process. There are seven such rights. They relate respectively to equality, human dignity, life, freedom and security of the person, privacy, access to information, and access to the courts.

The Right to Equality

Although there is no pecking order in the final Bill, the right to equality can probably claim top priority status. Equality is antecedent to the establishment of a society based on democratic values, social justice and fundamental human rights, which the Preamble pledges. Other rights, such as the right to due process of law and the right to have access to the courts, are accessory to, and indeed give expression to, the right to equality. Section 9 of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. This is clearly a right which is extended to persons

2 Van der Vyver, *Seven Lectures on Human Rights* (1976) 83.

3 Van der Vyver, *op. cit.* 83-84.

4 Du Plessis & Corder, who were both on the Technical Committee which drafted the Bill of Rights in the interim Constitution, acknowledge this.

5 Constitutional Principle II.

suspected of criminal conduct, crime victims and witnesses. As far as a suspect is concerned, this means his or her rights to life, liberty and property should not be infringed without due process of law. For the crime victim, this provision holds out the promise that he or she will not be stripped of their right to seek the intervention of the justice system. This could have an impact on the exercise of the right of private prosecution.⁶ It could also affect the public policing responsibilities of the state. For the witness the right to equality entitles him to protection, but not involuntary detention, at the instance of the state.

The Right to Human Dignity

Section 10 reads:

Everyone has inherent dignity and the right to have their dignity respected and protected.

This right flows from the right to equality and gives a certain dimension to it. Dignity is a rather intangible concept. At its most general it means human status. Section 10 requires the respect of that status. The concept can only be given meaning in the specific context of an interaction between the state, as represented by a public official, on the one hand, and the individual on the other. That individual could be a suspect in a criminal investigation, or the complainant in an alleged sexual offence. In the case of a suspect, the final Bill sets out other rights which are calculated to give practical effect to the right to human dignity. Thus, torture is prohibited,⁷ as is cruel, inhuman or degrading treatment or punishment.⁸ Furthermore, section 35 has an elaborate set of restraints operative on the state in its dealings with suspects, detainees and accused persons. These will be examined below. Section 10 should spawn practices which are more sensitive to crime victims and therefore humane. One observes that there has been a growth in special units in the police force to deal with cases of child sexual molestation and domestic violence. This development even preceded the transitional Constitution and the final Constitution should add impetus to it.

The Right to Life

One of the longest judgements handed down by the Constitutional Court to date was the decision in *S v Makwanyane*,⁹ in which the court ruled that the death penalty was inconsistent with the provisions of the transitional Constitution. There has been a slight change in the wording of the right to life provision in the final Constitution. Whereas the transitional Constitution conferred the right to life on every person, the final Constitution entitles everyone to life. Whatever the distinction may be between the word "person" and the word "one", it is of no consequence to the present discussion.¹⁰ In any event, it is most unlikely that the Constitutional Court will reverse itself on the legality of the death penalty. The only way in which the death penalty can be re-introduced in South Africa is through a Constitutional amendment.

The Right to Freedom and Security of the Person

It is more correct to say that this is a collection of mutually complementary rights which have been grouped together under section 12 of the Constitution. The mischief at which

6 But see the judgement of the Constitutional Court in the AZAPO/Mxenge case.

7 Section 12(1)(c) and (d).

8 Section 12(1)(e).

9 1995(2) SACR 1 (CC).

10 In fact the phrase every person which occurred in reference to every right in the transitional Constitution, has been replaced by the word everyone. The reason for this is not self-evident.

these rights, particularly those in section 12(1), was aimed, is well known to those familiar with the excesses of apartheid. Detention without trial of suspects and prospective witnesses was an integral part of the law of criminal procedure in South Africa. In some instances the law which legalised such detention would also forbid the courts from questioning the validity of such detention.¹¹ It comes as no surprise therefore that arbitrary detention and detention without trial are at the core of the prohibitions in section 12. Section 12(1) outlaws, *inter alia*:

- detention without trial, presumably for the purposes of interrogation;
- the application of force or violence;
- the use of torture; and
- treatment or punishment that is cruel, inhuman or degrading.

There is no doubt that, in so far as it relates to a suspect, section 12 echoes concerns which have always been harboured by the common law, and on occasion, expressed in statutory law.¹² The Constitution is, however, easier to access than the common law or the Criminal Procedure Act for that matter. Moreover, the style of drafting that was adopted in the final Bill is far superior to that used in the Criminal Procedure Act. On the face of it, the language employed is simpler. The merits of this will be discussed in due course. From the standpoint of witnesses, section 12 promises an end to a dispensation in which detention for interrogation was permissible. Section 185 of the current Criminal Procedure Act deals with the powers of the state, with or without the intervention of a judge, to detain a prospective witness. The detention could be in solitude,¹³ and, once ordered, could not be reversed by a court.¹⁴ Solitary confinement must amount to torture. In the unlikely event of the detention of a witness being found to be constitutional,¹⁵ it would be surprising if this kind of detention was to co-exist with the Constitution. The rights in section 12 are antecedent to the rights in section 35, which pertain to suspects, detainees and accused persons.

The Right to Privacy

Section 14 of the Constitution provides:

Everyone has the right to privacy, which includes the right not to have —

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

11 Examples of these laws can be seen in section 17 of the General Law Amendment Act 37 of 1963 (which authorized detention for up to 90 days, on suspicion of violating the Suppression of Communism Act 44 of 1950); section 215b of the Criminal Procedure Act 53 of 1955 (which authorized the detention of a prospective witness, at the instance of an attorney general, for up to six months). This provision subsequently became section 185 of the Criminal Procedure Act 51 of 1977. A detainee could be held incommunicado, in terms of section 185(4)); section 6 of the Terrorism Act 83 of 1967 (in terms of which a person who was suspected by the police of being a terrorist or terrorist collaborator could be detained in solitude for an indefinite period) and section 22 of the General Law Amendment Act 62 of 1966 (which provided for a 14 day, renewable detention). Numerous detentions occurred on the authority of these laws, and a minority ever attracted the attention of the courts. Those detainees who sought the assistance of the courts were left in no doubt as to the helplessness of their plight. See *Rossouw v Sachs* 1964 (2) SA 551; *Scherbrucker v Klindt* NO 1965 (4) SA 606 (A); *Singh v Attorney General, Transvaal and another* 1967 (2) SA 1 (T); *S v Moumbaris and others* 1973 (3) SA 109 (T).

12 Section 217(1) and section 219A of the Criminal Procedure Act 51 of 1977.

13 Section 185(5).

14 Section 185(8).

15 By virtue of some limitation of section 12(1)(b), in terms of section 36.

There are two values which come to the fore whenever a provision such as section 14 is considered. On the one hand is the inviolability of the privacy of an individual's person, home, possessions and communications. On the other hand, there is the need to prevent, detect and investigate crime. The provision may appear to uphold one value to the complete exclusion of the other, but this impression is illusory. As one commentator pointed out:

No police force in the world could possibly function at all without being able to search both people and premises in appropriate circumstances. Normal police investigative procedure would be very severely hampered, if not brought totally to an end, if all forms of search and seizure were now to be outlawed.¹⁶

The Criminal Procedure Act makes provision for the search and seizure of articles in certain cases. Section 20 defines what may be seized in a search; section 21 stipulates that a search warrant is generally required, but in some cases, in terms of section 22, a search may occur in the absence of a warrant. On the arrest of an individual, he may be searched,¹⁷ as may his premises.¹⁸ Furthermore section 25 provides for searches in the interest of state security.

The difference that has been brought into the law regulating search in criminal procedure is that any law authorising such search has to fall within the strictures of the limitation clause. In terms of section 36 of the Constitution, apart from being of general application, such law must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, . . ." The formulation employed in section 36 is similar to the one in section 33 of the transitional Constitution. That section was interpreted in *Park-Ross and another v Director, Office for Serious Economic Offences*.¹⁹ Its origins are traceable to section 1 of the Canadian Charter of Rights and Freedoms. The manner in which it should be interpreted was demonstrated in *R v Oakes*.²⁰ In that case the Canadian Supreme Court set out a two stage inquiry to be used in determining the constitutionality of a limitation. Firstly, the court asks whether the objective of the state action is sufficiently important to override the protected right or freedom. To be sufficiently important, the state action complained of must relate to matters that are "pressing and substantial" in a free and democratic society. If the answer to this stage is in the affirmative, the court moves on to decide whether the means chosen to achieve the objective are proportional. Three questions have to be answered in this part of the inquiry. Firstly, is the state action rationally connected to the objective sought to be achieved? This demands that the state action should not be arbitrary, unfair or based on irrational considerations. Secondly, does the state action affect the right or freedom as little as possible? Thirdly, the court asks whether the effects of the infringement on the limitation of rights are proportional to the objective to be achieved.

The final Constitution lays down various factors to be taken into account by the court in assessing the constitutionality of a limitation to a constitutional right. These factors are not exhaustive. Section 36 lists the following core factors:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

16 Rudolph: The 1993 Constitution — Some Thoughts on its Effect on Certain Aspects of Our System of Criminal Procedure (1994) *SALJ* 497, 508.

17 Section 23.

18 Section 24.

19 1995 (2) SA 148 (C).

20 (1986) 26DLR (4th) 200.

There is a similarity between the core factors and the test that was articulated in *R v Oakes*. Having regard to the permissive terms of the interpretation section²¹ in the Constitution, there is no doubt that South African courts will continue to refer to *Oakes*. In *Park-Ross and another v Director: Office for Serious Economic Offences*²² the Cape Provincial Division was faced with, *inter alia*, a challenge to the power to search contained in section 6 of the Serious Offences Act 117 of 1991. Having acknowledged that the power to search set out in section 6 was essential for the investigation of serious crime, Tebbutt J held that, in so far as it entitled the Director for Serious Economic Offences to unilaterally decide the time, venue and extent of a search without invoking the authority of a court, it was unconstitutional.²³

The Right of Access to Information

A unique feature of South Africa's Constitution is the provision relating to transparency. Section 32 reads:

- (1) Everyone has the right of access to —
 - (a) any information held by the state; and
 - (b) any information that is held by another person that is required for the exercise or protection of any rights.

The cognate provision in the interim Constitution²⁴ has already produced significant implications for the concept of privilege. A number of court decisions have held that this pre-trial disclosure of the information envisaged is essential to the right of an accused person to challenge the evidence with which he will be confronted at the trial.²⁵ Litigation over the meaning of section 23 of the interim Constitution culminated in the Constitutional Court's decision in *Shabalala v Attorney General, Transvaal*.²⁶ In civil cases, section 23 created a constitutional right to pre-trial discovery.²⁷ Section 32 of the final Constitution broadens the scope of right of access to information. It purports to give everyone the right of access not just to official information, but also to information which is in the custody of private individuals and bodies. In so far as it relates to privately held information, there is a possibility that a conflict may arise between section 32 and the right to privacy.

The Right of Access to court

The final Constitution extends to all the right to have any dispute that can be resolved by law decided "in a fair, public hearing in a court or, where appropriate, another independent

21 Section 38(1) provides that when interpreting the Bill of Rights, every court is obliged to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom;" and that to that end, the court may consider foreign law.

22 *Supra*.

23 172F-173E.

24 Section 23 of the interim Constitution created a right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of his or her rights.

25 In *S v Sefadi* 1994(2) SACR 667 (D), at 683 h-i, Marnewick AJ observed: "Fair trial requires, by its nature, equality between the contestants, subject only to two of the supreme principles of criminal jurisprudence, namely the presumption of innocence and the requirement that the guilt of the accused be proved beyond any reasonable doubt. When (only) one of the contestants has access to the statements taken by the police from potential witnesses the contest can . . . be neither equal nor fair."

26 1995 (2) SACR 761 (CC).

27 See *Qczeleni v Minister of Law and Order* 1994 (3) SA 625 (E); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W).

and impartial forum."²⁸ While this right may appear too obvious to warrant inclusion in a constitution, in the context of South Africa's recent history, its inclusion was imperative. I have highlighted above the plight of witnesses who found themselves in detention for the purpose of preserving their evidence, especially in politically charged trials. Section 34 is complementary to section 35 (2)(d), which grants to every detainee the right to challenge the lawfulness of his detention in person before a court of law. The Criminal Procedure Act is not always accommodative of the right of a private individual to prosecute in respect of a crime committed against him. Section 204, for instance can extinguish the entitlement of a private person to prosecute a person who has been indemnified at the behest of the state. Section 142 can have a similar result. The effect of the right of access to court is to impose limitations on the capacity of the state to frustrate the prospective private prosecutor by legislation such as the provisions referred to above.²⁹

DUE PROCESS RIGHTS

The other rights set out in the final Constitution are specifically directed at those against whom action is taken on the basis of alleged involvement in criminal activity. In this regard section 35 articulates what, for lack of a better description, may be called "due process rights" for arrested persons, detainees, and accused persons. Many of these rights are underpinned by the right to freedom and security, which has been discussed above. These constitutional guarantees in the field of criminal justice are a manifestation of the material constitutional state or *Rechtsstaat* as it is referred to in German constitutional law.³⁰

Section 35 incorporates the rights which are regarded, in adversarial systems of criminal justice, as being integral to a fair criminal process. Thus, the right against self-incrimination is enshrined in respect of both a person who has been arrested and a person who is on trial.

In *S v Maseko*³¹ it was held that even an accused who pleads guilty should be advised that he is not obliged to incriminate himself. If he was not so advised by the court, the omission would render inadmissible any incriminating replies elicited through judicial questioning in the plea proceedings.

An omnibus right to a fair trial is also incorporated in the final Constitution. This right should be read with the right of access to information which has been discussed above. The relationship between them appears in three references in section 35, namely, the entitlement to be informed of the charge with sufficient details to answer it;³² to adequate time and facilities to prepare a defence;³³ and to adduce and challenge evidence.³⁴

The right to a fair trial has also had an effect on reverse onus provisions. Such provisions are generally inconsistent with the presumption of innocence which is implied in the right to a fair trial.³⁵ The other rights listed in section 35 in respect of an accused person have

28 Section 34.

29 For a fuller discussion, see C. Goredema "The Right of Private Prosecution in South Africa — A precarious Right indeed!" 1996 *Lesotho Law Journal*.

30 See De Waal, "A Comparative Analysis of the Provisions of German Origin in the interim Bill of Rights" 11 *SAJHR* (1995) 1.

31 1996 (9) BCLR 1137.

32 Section 35 (3)(a).

33 Section 35(3)(b).

34 Section 35(3)(i).

35 See *S v Bhulwana*; *S v Gwadiso* 1995 (12) BCLR 1579 (CC) and *S v Julies* 1996 (7) BCLR 899 (CC).

existed for a long time in the Criminal Procedure Act.³⁶ The significance of "constitutionalising" them is of course, that they are immunised from abrogation at the behest of the executive or of Parliament.

Section 35(5) provides a form of protection against violation of procedural rights in criminal justice. It states:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

In conferring a discretion on the court to exclude unconstitutionally obtained evidence depending on the consequences of admitting the evidence, the Constitution rejected the American "fruit of the poisoned tree" approach. That approach directs the court to reject direct and indirect evidence obtained in violation of constitutional rights, particularly due process rights. The court need not consider the further issue of whether admitting the evidence would render the trial unfair or be otherwise detrimental to the administration of justice.³⁷

The approach adopted in South Africa represents a compromise between the ideal of eliminating violations of fundamental rights by depriving the police of the fruits of such violations on the one hand, and, on the other, the fact that not all violations of such rights impact on the fairness of the trial.

In *S v Hammer*,³⁸ the court prevented the prosecution from using a letter which had been written by the accused and intercepted by the prosecutor, on the basis that the letter was obtained in violation of the accused's privacy. While it was not grounded on section 35(5) of the Constitution, the judgement gives an indication of the way in which that provision will work.

One of the outstanding features of South Africa's Bill of Rights is the simplicity of the language which was used in drafting. The rights are drafted broadly and in terms which are inclusive. There appears to have been an effort to avoid the approach in, for example, the Declaration of Rights in the Constitution of Zimbabwe. In the latter every right is carefully qualified by a multitude of exceptions and/or provisos.³⁹ It then becomes relatively simple for government, through Parliament, to narrow the scope of operation of the rights in the declaration.

36 Many of these rights flow from the presumption of innocence. Notable among them is the right to pre-trial release unless the interests of justice require incarceration. The question of bail pending trial has proved thorny in the aftermath of the advent of the interim Constitution. The approach of the courts has definitely shifted from requiring the accused to show why he should be released to casting a duty on the prosecution to establish the grounds for refusing bail.

As a result of public pressure and an apprehension that in some cases, such an approach would yield injustice to the community, the justice department pushed through an amendment to the Criminal Procedure Act, namely the Criminal Procedure Second Amendment Act, 75 of 1995. It introduced a new section 60, subsection (11) of which sought to transfer the duty of persuasion to the accused in serious cases. See *S v De Kock* 1995(1) SACR 299 (T) and commentary on the Amendment Act by Cowling, in "Bail Reform: an assessment of the Criminal Procedure Second Amendment Act 75 of 1995" 9 SACJ (1996) 50.

37 See *Michigan v Tucker* 417 U.S. 433 (1974); *Oregon v Hass* 420 U.S. 714 (1975).

38 1994(2) SACR 496 (C).

39 Or, as has some cynics have put it, each right is buried under the rubble of exceptions and provisos.

The style adopted in the South African Bill allows more room for adapting the Bill of rights to current circumstances. The simplicity of the text is not only conducive to greater accessibility, but it also shifts the debate away from arguments about the meaning of words and phrases to the more important question of whether or not a right has been infringed. Furthermore, that approach negates the limitation of rights through the application of interpretive techniques such as the *inclusio unius est alterius exclusio* rule.⁴⁰

CONCLUSION

The Bill of Rights in the final Constitution of South Africa constitutes a significant step forward in the transformation of the criminal justice system in that country. Court decisions based on the provisions contained in its predecessor have already had an important impact on the procedures adopted in criminal courts. The indications are that a great deal of anachronistic practices which had, in some cases, acquired legitimacy as rules of law, will be consigned to the dustbin of history.

40 See Du Plessis & Corder, *supra*.



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