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PROCEDURAL HUMAN RIGHTS IN THE NEW SOUTH AFRICA

by JUDGE P J J OLIVIER
VICE-CHAIRMAN, SOUTH AFRICAN LAW COMMISSION

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1. INTRODUCTION

South Africa is on the eve of its most dramatic transformation ever. Not only are we moving away from a minority form of government to an inclusive democracy, but it is also common cause that the basis of the new legal order will be the protection of fundamental individual rights. A Technical Committee of the Negotiating Forum is at present considering proposals for an interim bill of rights. Hopefully, such a bill of rights will get statutory form before the election of a legislative assembly, which is scheduled for 27 April 1994. One of the primary functions of the legislative assembly will be the drafting and enactment of a final bill of rights for our country. The resolve to enact an interim and, later, a final bill of rights for our country comes after a long struggle, but today it enjoys the support of all the major political parties and groups. Unfortunately, some still harbour inner reservations towards this new approach, as will become apparent during my address. It is also true that differences - even major differences - exist regarding the content of such a bill of rights. I believe, however, that we have reason to be optimistic about the ability of the present negotiation process to meet these challenges.

The time is therefore ripe for all South Africans to participate in earnest in the debate on the future human rights dispensation for our country. What rights must be protected? What limits must be placed on the legislature's power to circumscribe fundamental rights? Where does the border lie between healthy and balanced state power and healthy and necessary individual freedom?

At present the debate is dominated by the question of socio-economic rights (the so-called "second generation rights"). I believe that it is equally important for the creation of a new, balanced dispensation to give serious attention to the reform of the law of criminal procedure and to bring it into line with a human rights approach. Criminal procedure can be viewed as the acid test of human rights protection. It is

precisely in this area, where the interests of the State require the enforcement of the rules of criminal law against those who apparently transgress the interests of the broader community, that the temptation might lurk to deny unreasonably the rights and freedoms of the individual.

There are inherent, atavistic reasons why Governments, through all times, have so readily forgotten the rules of "fair play" in criminal procedure. In our country, the situation in the past was aggravated by transparent political considerations: Through the enactment of many laws, it was made easier for the government of the day to persecute and prosecute its political opponents by the creation of political crimes and by loading the procedural dice against the accused. We, as South Africans, can therefore concur with Packer:[1]

> Power is always subject to abuse - sometimes subtle, other times, as in the criminal process, open and ugly.

And precisely because we now have an ideal opportunity to rectify the mistakes of the past and to ensure a better future, is it imperative that we should ensure that the protection of procedural rights tops the reform agenda.

There is a second reason for the reform of the law of criminal procedure so as to bring it into line with a human rights dispensation. It concerns the legitimacy of the State itself. We as South Africans know better than most, from experience, that State action that infringes the rights of individuals, subverts the very legitimacy of the State. Once the State loses its legitimacy, it disintegrates into anarchy. Human rights are violated not only by the disregard for substantive rights but also by the non-recognition of procedural rights. In this regard it is appropriate to recall the words of Mr Justice Brandeis in Olmstead v United States:[2]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws the existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the

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1 The Limits of the Criminal Sanction (1968) 149 - 172.

2 227 US 438 (1928).

> means - to declare that the government may commit crimes to secure the conviction of a private criminal - would bring terrible retribution.

There is also a third important reason why we should integrate our law of criminal procedure with the human rights ideal. It concerns the legitimacy and credibility of the Bench - of all our judges and magistrates. When the man on the street falls prey to an unfair or draconian rule of criminal procedure, he blames the presiding official and not the legislature that enacted the rule. And it does not help the presiding official to explain that he merely applies the legal rule, as this explanation undermines his credibility as an independent upholder of fairness and justice. The excuse "I am sorry, but ..." in these circumstances is, in the eyes of the ordinary citizen, an abdication of judicial responsibility and relevancy. H G Calvert[3] is correct when he says:

> Since the political cliques learned how to control Parliament in the nineteenth century the citizen's only protection against tyranny has been those marvellous begowned, be-wigged and fearless freedom fighters on the Bench. When they start to capitulate, even moderate men may start looking to the streets.

For many years the members of our judiciary were the target of attack, mainly as a result of the application of unjust rules of criminal procedure. No other reason undermined the legitimacy of the Bench more.[4]

In order to repair the damage done to the legitimacy of the Bench it is therefore imperative to reform our law of criminal procedure.

2. THE "HUMAN RIGHTS" APPROACH TO CRIMINAL PROCEDURE

So far the premiss has been that reform of our law of criminal procedure is necessary and that it should take place against the background of the norms of a human rights ideal. But are there such norms and what are they?

This question can be answered at three levels.

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3 "The 'Republican Clubs' Case" 1970 Northern Ireland Legal Quarterly Vol 21, 91 at 193.

4 See, in this regard, inter alia, the (sympathetic) remarks by Anthony Mathews Freedom, State Security and the Rule of Law - Dilemmas of the Apartheid Society Cape Town: Juta 1986, 28-30.

First, the formal. At this level, it can be stated that the procedural rights have always been, since the first and oldest manifestations of bills of rights in Western legal history, a very important part thereof. Procedural rights form part of all contemporary bills of rights and are thus positivized and constitutionalised as fundamental rights. They form part of the universal human rights ethos and perspective. There are therefore norms of criminal procedure that have their origin in the history of human rights of the Western world and form part of contempory human rights thinking.

This is not the place to re-examine the history once more. Suffice to say that the Magna Carta already in 1215 guaranteed procedural justice by declaring:

> No Freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

Edward III (1327 - 1377) replaced the words "the Law of the Land" in the original text with "due process of law". This concept later became the very crux of the notion of procedural human rights that is incorporated in the Fifth Amendment and the first clause of the Fourteenth Amendment of the USA Constitution.[5]

Procedural human rights are also incorporated in the Canadian Bill of Rights (1960), the Canadian Charter of Rights, the French *Déclaration des Droits de l'Homme et du Citoyen* (1789), Part Three of the Constitution of India (1949) and various international instruments such as the African Charter on Human and Peoples' Rights (1981), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1950), the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966).

It is possible to compile a list of the generally accepted and recognised procedural rights from these documents, as was done by, amongst others, Professor Johan van der Vyver.[6] But the mere listing of the generally accepted and recognised procedural

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5 J D van der Vyver Seven Lectures on Human Rights Cape Town: Juta 1976, 83-4.

6 Seven Lectures on Human Rights Cape Town: Juta 1976, 88-9.

rights does not satisfy the analytical jurist. Where do these rules, philosophically speaking, come from? What is the underlying ratio?

These questions lead one to the second level of analysis. At this level an attempt is made to find a common denominator. It holds that the substance of "due process" is determined by those "immutable principles of justice which inhere in the very idea of free government ..." or those "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental".[7]

The advantage of this approach is that it takes one past the web of plain rules to mainstream principles. For us in South Africa, who are about to formulate a justiciable bill of rights, such an approach will assist in determining which rules of procedure are genuinely so fundamental that they deserve a place in the bill of rights. And when we have such a bill of rights, this approach will enable our courts to determine whether a particular statutory provision infringes upon the fundamental core of a formulated right to such an extent that it must be declared invalid - a process analogous to the interpretation method that is followed by the American courts.

I wish to reflect for a moment on my last comment. In the drafting and interpretation of our bill of rights, we will have to guard against a formalistic and dogmatic approach that defines and interprets rights so strictly that in criminal trials the truth never comes to light. The sound approach of Mr Justice Cardozo in Palko v Connecticut[8] can and should guide us in these times:

> The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed, today as in the past there are

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7 See Palko v Connecticut 302 US 319 (1937); Duncan v Louisiana 391 US 145 (1968); Jerold H Israel, Yale Kamisar and Wayne R LaFave Criminal Procedure and the Constitution St Paul, Minnesota: West Publishing Co 1990, 34 et seq.

8 Supra; Palko was later overruled in Benton v Maryland 395 US 784 (1969), which found that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment". However, this does not detract from the method of approach set out by Mr Justice Cardozo.

> students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the States has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

This nuanced approach - also evident in the judgment of Mr Justice Reed in Adamson v California[9] and in the dissenting judgment of Mr Justice Harlan in Duncan v Louisiana[10] - leads us to the third and deepest level of inquiry, namely, the determination of those fundamental and unchangeable principles of justice in the procedural context which should guide us. How do we find those principles? What may be fundamental and just for one person (for example, trial by jury), may be anathema for another.[11]

The position may differ at different times and in different places, but the basic choices in our country, for the foreseeable future, will depend upon political considerations in the broadest sense of the word. It should come as no surprise that the choices that have been made by our legislature over the past thirty or forty years, especially in the field of public law - which includes procedural law - were essentially political choices. The transformation in our country is taking place because of the political rejection of the ancien regime. The game of reform is played by political chessmasters on an intensely politicised board. Political convictions will dominate the introduction and drafting of our new constitution and bill of rights. Just as political convictions - in the form of unspoken, major premises - typified some of the judgments of our courts in the past,[12] so they will probably remain in the future, whoever the judges may be. By this I do not mean the political convictions of one particular political party, although this might be conclusive, but

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9 332 US 46, 67 S. Ct. 1672, 91 L.Ed 1903 (1947).

10 391 US 145, 88 S. Ct. 1444, 20 L.Ed 2d 491 (1968).

11 Compare the debate in Duncan v Louisiana, supra.

12 John Dugard Human Rights and the South African Legal Order Princeton: Princeton University Press 1978, 279 et seq; "Some realism about the judicial process and positivism - a reply" 1981 SALJ 372; "Should judges resign - a reply to Professor Wacks" 1984 SALJ 286; Hugh Corder Judges at Work Cape Town: Juta 1984; "Crowbars and cobwebs: Executive autocracy and the law in South Africa" 1989 SAJHR 1; C J Forsyth In Danger of their Talents Cape Town: Juta 1985; A van Blerk Judge and be judged Cape Town: Juta 1988; R Wacks "Judges and injustice" 1984 SALJ 266; "Judging judges: A brief rejoinder to Professor Dugard" 1984 SALJ 295.

rather the vision of the majority of South Africans of what is politically acceptable, of what government policy should be, et cetera.

The Government of the day has apparently followed the so-called "Crime Control Model" for the past two or three decades.[13] As Professor Steph van der Merwe has correctly shown, this model is based "upon the proposition that suppression of criminal activity is the most important aim of the criminal process ... the Crime Control Model favours extensive powers of arrest, search and seizure. And it is not too keen on liberty pending the outcome of a criminal trial. It does, furthermore, in principle resist, or limit, evidential barriers to reliable fact finding. It will, for example, not exclude relevant and reliable evidence merely because it was illegally obtained by the police. The Crime Control Model also limits the number of appeals or other forms of post-trial remedies, and does not favour reversal of convictions where the criminal justice system has breached the rules laid down for its observance."

The Crime Control Model reflects a particular political view of man and society. It is premised on the view that the State and criminals are at war, that law and order are subject to a prolonged "total onslaught", and that the hands of the State should not be circumscribed by arm-chair rules. It relies on a world view of homo hominis lupus est - and to keep the wolves at bay, the end justifies any means.

The Crime Control Model fitted the political ideology of the past two to three decades like a glove. Acts of political opponents of the Government were criminalized and criminal procedure was and can still be used to allow an accused the minimum rights. Examples abound, but it is sufficient to mention the following:

A number of provisions in the Internal Security Act 74 of 1982 facilitate proof by the prosecution of the prescribed intent. If the act alleged to have been committed by the accused results, or is likely to result, in the achievement of the "objects" specified in the intent provision (for example, causes or is likely to cause the endangering of State authority or some form of political or social change) then the

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13 Steph van der Merwe "Constitutional due process versus crime control: Some implications of a bill of rights" Paper delivered at a seminar on the proposed bill of rights for South Africa, Rand Afrikaans University, 4 June 1993.

accused is presumed, unless he proves the contrary, to have committed the act in question with the intent of achieving that objective.[14] Other examples include the prohibition of public trials in certain cases;[15] trials by courts which would ordinarily not have jurisdiction;[16] authorising the court which sentenced a protest offender to issue a warrant for the attachment of his property if any fine imposed is not paid within forty-eight hours;[17] detention without trial through a range of statutory provisions, the one more draconian than its predecessor;[18] the power of an Attorney-General to order that a person arrested on a charge of having committed an offence referred to in Schedule 3 of the Internal Security Act 74 of 1982 shall not be released on bail or warning if the Attorney-General considers such an order necessary in the interests of State security or the maintenance of law and order;[19] the admissibility of evidence obtained by covert surveillance, illegal entry, search and seizure;[20] the granting of indemnities;[21] the use of evidence in political trials of persons held in solitary confinement and subjected to prolonged interrogation, and the use of confessions and admissions.[22]

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14 Section 69(5) of the Internal Security Act 74 of 1982. The accused has to discharge this onus on a balance of probabilities, not by proof beyond a reasonable doubt as under the Terrorism Act of 1967.

15 See, for example, section 65 of the Internal Security Act 74 of 1982. Also see S v Leepile and Others 1986 4 SA 187 (W).

16 See, for example, section 68(1) and (2) of the Internal Security Act 74 of 1982.

17 Section 61 of the Internal Security Act 74 of 1982.

18 See Mathews Freedom, State Security and the Rule of Law Cape Town: Juta 1986, 62 et seq for an analysis.

19 Section 30(1) of the Internal Security Act 74 of 1982, now repealed. A clause in similar form was introduced into the Internal Security Act 44 of 1950 (s 12A) in 1976. This clause, in turn, had predecessors; Mathews 1986, 99. However, see section 21 of the Criminal Law Second Amendment Act 126 of 1992 which now gives the Attorney-General the authority to refuse bail for 120 days in respect of special offences.

20 Mathews 1986, 179 et seq.

21 Mathews 1986, 205 et seq. Also see the Indemnity Act 35 of 1990, as amended, and the Further Indemnity Act 151 of 1992.

22 For a discussion, see Mathews 1986, 226: "... the use of detainee evidence and statements constitutes so fundamental a threat to fair-trial procedure that the security trial is thereby deprived of legitimacy in the minds of its victims and those who identify with them and indeed more widely in the thinking of fair-minded lawyers throughout the world. A large factor in the low repute of political justice in South Africa is the spectacle of the pitiful victims of interrogation in isolation being paraded in court as witnesses for the prosecution."

The Due Process Model stands in sharp contrast to the Crime Control Model. It "... proceeds from the premise that the primary function or goal of a criminal justice system is not merely to secure the conviction of an accused, but to ensure that a conviction takes place in terms of a procedure which duly acknowledges the rights of an accused at every critical stage during pre-trial, trial and post-trial proceedings. It concentrates on the individual and claims that protection of the individual in the criminal justice system is in the best interest of society. It may be said that the Due Process Model pays more attention to the basic value that 'it is better to acquit ten guilty persons ... than convict one innocent.' The Model prefers to err on the safe side. But this is just one aspect of the philosophy of the Due Process Model. The second aspect - and this is at once the more important and controversial one - is that legality in the criminal process must be maintained even if it means that the material truth must be ignored ... . The system does not tolerate non-observance of its rules."[23]

Before our law of criminal procedure became contaminated by legislation, examples of which have been mentioned above, our system fundamentally followed the Due Process Model. A number of fundamental rights were recognised and still form the basis of the system, even today.[24] The more important ones include the recognition of the right to remain silent, the right to a fair and public trial by an impartial court, the right to habeas corpus, the right to cross-examine and to call witnesses, the right to argue one's case fully, the right to a trial based on accusatorial principles, the right to a reasonable and fair sentence, the right of appeal and to review, etc.[25]

3. REFORM OF THE LAW OF CRIMINAL PROCEDURE

It is evident that our law of criminal procedure needs a thorough revision and reformation. First, a purge is necessary of those provisions inspired by political convictions of the past and which caused so much damage to the due process image of our law of criminal procedure. This part of the reform process should go hand in hand with the introduction of a justiciable bill of rights for our country. Such a bill of

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23 Steph van der Merwe 1993, 4-5.

24 J D van der Vyver Seven Lectures on Human Rights Cape Town: Juta 1976, 89.

25 See also Steph van der Merwe 1993, 6-8.

rights should codify the basic human rights aspects of criminal procedure as exemplified by the Due Process Model. It should entrench those principles so that no legislature can ever dilute or disregard the due process rights.

This reform process requires serious consideration of the fundamental principles of criminal procedure from a human rights perspective and of the formulation thereof in a bill of rights. However, an immediate start should be made to repeal and amend those statutory provisions that are in conflict with the said principles. We do not have to wait for the day when a bill of rights eventually sees the light of day before we get our criminal procedure house in order.

Second, there are numerous aspects of the law of criminal procedure that are in need of reform - not because they have a direct bearing on human rights, but because they make the process cumbersome, unwieldy, expensive, and time-consuming.[26] The public at large and legal practitioners alike, are dissatisfied with the endless rounds of remands and delays in criminal cases, the large number of futile prosecutions, and the extent of the unproductive waste of time and money.

We can also start immediately with this process and there is again no need to wait for the birth of the New South Africa.

4. THE ROLE OF THE SOUTH AFRICAN LAW COMMISSION

The only body in South Africa that is giving full-time attention to the reform of the law of criminal procedure is the South African Law Commission, a statutory law reform body that was established in 1973. It is at present under the Chairmanship of Mr Justice H J O van Heerden, Judge of Appeal. The contribution of the Commission can, as far as the present topic is concerned, be divided into three parts:

(a) A draft bill of rights
(b) Reform of the law of criminal procedure
(c) Specific areas of reform

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26 See, for example, S v Magoda 1984 4 SA 462 (C); V Basserman "Justice delayed is justice denied: Proposed law reform" 1989 Consultus 113; J Kovacevich "The inherent power of the District Court: Abuse of process, delay and the right to a speedy trial" May 1989 New Zealand Law Journal 184.

(a) A draft bill of rights

The Commission published its first Working Paper on a bill of rights for South Africa in March 1989.[27] The Working Paper contained a fairly comprehensive list of procedural rights in its draft bill of rights. This was followed by its Interim Report[28] in October 1991. The Commission is at present deliberating on its final report, a document which we hope to submit to the Legislative Assembly in 1994.

The modus operandi of the Commission with regard to the final report is to establish a synthesis of the procedural provisions of those draft bills of rights that are at present on the negotiating table, namely -

* the Interim Report of the South African Law Commission, October 1991;

* the ANC draft, February 1993;

* the Government's Proposals on a Bill of Fundamental Rights, February 1993;

* the draft by the Democratic Party, May 1993;

* the draft constitution for KwaZulu/Natal submitted by the Inkatha Freedom Party, December 1992; and

* the Charter for Social Justice by a group of academics,[29] December 1992.

On this basis it seems that substantial consensus exists on the inclusion of the following clauses in a bill of rights for South Africa:

The rights of arrested persons and detainees

(1) Every arrested person and detainee has the right -

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27 S A Law Commission Working Paper 25: Group and Human Rights Pretoria: Government Printer 1989.

28 S A Law Commission Interim Report on Group and Human Rights Pretoria: Government Printer 1991.

29 Hugh Corder, Steve Kahanovitz, John Murphy, Christina Murray, Kate O'Regan, Jeremy Sarkin, Henk Smith and Nico Steytler.

(a) to be detained and to be fed under conditions consonant with human dignity and to receive the necessary medical treatment;

(b) to be informed as soon as possible in a language which he or she understands of the reason for his or her detention and of any charge against him or her;

(c) to be informed as soon as possible in a language which he or she understands that he or she has the right to remain silent and the right to refrain from making any statement and to be warned of the consequences of making a statement;

(d) within a reasonable period of time, but not later than 48 hours or the first court day thereafter, to be brought before a court of law and to be charged in writing or informed in writing of the reason for his or her detention, failing which he or she shall be entitled to be released from detention unless on good cause shown a court of law orders further detention;

(e) to be tried by a court of law within a reasonable time after arrest and pending such trial to be released, which release may be subject to bail or guarantees to appear at the trial, unless on good cause shown a court of law orders further detention;

(f) to communicate and to consult with a legal practitioner and a medical practitioner of his or her choice;

(g) to communicate with and to be visited by his or her spouse, family, next of kin, religious counsellor or friends, unless a court of law otherwise orders;

(h) to be released when the reasons for detention fall away or in the case of his or her detention for a certain period, upon expiry of the term of detention;

(i) to claim compensation if the arrest or detention is unlawful.

(2) During detention persons awaiting trial shall be separated from convicted persons and youths shall be separated from adults, in so far as it is feasible.

The rights of an accused person

Every accused person has the right -

(1) not to be sentenced or punished without a fair and public trial before an independent and unbiased court of law in accordance with the rules of procedure and evidence generally in force;

(2) to be presumed innocent until the contrary is proved by the State or other prosecutor;

(3) to remain silent during pleadings and trial and to refuse to testify at the trial;

(4) if he or she is not assisted by a legal practitioner, to an explanation of the possible consequences of any applicable presumptions and of his or her choice to exercise his or her right to remain silent or not to testify;

(5) not to be convicted or sentenced on the grounds of evidence so obtained or presented as to violate any of the rights under this Bill of the accused person or of the witness concerned or of any other person, unless the court, in the light of all the circumstances and in the public interest, otherwise orders;

(6) to be represented by a legal practitioner of his or her choice;

(7) to be informed by the presiding officer -

(a) of his or her right to be represented by a legal practitioner;

(b) of the institutions which he or she may approach for legal assistance;

and to be given a reasonable opportunity to endeavour to obtain legal assistance: Provided that failure or neglect so to inform an accused person or to give him or her such opportunity shall not result in the setting aside of the proceedings unless on appeal or review a court finds that justice was not done;

(8) to question witnesses who testify against him or her, to contest evidence, to testify himself or herself, to call witnesses and to present additional rebutting evidence;

(9) to be allowed sufficient time to prepare his or her case;

(10) not to be removed from the jurisdiction of the judge who has the jurisdiction to try the offence in question;

(11) not to be sentenced to an inhuman or degrading punishment;

(12) not to be convicted of a crime in respect of any act or omission which was not a crime at the time when it was committed and not to be given a sentence more severe than that which was by law applicable at the time when the crime was committed;

(13) not to be convicted of any crime of which he or she has previously been convicted or acquitted, save in the course of appeal or review proceedings relating to that conviction or acquittal;

(14) to have recourse, on appeal or review, to a higher court than the court of first instance: Provided that legislation may prescribe that leave to appeal shall be first obtained;

(15) to be informed in a language which he or she understands of the reasons for his or her conviction and sentence;

(16) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;

(17) to be sentenced within a reasonable time after conviction;

(18) to be informed by any State authority when he or she becomes the subject of any investigation for whatever reason.

Rights of persons convicted of a crime

Everyone who has been convicted of a crime and who in accordance with a sentence of a court of law is serving a term of imprisonment has the right -

(1) to be detained and to be fed under conditions consonant with human dignity and to receive the necessary medical treatment;

(2) to be given the opportunity to develop and to rehabilitate; and

(3) to be released at the expiry of his or her term of imprisonment as imposed by the court of law.

The provisions of these proposals are self-explanatory. However, attention can be focussed on the following two aspects:

(i) It stands firm on the exclusionary rule[30] - a policy decision highly acclaimed by Steph van der Merwe;[31]

(ii) detention without trial is prohibited totally, even in an emergency.[32]

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30 See Article 20(5) above. Also see S A Law Commission Interim Report on Group and Human Rights 391 et seq for a discussion of this rule. Cf., also A Skeen "The admissibility of improperly obtained evidence in criminal trials" 1988 SAJCJ 389; S E van der Merwe "Unconstitutionally obtained evidence towards a compromise between the common law and the exclusionary rule" 1992 Stell L R 173.

31 1993, 18 et seq.

32 Cf., Article 31(4)(d) of the proposed Bill, which reads as follows:

(d) Legislation relating to the state of emergency or regulations made thereunder shall not permit, authorise or sanction the cruel or inhuman treatment of persons, the retroactive creation of crimes, detention without trial, indemnity of the State or any officer of the State for acts done during the state of emergency or the subjective discretionary use of force by an officer of the State or Government: Provided that

(i) the foregoing notwithstanding, articles ... shall remain of force and effect and shall not be suspended;

(ii) any person detained under emergency measures shall within seven days or on the first succeeding court day thereafter be brought before a court of law and be charged in writing or informed in writing of the reason for his or her detention, failing which he or she shall be entitled to be released from detention unless on good cause shown a court of law orders further detention.

(b) The simplification of criminal procedure

The Commission appointed a full-time researcher to investigate and make recommendations, contained in draft legislation, in working papers and in reports, on the Criminal Procedure Act 51 of 1977, and matters incidental thereto. In addition, a committee of experts was established to make and consider proposals and to review the proposals for reform. This committee has met on several occasions.

The investigation has been on the Commission's programme since 1989.[33] The object of the investigation is to investigate the possibility of streamlining and simplifying certain cumbrous procedures that give rise to the unnecessary protraction of criminal trials. A possible simplification of the procedure is considered with particular reference to:

* The procedure of pleading (misuse and prolixity).

* Objections against charge-sheets, further particulars and jurisdiction which delay the commencement of the trial.

* A limitation of the right of appeal from the lower courts.

* The desirability to broaden the power of presiding officers to limit irrelevant or unnecessary protracted cross-examination and testimony.

* The introduction of pre-trial conferences.

* The separate hearing of matters in dispute.

* Any other circumstances that may cause delays or abuses.

Due to the extent of the investigation, the Commission decided to publish various working papers in order to deal with different aspects of the investigation separately. A working paper dealing with appeal procedures was published on 24 July 1992 for general comment, and the closing date for comments was 15 November 1992.

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33 S A Law Commission Project 73: Simplification of Criminal Procedure.

The Working Committee of the Law Commission will consider a draft report and recommendations for reform in this regard on 9-10 August 1993.

The Working Committee of the Law Commission also approved the publication of a second working paper during May 1993. This working paper deals with the concept "abuse of process" and several provisions of the Criminal Procedure Act which are the cause of delays. It is expected that this working paper will be published before the end of 1993.

Alternative trial procedures, where a difference in the procedure for defended and undefended cases and for serious and minor offences will be considered, will be discussed in a third working paper. It is expected that a draft working paper in this regard will be completed before the end of 1993.

In its first working paper[34] dealing with appeal procedures the Commission considered the following proposals:

* The introduction of a procedure in terms of which appeals from district courts can only proceed if leave to appeal is granted in the form a judge's certificate or, if refused, with permission of a full court.

* The introduction of a procedure in terms of which appeals from regional courts can only proceed if leave to appeal is granted by the regional court magistrate or, if refused, with permission of a full court.

* An amendment of the Uniform Rules of Court so as to provide that no criminal appeal can be withdrawn without leave from the court once it has been set down for hearing.

* The statutory enactment of a procedure which will allow for the separate hearing of questions of law or fact in exceptional circumstances.

* That no changes shall be made to existing practices with regard to appeals against interlocutory decisions.

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34 S A Law Commission Working Paper 42: Simplification of the Criminal Procedure Pretoria: S A Law Commission 1992.

* The enactment of a provision to empower the Supreme Court and the Regional Court to hear further evidence after the termination of criminal proceedings if certain requirements are met; that this power should exist independently of an application for leave to appeal and, provided the application is granted, that the court should be empowered to alter or set aside its own judgment or sentence after hearing such evidence.

During the evaluation of the comments on the working paper the Commission received proposals from the Chief Justice of South Africa on the creation of a separate Court of Criminal Appeal. As a result of a request by the Minister of Justice these proposals were distributed to the Judges-President, Attorneys-General, the Bar Associations and Law Societies for comment.

A draft report containing an evaluation of the comments on the working paper and proposals for the reform of matters relating to appeal procedures will be considered by the Working Committee of the Commission on 9-10 August 1993. The Working Committee will consider the following recommendations:

* No limitations on the right of appeal from lower courts should be countenanced.

* The creation of a separate and distinct Court of Criminal Appeal to replace the Full Court. The proposal is aimed at reducing the workload of the Appellate Division of the Supreme Court and to provide for a speedier process and finalisation of criminal appeals.

* An amendment of the Uniform Rules of Court in order to prevent a withdrawal of a criminal appeal without leave from the court once an appeal has been set down for hearing.

* The enactment of a procedure to allow for the separate hearing of questions of law or fact in exceptional circumstances. The purpose of this procedure is to shorten the proceedings.

* Statutory recognition of existing principles governing appeals against interlocutory decisions.

* The enactment of a procedure to empower the Supreme Court and Regional Court to hear further evidence after the termination of the trial and, after having heard

such evidence, to alter or set aside its own judgment or sentence and in general to give such judgment or impose such sentence or give such order as it should have done in respect of a matter raised in court during the trial.

In the second working paper the following proposals for reform were considered:

* Statutory recognition of the principle that a criminal trial should be instituted and proceeded with as soon as possible.

* Statutory recognition of the principle that delays which could reasonably be prevented should be regarded as an abuse of process.

* If the court finds that there is an abuse of process the court should be empowered to issue any order it deems fit to prevent the abuse including an order -

  (i) that a postponement be refused or granted on the conditions the court deems fit;

  (ii) that the trial should proceed without legal representation either immediately or at a time prescribed by the court;

  (iii) where an accused has not pleaded, that the prosecution may not proceed or may not be instituted again;

  (iv) where the accused has pleaded, that he or she be acquitted;

  (v) that cross-examination be limited.

* Statutory recognition of guide-lines should be considered in order to make a finding of an abuse of process.

* A finding of abuse of process and a resultant order should not be set aside on appeal or review unless the party claiming the relief, in the case of an appeal, convinces the court, or, in the case of a review, the court is convinced that, having regard to all the circumstances, a failure of justice resulted;

* In view of the criticism levelled against the right of silence and with particular reference to the application of section 115 of the Criminal Procedure Act, the Commission requested comments on the following proposals:

  (i) that the accused be compelled to disclose his defence; alternatively,

  (ii) that the accused be compelled to disclose his defence provided the State also discloses its case; and in the further alternative,

  (iii) that the court be entitled to comment on the accused's failure to disclose his defence, provided that the possibility of adverse comment be explained to an undefended accused.

* Pre-trial conferences should not be statutorily provided for.

* Better use should be made of a summons instead of arrest as a method to ensure the accused's presence in court. This should be promoted by means of administrative directives issued by the Department of Justice in co-operation with the police.

* The concept of plea-bargaining should be statutorily recognised.

* The provisions of section 115(2)(b) and 115(3) of the Act should not be amended.

* Section 113 of the Act should be amended to remove any uncertainty as to the application thereof.

* The accused's right to legal representation should be statutorily recognised and any abuse in this regard should be governed by the proposed section on abuse of process.

* Section 168 of the Act should be amended to provide that the State or defence should be given the opportunity to object to any postponement.

* Apart from the proposed section on abuse of the process, no further amendments with regard to objections to charge-sheets, further particulars and jurisdiction should be enacted.

* Section 75 of the Act should be amended to facilitate the transfer of cases to a regional court without requiring the accused to plead.

* The provisions of section 119 of the Act should be retained unchanged.

* Section 217 of the Act should be amended to provide for the inadmissibility of confessions made to any police officer.

* Section 116(3)(a) of the Act should be amended to provide that a regional court magistrate be empowered to request from the magistrate reasons for conviction.

* Section 212(4) of the Act should be amended to provide for the admission of an opinion as prima facie evidence if certain requirements are met;

* Section 158 of the Act should be amended to provide for witnesses to testify in the absence of the accused by means of electronic devices if such facilities are readily available and if it appears that unreasonable delays could be prevented.

* Provision should be made to facilitate the proof of undisputed or uncontroversial facts.

* The Department of Justice should take responsibility to address the administration of the criminal justice system and the administrative problems that cause delays.

* The administration of the courts should be monitored on a permanent basis and the appointment of court administrators should be considered.

* The Department of Justice should co-ordinate the activities of the Departments of Justice, Law and Order and Correctional Services.

* The absence of meaningful statistics concerning criminal cases prevents proper research and motivated proposals for reform. This problem should be addressed by the Department of Justice.

In the third working paper the Commission will consider the question of whether the adversary system should be retained with particular reference to alternative trial methods. The Commission will consider the question of whether a differentiation in

procedure is justified with regard to defended and undefended cases and with regard to serious and minor offences. The Commission will also consider changes which will facilitate a better managed trial with particular reference to the pre-trial stage. Attention will also be given to a departure from the adversary system whenever it appears to be advantageous and a more effective control of the criminal process.

(c) Specific areas of reform

Besides the above-mentioned activities, the Commission has put forward or is at present considering the following proposals:

(i) Project 66 - Reform of the South African law of bail

As a result of representations made to the Commission regarding alleged deficiencies in the South African law of bail, the Commission considered the views of those who are directly involved in the administration of justice on the need for an investigation into the law of bail. Such a need was identified and the investigation was included on the Commission's programme during 1987 with the approval of the Minister of Justice. After the completion of the investigation the Commission's report was submitted to the Minister on 17 November 1992. Unfortunately, to date the Minister has not tabelled the Report in Parliament.

The most important recommendations of the Commission are the following:

* It is recommended that someone who is arrested on a charge that he or she has committed an offence should be entitled to be released on bail pending the conclusion of the trial, unless the court is convinced on the basis of the available information that there are valid grounds why he or she should be kept in custody. Judicial control of the granting of bail should be maintained.

* The court should base its decision concerning the question of whether there are valid grounds for an accused to be kept in custody on the probability of the accused attempting to evade trial or defeat the ends of justice or that his or her release will constitute a serious threat to the safety of the public or of any specific member of the public, and in this regard the court should take the following factors into account:

. The nature and seriousness of the offence with which the accused is charged, and in particular whether violence is involved;

. the circumstances in which the offence was committed and the accused's probable involvement therein:

. the seriousness of the penalty;

. the accused's personal circumstances, his family and community ties, his employment record, his residence record, his financial position, any previous convictions that he or she has or any previous failure on his or her part to comply with bail conditions or court orders; and

. any other factors that should, in the opinion of the court, be taken into account.

* An accused should at his or her request be brought to court so that his or her release on bail can be considered.

* A court should of its own accord (and not only at the request of an accused) consider whether an accused should be released on bail.

* The power of a police official to grant bail should be extended to all crimes and there should be no limitation on the bail that can be granted by a police official.

* Someone who has been released on bail and who fails to appear at the specified time and place should, in addition to the forfeiture of bail, be guilty of an offence.

* The power to refuse the granting of bail should vest exclusively with the courts and not with the Attorney-General.

(ii) <u>Project 84 - Application of the entrapment system</u>

The object of the investigation is to investigate aspects of the application

of the present system of entrapment by the police in order to consider the reform thereof in the light of the impact of a future human rights dispensation and trends in other parts of the world.

It is expected that a draft working paper will be completed before the end of 1993.

The following proposals for reform will be considered by the Working Committee of the Commission:

* The enactment of an exclusionary rule in terms of which the court should be empowered to exclude the evidence of a trap if it was obtained improperly.

* Evidence should be regarded as improperly obtained if the accused was incited, induced or engaged to commit the offence by unreasonable methods.

* Evidence of a trap should not be admitted unless it is established in a trial within a trial that the police employed the trapping system on the grounds of reasonable suspicion that the accused was customarily engaged in unlawful acts of a particular kind.

* Criminal prosecution of the person (including police officers) who induces, incites or persuades another to commit a crime should be enforced.

5. PROSPECTS FOR REFORM OF THE LAW OF CRIMINAL PROCEDURE

It is one thing to make proposals for reform and to submit them to the legislature. It is quite another to persuade the legislature to act on them. You can bring a horse to the water, but you cannot make it think. What are the chances that the legislature will act within the foreseeable future on the various proposals for reform?

It is of course accepted that this question is bedevilled by the fact that we find ourselves in the midst of a political transformation. The role of the present

legislature has all but expired; when it meets again, it will be to finalise a few transitional constitutional issues. It is also unlikely that the newly elected Legislative Assembly will accord the reform of the law of criminal procedure a high priority in the light of the other pressing problems it is likely to face. To answer the question that I have posed, one should work with perceptions and own impressions. Judged in this light, positive and negative indicators can be traced.

A positive indicator is the broad, general consensus that we will have a bill of rights as part of our constitution, and that this bill will include due process rights. Also positive is the criticism expressed by numerous academics, the liberation movements and eminent judges on the draconian measures of the past. The surge for reform and the urge to return to the Due Process Model are simply too great to be placed indefinitely on the back burner.

However, there are also negative signs, a few of which I must mention:

(a) In the light of the strong similarities between the above-mentioned draft bills of rights as regards the procedural rights, one would have expected a strong emphasis of this aspect in the interim bill of rights. However, it is a disappointment to hear that the interim bill of rights under discussion at present by the Technical Committee of the Negotiating Forum does not meet expectations, not even as far as the procedural rights are concerned. It would be a pity if the provisions of the interim bill are diluted merely to enable a future forum to lay claim to the honour of drafting a better, more comprehensive bill of rights. This is definitely not the time and place for political games.

(b) During the course of 1993 two of the present Attorneys-General expressed themselves on the reform of the law of criminal procedure and then also specifically with reference to the proposals of the Commission. Dr Jan d'Oliviera, the Attorney-General of the Transvaal, delivered a public address at the University of Pretoria on 30 April 1993 while Adv Klaus von Lieres und Wilkau, SC, the Attorney-General of the Witwatersrand, delivered his address at a seminar at the Rand Afrikaans University on 4 July 1993. Both speakers expressed the same sentiments, but I shall restrict my comments to the latter.

Von Lieres warns against a bill of rights which is "too fanciful for that which it seeks to protect". He then attacks the (fictional) drafters of such a bill of rights by, for instance, quoting from Frederick the Great (1748):

> Small people (minds) want to defend everything. Sensible people identify the heart of the matter, and suffer smaller drawbacks in order to prevent a larger evil. He who wants to protect everything, protects nothing.

Von Lieres also declares that "(w)e should not let a number of second and third generation rights, catering to a relatively small criminal-minded part of the population, cloud the essential moral values which should form the basis of a bill of rights."[35] He disapproves of a detailed bill of rights; rather it should have a high degree of mobility and the bill should not be too comprehensive as "there will be ample time in future to identify and address possible shortcomings in the bill."[36] His point of departure is that we live in abnormal circumstances and that the hand of law enforcement should be strengthened. For him it is clear, as it must be for any right-thinking individual, that "the state apparatus responsible for combating crime can become completely marginalized if a bill of rights recognises second and third generation rights, which have the effect of making the detection, investigation and prevention of crime more difficult than is the case at present."[37] He considers it unnecessary to entrench the right to bail in a bill of rights since provision is made for bail in the Criminal Procedure Act 51 of 1977. The same argument is used in his analysis of the duty to bring an accused before a competent court within forty-eight hours after his arrest. He argues that a bill of rights that restricts the hands of law enforcement will hamper the effectiveness of law enforcement and the effect of this may lead to a position akin to Argentina a decade or so ago "... when the police and military decided to take the law into their own hands."[38]

It hardly merits argument that this approach is totally out of line with mainstream South African legal thought. It is, firstly, based on apparent faulty facts and insight. The procedural rights are not second or third generation rights. They do

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35 1993, 11.

36 1993, 13.

37 1993, 9-10.

38 1993, 11.

not originate from Locke, but were, as any student of human rights knows, already incorporated in the Magna Carta.

It is also a basic, and, with respect, inexcusable, wrong point of departure to argue that the procedural rights "... cater ... to a relatively small criminal-minded part of the population." The proper protection of procedural rights stems from the convictions of those who wish for a legitimate, credible and basically fair system of criminal procedure. And I think this group of people includes most of our legal academics, private practioners and judges.[39] Certainly not a "relatively small criminal-minded part of the population"!

Another strange point of view is that the bill should not contain a full set of fundamental freedoms, and that it can be supplemented at a later stage. The reality is that it is extremely difficult, if not impossible, to amend a bill of rights once it is in place. Equally unacceptable is the view that aspects such as bail should not be contained in the bill of rights, since ample provision is made therefor in separate legislation. The point is - and our own tragic history is evidence thereof - that an unsympathetic legislature can repeal or amend such legislation by a simple majority and that the courts can do nothing about it. We want to prevent a recurrence of such a sad state of affairs by entrenching the fundamental rights in the constitution, and not leave it to the arbitrary whim of the legislature.

The question to Von Lieres and likeminded people is this: Why not a comprehensive system of procedural human rights in a bill of rights? Why not cover the complete, justiciable spectrum of human rights? And why not now?

At best their argument might be the perception that constitutionalised procedural rights may hinder the prevention of crime. Two responses are possible in this regard. First, as was done by Professor Steph van der Merwe, it is possible to argue that the Due Process Model will not lead to any significant increase in acquittals in criminal

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39 I respectfully refer to the following statement of Holmes JA in S v Lwane 1966 2 SA 433 (A) at 444: "The ... question is whether such evidence given in the absence of judicial warning is admissible on the prosecution of the witness. As to that, the pragmatist may say that the guilty should be punished and if the accused has previously confessed as a witness it is in the interest of society that he be convicted. The answer is that between the individual and the day of judicial reckoning there are interposed certain checks and balances in the interest of a fair trial and the due administration of justice. The rule of practice to which I have referred to is one of them, and it is important that it be not eroded. According to the high judicial traditions of this country it is not in the interest of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication."

trials. Second, it boils down to a policy decision between the Due Process Model and the Crime Control Model. The poor results of the application of the Crime Control Model are there for all to see, and, as has been argued, we need the Due Process Model in order to secure long-term legitimacy and credibility. I suggest, with respect, that those who wish to see a return to the Due Process Model in South Africa, should actively co-operate with the Law Commission in the realisation of the sort of law reform described above. We invite discussion and criticism of the proposals made in our working papers; we welcome new ideas and suggestions. We now have a unique chance to return to basic, civilised values.

It is those who wish to retain the present system that should keep the wise words of Frederick the Great in mind.