

# **The Bill of Rights in the Constitution of the Republic of South Africa and its Application within the Criminal Justice System\***

\*Based on research for the MA-degree

Mr. David Kgosimore

Department of Criminology

University of the North

E-Mail: [davidk@unin.unorth.ac.za](mailto:davidk@unin.unorth.ac.za)

## **1 Introduction**

The intention of this article is to gain familiarity with the phenomenon of victim rights. This is to be attained by reviewing the Constitution of the Republic of South Africa, (Act 108 of 1996) especially Chapter 2, which deals with Human Rights and its operation within the criminal justice system. In the process, the researcher will strive to confirm the viewpoint held by Nelken (1994:78) that, while the broader notion of human rights was central in the phase of resistance against apartheid, these norms are not easily translatable during social reconstruction where the narrow notion of human rights seems to work better.

The aim is, therefore, to demonstrate the failure of the Constitution to deal with the competing rights of the offender in the criminal justice system. While the Bill of Rights has radically altered the situation of the offender in the criminal justice system, practically nothing has been achieved for the victims of crime. As such, equality before the law in the new South Africa is far from being achieved, from the point of view of the victims of crime.

## **2 The Constitution of the Republic of South Africa**

The Constitution of the South Africa, which has been hailed as the most *ambitious* piece of document by the international community, seeks to *re-order* both the *social* and *legal reality* of our country. The Preamble of this Constitution adds to this "positive" development by proclaiming no less than "... a need to create a new order in which... all citizens shall be able to enjoy their fundamental rights".

While the previous South African Government observed universally recognised fundamental rights in breach, constitutional framers in the new democratic dispensation sought to correct that situation by entrenching the Bill of Rights in the new Constitution. The Bill of Rights, according to Basson (1994:XXVII) entrenches the fundamental rights of every South African and, in this sense, embodies the legal values of dignity, equality and freedom.

In order to appreciate the extent to which rights are fundamental in the new South Africa we should, as Conklin (1979:1) advises, "pierce the veil presented by written constitutions and statutory enactments (and)...penetrate deeper into the moral-political premises underlying the enactment(s)...."

A pierce of the veil presented by the new Constitution, - (especially Chapter 2), and its application in the criminal justice system, brings to light a number of issues, especially those that are of concern to the victims of crime, as it can be seen below.

It is offender-friendly.

Contrary to claims that the fundamental rights of every South African are entrenched in the Constitution, it is silent about the rights of the law-abiding people who become crime victims.

The legal reality for the victims in the new Constitution is that their rights are not recognized in the criminal justice system. They only assist the state to pursue its case against the offender as witnesses.

There is a lack of ambition on the part of constitutional framers to re-order the legal reality by creating a balance between the rights of the offender and those of the victim. Whereas the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power confirmed the need for the recognition of, and respect for, the rights of victims of crime by member states (a situation which according to Joyce (1978:1130) led to most countries giving increased attention to the victims of crime), the Bill of Rights in the new Constitution of South Africa does not show compliance with the above Declaration.

The authorities seem not to have come to grips with the fact that in criminal offenses the injured party is the victim and not society in the abstract. Ziegenhagen (1977:29) is of the view that when the state acts as victim surrogate its interests predominate over the individual interests of the victim. The state then uses collective claims to justify its counterclaim to the individual victim's rights and, according to Viano (1987:444), to describe the call for the recognition of victim rights as a populist reaction to perceived injustice in the criminal justice system.

Given the above scenario the following question can be asked: Why has broader notion of human rights and equal treatment for all, which were central in the phase of resistance, suddenly become difficult to extend to victims of crime in the new Constitution? The possible answers to this question are set out below:

The enhancement of victims' rights is largely a matter for criminologists and other social scientists rather than of legislators and popular political interest (Bharat, 1994:15). According to Prof. Devlin (Currin, 1991:5), academics and political and human rights activists who adopted a critical/radical approach to the socio-political problems in South Africa during the apartheid years tended to concentrate on State violence and not on

common crime. In the process they portrayed the criminals as "victims" of the State's criminal justice system and neglected the real victims of crime (Schneider, 1982:105).

Constitutional framers believe that giving rights to victims of crime will infringe on the rights of the criminal defendants. According to Prof. Devlin (Currin, 1991:5), human rights advocates are not open-ended, inclusive and forward-looking - hence their one-sided approach to justice.

Many in the human rights struggle who became part of policy-making, now find themselves in the justice-stream bureaucracy and, according to Prof. Devlin (Currin, 1991:4), have become part of the problem for victims of crime when all along it was hoped that they would be part of the solution.

In addition, there is a false belief that the victim does not have to have special rights entrenched in the Constitution because some of his/her rights are addressed in the Criminal Procedure Act, Act 51 of 1977. This Act provides for protective custody for a witness in a criminal case (Section 153) and for the witness "right" to be in court when the case is heard (Section 179), for example. However, a closer scrutiny of the Criminal Procedure Act reveals that the so-called "rights" are accorded the victim as a witness and not as a victim in his/her own right. As such, these "rights" benefit the state and not the victim. The fact that the victim is usually made to "enjoy" these "rights" in a coercive manner confirms this viewpoint. For example, Section 186 of the Criminal Procedure Act empowers the court to subpoena the victim (witness) to be present in court (to give evidence).

The researcher finds it important to juxtapose the rights of the victim (or a lack of them) against those of the offender from the point of view of the Constitution for the following reasons:

The Constitution expresses itself quite clearly about what rights the offender should enjoy within the criminal justice system but it is silent about the rights of the victim. The Constitution is the supreme law of the country. Any amendment to the Constitution which covers the rights of the victims of crime will "rub" on to any other laws which deal with victims of crime (e.g. the Criminal Procedure Act) and make them victim friendly.

What follows below is an evaluation of the Bill of Rights, which is contained in Chapter 2 of the Constitution of South Africa. The aim of the researcher is to demonstrate its "warm-heartedness" towards the offender and its "cold-shoulderedness" towards the victims of crime in the criminal justice system.

## The Bill of Rights

The Bill of Rights as contained in the Constitution of South Africa is regarded as the cornerstone of democracy. Section 7(1) of the Constitution says that the Bill of Rights enshrines the rights of all the people

of South Africa and affirms the democratic values of human dignity, equality and freedom. Section 9 (1) on the other hand provides as follows: "Everyone is equal before the law and has the right to equal ... benefit of the law". However, there are no specific provisions in the Constitution regarding the victims of crime. This is borne out by the fact that in their policy proposal, entitled "*Winning the War Against Crime*," the Democratic Party intends pressing for the amendment of the Constitution in order to have the rights of the victims entrenched there-in. The proposal that the victim be empowered (as a crime-prevention strategy) which appears in the *National Crime Prevention Strategy* document (1996:65) may be taken as an acknowledgement on the part of the government that the victim needs to be recognised.

What was intended by the Bill of Rights in terms of *human dignity, equality and freedom* has only been partially realised so far. This means that a society, which has committed itself to equality, has failed to entrench the rights of the victim in the Constitution. The unfairness of this situation on the victim is demonstrated below.

### Equality

According to Dennis Davis (Van Wyk et al., 1994:196), a society committed to equality attempts to make the lives of all its citizens better by insisting that each person must be shown equal concern and respect. To ensure that this objective is achieved, the Constitution - despite the Bill of Rights - goes on to entrench the rights of certain groups of people such as women, children, employers, employees, gays and offenders, to name only a few. The victim of crime does not feature in these groups.

We cannot help but make these comparisons about rights. As Davis (Van Wyk et al., 1994:196) puts it, equality is not simply a principle, which lives in abstraction. *It requires comparison*. As it was important for the Constitutional Assembly to use the Bill of Rights as a comparator to measure the extent to which, by entrenching the rights of the workers only without considering those of their adversaries (namely the employers) in the Constitution, they would be discriminating against the latter, so it is important that the constitutional framers should have taken the rights of the victim into consideration when they dealt with the rights of the offender in the constitution. Failure in this regard has induced a feeling of injustice in the victims.

In his theory of justice, John Rawls (Meron, 1984:94) regards justice as the first virtue of social institutions and human rights as the end of justice. Whereas the Constitution has, through the Bill of Rights, empowered the offender with an instrument through which to claim any of his/her rights which may be infringed in the criminal justice process and, as such, ensure the delivery of justice, the Constitution has failed to ensure the same for the victims of crime; hence their feeling of injustice in the system. A move to correct this situation will go a long way in establishing a balanced justice and in remedying or preventing the source of injustice for victims.

The procedural rights enjoyed by offenders and constructed according to the standards of fairness and justice are a good example of inequality and injustice suffered by the victim and illustrates the extent to which the

victim has been marginalised in the criminal justice system.

### Procedural rights

Procedural rights relate to procedural law which, according to Milton et al. (Van Wyk et al., 1994:401), sets out the legal machinery whereby the rights and duties of the accused are entrenched and enforced. Since legal procedure is concerned with substantive human rights it is therefore a subject for consideration in the Bill of Rights, says Milton et al. (Van Wyk et al., 1994:401).

The course which procedure takes may have a decisive effect on the enjoyment of human rights in the criminal justice system. It was with this idea in mind that the constitution was framed in such a way that the rights of offenders were respected at every stage of the criminal justice process, namely, investigation, prosecution and adjudication. However, as it has been stated throughout this discourse, the rights of the victim are overlooked and he/she continues to be treated as a piece of evidence only, in the criminal justice system.

#### *Procedural rights at the investigation stage*

Section 35(1) of the Constitution states as follows: Everyone who is arrested for allegedly committing an offence has the right -

(a) to remain silent

(b) not to be compelled to make any confession or admission that could be used as evidence against him/her.

What this section sets out to do was to correct the situation which prevailed in the past when it was a "norm" for the police to apply unconventional methods like torture during investigation of crime in order to force suspects to confess to the crime. Such methods, says Milton et al. (Van Wyk et al., 1994:403), tainted the fairness of subsequent criminal trials and blatantly disregarded the rights of the offender.

Since the role played by the police is important in the establishment of a culture of human rights, it is encouraging to see that the South African Police Service has found it necessary to integrate the subject of human rights in the formal training of the police. This aim is to ensure that the police will respect and protect the rights and dignity of offenders at all times. Unfortunately this exercise does not encompass the rights of the victim. It is encouraging, however, to note that the *National Crime Prevention Strategy* document (1996:66) recommends that the police and other justice officials should be trained in victim rights so as to make the criminal justice system more sensitive and service-oriented towards victims. The latter proposal would be meaningful and carry weight if the reality of the victim rights was reflected in the Constitution and the aim was to protect the victim's constitutional rights.

The other contentious issue at this stage is the right of the suspect to bail. Section 35(1) of the Constitution guarantees the right of every arrested person "to be released from detention if the interests of justice permit, subject to reasonable conditions by being granted bail."

The victims have vigorously debated the right of the suspect of bail, the public in general, the Minister of Justice and Human Rights Lawyers and Activists. The victims and the public see the entrenchment of the right to bail for crime suspects as blatant injustice. Although the Minister of Justice was in total support of this right, he has now made an about-turn on the issue and intends lobbying political parties for their support on drastic legislation to compel the courts to refuse bail in all cases of serious crimes - a move which would require a change to the Bill of Rights (The Star: 15/01/1997). The Minister is of the view that the easy granting of bail is a display of total insensitivity by Magistrates to the concerns of the victims.

#### *Procedural rights at the prosecution level*

In every legal system the power to prosecute offenders is vested in the state. In South Africa the Attorney General and the public prosecutors have the discretion whether or not to prosecute, according to the Attorney-General Act 92 of 1992. As such, the principle of compulsory prosecution does not apply in the country. Neither the executive nor the judiciary can interfere in exercise of this discretion by the Attorney General, according to Milton et al. (Van Wyk et al., 1994:411).

Since the decision of the Attorney General not to prosecute results in the case not coming before a court of law, it means that the victim is denied his/her right to justice. The danger of this situation is that the victim as the aggrieved party, may resort to illegal retaliation in his/her quest for justice.

#### *Procedural rights at adjudication level*

According to Milton et al. (Van Wyk et al., 1994:402), adjudication involves the trial of the charges against the accused, the receiving of evidence, and the imposition of punishment.

In terms of Section 35(3), every accused person has a right to a fair trial. What constitutes a fair trial is outlined in the different sub-sections of Section 35(3) and includes, among others, the right:

(a) to be present when being tried [Section 35(3)(e)];

(b) to have a legal practitioner assigned to the accused by the state, at state expense, if substantial injustice would otherwise result, and to be informed of this right [Section 35(3)(f)];

(c) to be presumed innocent, to remain silent and not to testify during proceedings [Section 35(3)(g)];

(d) to adduce and challenge evidence [Section 35(3)(h)].

While the right to a fair trial serves to ensure justice for the accused/offender, the Bill of Rights has once more sadly left the scales of justice hopelessly unbalanced for victims of crime and puts even Section 7(1) into question, especially because this section guarantees equality for all in South Africa.

The unfairness of Section 35(3) for the victim lies in the fact that:

\* Whereas the accused has the right to be present when being tried, the presence of the victim (as witness) in court is required for the purpose of giving evidence only. As such, he/she may not even come to know what the outcome of the case is. The unfairness of this situation is confirmed by the fact that the *National Crime Prevention Strategy* document (1996:66) is proposing that the criminal justice system makes communication of the progress of the case an integral part of the procedure around criminal justice.

\* The right enjoyed by the accused to have a legal practitioner assigned to him/her by the state ensures that substantial injustice does not result in the case. Because the prosecutor represents the state in a criminal case, the victim is left unrepresented. He/she has to deal, and cope, with the unfamiliar norms and procedures, as well as the legal jargon of the court all by him-/herself. This may lead to the victim making serious blunders in giving evidence, with the result that the accused may get an easy acquittal.

\* Whereas the accused enjoys the right to remain silent and not to testify during the proceedings, the victim is obliged to testify for the state. According to Palmer (1994:37), it is at the stage of testifying that many victims of violent crime realize that the nature and process of the criminal justice system is such that the cross-examination by defence attorney subjects them through another process of victimization, namely, secondary victimization. This secondary victimization occurs when a defence lawyer operates in accordance with Lake's (1954:165) legal style of "battering and kicking the witness around not only to humiliate but also to subdue him/her". The defence attorney's adoption of Hyam's (1992:84) style of using cross-examination to "destroy" the evidence of witnesses or to undermine its credibility, also puts the victims - as a witness - through a process of secondary victimization.

\* While the Bill of Rights entrenches the right of the accused to adduce and challenge evidence, the victims do not enjoy such a right. Firstly, it is because the Constitution does not provide as such and, secondly, it is because procedure does not afford them such an opportunity since they are regarded as witnesses. The rules of procedure dictate that, like any other witness, the victim may be allowed into the courtroom to follow proceedings only after he/she has taken the witness stand and *answered questions as put to him/her*.

Plea bargaining and evidence in mitigation of sentence are other provisions enjoyed by the accused at the adjudication level. They tip the scale of justice in favour of the accused and bring about a feeling of injustice

to the victim.

### Plea bargaining

The accused in a criminal trial may enter into plea bargaining with the prosecutor. Plea bargaining lays the foundation for the miscarriage of justice because it caters for the interests of the defendant and the state only without considering those of the victim. According to Miethe (1987:950), prosecutors benefit from plea-bargaining because it enables them to secure high conviction rates. On the other hand the defendant also benefits because plea-bargaining enables him/her to negotiate favourable sentence. Plea-bargaining, however, makes the criminal justice process hollow. Once the prosecutor and the defendant have successfully entered into a plea bargaining, the case is closed even without the court getting to hear the victim's side of the story. In addition, the victim may not come to know what the outcome of the case is because the state is not obliged to inform him/her by any law.

### Evidence in mitigation of sentence

When the accused has been found guilty, he/she is given the opportunity to give evidence in mitigation of sentence. The accused may then tell the court why he/she should or should not receive a particular sentence. However, the victim does not get this opportunity of addressing the court. To balance this situation, Naudé (1995), proposes in her research that the victim should be afforded the right to be heard in court through the "victim impact statement", before sentence is passed on the offender.

The victim impact statement which, according to Davis et al. (1984:493), was begun by the Vera Institute of Justice in the United States, is defined by Naudé (1995:5) as a document intended to provide the court with information about the physical, financial, emotional and psychological effects of crime on the victim and, where relevant, his/her family. The purpose of the victim impact statement says Naudé (1995:5), is to reintegrate the victim into the court process and, as such, improve the quality of sentencing by balancing the rights of the accused with those of the victim.

### **3 Summary**

The Constitution of South Africa, which is regarded as the most liberal in the world, has failed to deliver justice for victims of crime because under this new Constitution human rights are pursued in favour of the accused/offender. What is regarded as human rights actually turns out to be offender rights within the criminal justice system. The recognition of offender rights without recognizing the rights of the victim reflects the insensitivity of the constitutional framers towards the victim.

Because human rights are an end of justice, the call for the recognition of the rights of the victim is actually

a call for justice (within the criminal justice system). It is not a call to deny the offender of his/her rights. Justice for the victim can, however, not be realised as long as the state plays the victim surrogate and the real victims of crime are treated as pieces of evidence.

Procedural rights enjoyed by the accused are a source of the perceived unfairness and injustice of the criminal justice by the victim. It is encouraging to see that the authorities are, in certain ways, working towards correcting this situation.

As signatory to international conventions and declarations, South Africa has a duty to recognize the rights of the victim because the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power expects member countries of the United Nations to do so.

## **Bibliography**

Basson, D.A., 1994. *South Africa's Interim Constitution*. Cape Town, Juta.

Bharat, B.D., 1994. *Suggestions to Improve Victim's Position in the Criminal Justice System*: Indian Journal of Criminology, Vol. 22 (1), pp. 14 - 20.

Conklin, W.E., 1979. *In Defence of Fundamental Rights*. Alphen aan den Rijn, Sythoff and Noordhoff.

Currin, B., 1991. *Human Rights: Essentialism or Critical Modernism?* Rights, Vol. 1.

Davis, R.C., Kunreuther, F. and Connick, E., 1984. *Expanding the Victim's Role in the Criminal Court*. The Journal of Criminal Law and Criminology, Vol. 75, No. 2, pp. 491-505.

Hyam. M., 1992. *Advocacy Skills (2 nd ed.)*. London, Blackstone Press.

Joyce, J.A., 1978. *Human Rights: International Documents, Vol. II*. Alphen aan den Rijn, Sythoff and Noordhoff International Publishers.

Lake, L.W., 1954. *How to Win Lawsuits Before Juries*. New York, Prentice-Hall.

Meron, R. (Ed.), 1984. *Human Rights in International Law: Legal and Policy Issues*. Oxford, Clarendon Press.

Nelken, D. (Ed.), 1994. *The Futures of Criminology*. London, Sage.

Miethe, T.D., 1987. *Charging and Plea Bargaining Practice Under Determinate Sentencing: An Investigation*

*of the Hydraulic Displacement of Discretion*. The Journal of Criminal Law and Criminology, Vol. 78, No. 1, pp. 155-176.

Naude, C.M.B. 1995. *An International Perspective on Victim participation in the Criminal Justice Process with Specific Reference to Victim Impact Statements*. Pretoria, Unisa.

Palmer, J. 1994. *Everything You Need to Know When You Are the Victim of Violent Crime*. New York, The Rosen Publishing Group.

Schneider, H.J. (Ed.), 1982. *The Victim of International Perspective*. Berlin, Walter de Gruyter.

*The Constitution of the Republic of South Africa*, Act 108 of 1996.

*The Criminal Procedure Act*, Act No. 51 of 1977.

*The National Crime Prevention Strategy*, May 1996.

*The Star*, 15 January 1997.

Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D. 1994. *Rights and Constitutionalism The New South African Legal Order*. Cape Town, Juta.

Viano, E., 1987. *Victim's Rights and the Constitution*. Crime and Delinquency, Vol. 33, No. 4, pp. 438 - 451.

Ziegenhagen, E. 1977. *Victims, Crime and Social Control*. New York, Praeger Publishing.