

HB Kruger

The impact of the Constitution on the South African criminal law sphere

Summary

In this article the extent of the impact of the new constitutional dispensation on the South African criminal law sphere is discussed. The influence of the Constitution on certain criminal offences, sentencing, justifiable homicide and specific presumptions are focussed on.

Die impak van die Grondwet op die Suid-Afrikaanse strafreg-sfeer

Die omvang van die nuwe grondwetlike bedeling se invloed op die gebied van die Suid Afrikaanse strafreg word in hierdie artikel bespreek. Daar word gefokus op die Grondwet se invloed op sekere aspekte rakende misdade, vonnisoplegging, straffelose doodslag en spesifieke vermoedens.

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1. Introduction

For the first time in the history of South Africa, a Bill of Rights formed part of the Interim Constitution, which came into operation on 27 April 1994. Subsequently an amended Bill of Rights was included in the new Constitution, which came into effect on 4 February 1997. A couple of years have passed since this far-reaching legal intervention and the question arises what the effect of the new constitutional order has been on the criminal justice system. This article will investigate to what extent did the Constitution, especially the Bill of Rights, impact on the criminal law sphere. A general overview will be given of the constitutional impact on (i) criminal offences, (ii) sentencing, (iii) justifiable homicide and (v) presumptions.

Criminal law is that part of our national law which mainly defines certain forms of human conduct as crimes and prescribes the punishment for it.¹ According to Burchell and Milton² criminal law is thus “a social mechanism that is used to coerce members of society, through the threat of pain and suffering, to abstain from conduct which is harmful to various interests of society. Its object is to promote the welfare of society and its members by establishing and maintaining peace and order”.

In aiming to promote the collective welfare of society, the criminal law system protects the community's interests and also the individual's basic rights of person and property. The question to be addressed is why and to what extent does the new Constitution, and especially the Bill of Rights, influence our criminal justice system?

2. The Constitution and the South African Criminal Law

In the previous constitutional dispensation the Constitution was only one of the general legal sources of the South African legal system. It was a statute, mainly regulating the organization and structure of the state.³

The present Constitution 108 of 1996, however, is not only a general source of law, but is elevated as the supreme law of the country.⁴ Accordingly the Constitution now sets a general standard with which the whole body of law must comply. Therefore, criminal law must also be in line with this overriding norm.

To enforce this new legal position, the Constitution grants testing powers to the courts to determine the compatibility of all legal rules with the Constitution as the supreme law. When a court finds that a legal rule is

1 Burchell and Milton 1997b:1.

2 1997b:2.

3 Kleyn and Viljoen 1998:100.

4 Constitution of the Republic of South Africa: section 2: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

inconsistent with the Constitution, the court must declare it invalid to the extent of its inconsistency.⁵ The court may further make an order that is just and equitable, including:

“(i) an order limiting the retrospective effect of the declaration of invalidity, and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”⁶

Crime violates the interests of the community and frequently the rights of individuals too. Therefore crime must be addressed by the criminal justice system. But on the other hand, the criminal justice system’s response of arresting an accused person, prosecuting the accused and eventually invoking punishment infringes on the individual’s rights. Since the Constitution is the supreme law, the South African Bill of Rights provides “the bounds of permissible intrusion into the sphere of individual rights by the criminal justice system.”⁷

Thus the Constitution, and particularly the Bill of Rights, has the potential to have a major impact on the development of the criminal law pertaining not only to the substance of criminal law, but also to sentencing, criminal procedure and evidence.⁸

What must be determined, is:

- the extent to which the Constitution has already led to changes in the criminal law sphere, and
- some likely constitutional reform to be expected in the near future.

3. Constitutional impact on Criminal Offences

The criminal law pertaining to certain crimes has already been declared invalid or was substantially changed due to the influence of human rights contained in the Constitution.

5 Section 172(1)(a).

6 Section 172(1)(b).

7 Burchell and Milton 1997b:72.

8 Burchell and Milton 1997b:72.

3.1 Sexual offences

3.1.1 Male homosexuality

- Sodomy

The common-law offence of sodomy was defined as the “unlawful and intentional sexual intercourse *per anum* between human males.”⁹ Other forms of sexual gratification¹⁰ between consenting adult males did not constitute the crime of sodomy.

Anal sex in private between a consenting adult male and a consenting adult female was never punishable in our criminal law.¹¹ Thus certain sexual acts between homosexual males were punishable as a crime, while the same sexual acts between heterosexual participants were not.

In 1997 this matter was addressed in the case of *S v Kampher*.¹² Farlam J of the Cape High Court found the common-law offence of sodomy, in the sense of sexual activity in private between consenting male adults, no longer to be subject to criminal sanction in South Africa.¹³ The decision was based on the right against unfair discrimination on the ground of sexual orientation, which is entrenched in section 9 of the Constitution.¹⁴

9 Burchell and Milton 1997b:632.

10 Such as masturbation or oral sex. Burchell and Milton 1997b:634.

11 Burchell and Milton 1997b:637.

12 1997 2 SACR 418 C.

13 Lötter 1999:294-301.

14 Section 9:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The Witwatersrand High Court came to a similar conclusion in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.¹⁵ Finally the Constitutional Court¹⁶ *per* Ackerman J confirmed that the common-law offence of sodomy was inconsistent with the Constitution, since it not only violates¹⁷ the equality provision,¹⁸ but also the right to human dignity¹⁹ and the right to privacy.²⁰ The inclusion of sodomy as an item in Schedule 1 of the *Criminal Procedure Act* 51 of 1977 as well as in Schedule 1 of the *Security Officers Act* 92 of 1987 was also declared inconsistent with the Constitution and was therefore set aside. This decision is now the pre-eminent legal source on homosexuality in South African law.²¹

- Homosexual gatherings

Section 20A of the *Sexual Offences Act* 23 of 1957 prohibits acts calculated to stimulate sexual passion or give sexual gratification committed between men at "a party". The Constitutional Court also declared this section invalid, since this statutory prohibition also constitutes unfair discrimination on the ground of sexual orientation.²²

3.1.2 Female homosexuality

Female homosexual activity is not a common law or statutory crime in the South African legal system. However, since 1988 female homosexual acts with a girl under the age of 19 years have been punishable under the *Sexual Offences Act* 23 of 1957.²³ The aim of this provision is primarily to protect minors and not to criminalise female homosexual activities between consenting adult females. Therefore it does not fall within the ambit of constitutional inconsistency due to unfair discrimination on the ground of sexual orientation.

15 1998 2 SACR 102 W.

16 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 2 SACR 556 CC.

17 Louw 1998:392-395.

18 Section 9: See note 14 above.

19 Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."

20 Section 14: "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 communications infringed."

21 Pantazis 1999:188.

22 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: 590-591.

23 Section 14(3)(b): "Any female who –
(b) commits or attempts to commit with such a boy or a girl under the age of 19 years an immoral or indecent act...shall be guilty of an offence."

3.1.3 Prostitution

According to section 20(1)(aA) of the *Sexual Offences Act* 23 of 1957 any person who has unlawful carnal intercourse or commits an act of indecency with any other person for reward, is guilty of an offence.²⁴

The above criminalisation of prostitution faced a constitutional challenge on 2 August 2001 in the Pretoria High Court, when one Me Jacobs appealed against her conviction.²⁵ Judges Spoelstra and Webster found the prohibition of sexual activities for reward between consenting adults which take part in private, unconstitutional because it violates the parties' right to privacy.²⁶ The court upheld the outlaw status of soliciting and brothels.²⁷ The prohibition of brothels thus remains an offence and are not declared unconstitutional. Brothels violate the interests of society and does not violate the parties' right to privacy, since it does not take place in private.²⁸ Child prostitution also remains an offence and is not effected by this judgment.

The above ruling of constitutional invalidity was made by a high court, and must still be confirmed by the Constitutional Court to be of force.²⁹ Whether the Constitutional Court will confirm the judgment or not will be finalised in the near future.

3.2 Possession of pornographic matter

In terms of the now repealed *Indecent or Obscene Photographic Matter Act* of 1967, the possession of photographic material, which depicts sexual intercourse, dissoluteness, lechery, homosexuality, lesbian love, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of this nature, was prohibited. The Constitutional Court in *Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security*³⁰ found section 2(1) of this Act unconstitutional, since it constitutes a violation of the constitutional right to privacy and the infringement could not be justified in terms of the limitation clause. The court held that the possession of erotic material for personal use is part of the protected sphere of the right to privacy.

Subsequently the new *Films and Publications Act* 65 of 1996 prohibits only the private possession of visual publications of child pornography³¹ as well as the possession of films, which deals with material that are classified as XX eg child pornography, explicitly violent sexual behaviour, bestiality, degrading sexual behaviour and so forth.³²

24 According to sec 22(a) the penalty is imprisonment for a period not exceeding three years with or without a fine not exceeding R6000 in addition to such imprisonment.

25 *Die Burger* 2001:2.

26 *Die Volksblad* 3/8/2001:11.

27 *Business Day* 2001:9.

28 *Die Volksblad* 3/8/2001:11.

29 Constitution 108/1996: sec 172(2)(a).

30 1996 5 BCLR 609 CC.

31 Section 27(1)(a).

32 Section 27(1)(b).

3.3 Abortion

3.3.1 Historical background

Before 1975 abortion was a common law crime. This crime consisted of the unlawful termination of the pregnancy of a human female.³³ Apparently necessity was the only ground of justification.³⁴

In 1975 this crime was replaced by a statutory offence created in the *Abortion and Sterilization Act*.³⁵ This Act permitted abortion in very limited circumstances and under strict control measures.

3.3.2 Human rights pertaining to the pregnant woman

After the new constitutional order came into operation, the 1975 Act was repealed insofar as it relates to abortion. It was replaced by the *Choice on Termination of Pregnancy Act*,³⁶ which came into effect on 1 February 1997. The preamble of this Act states:

Recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa;

Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security and control over their bodies...this Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act 1975.

From this extract of the preamble it is clear that the new Act is a product of recognising and emphasising the human rights of the pregnant woman.

The woman's rights include the right to:

- dignity,³⁷
- privacy³⁸ and
- to the protection of security of the person.³⁹ Section 12 (2)(a) of the Constitution provides specifically for the right to bodily and psychological integrity, which includes "the right to make decisions concerning reproduction."

33 Burchell and Milton 1997b:459.

34 Snyman 1999:443.

35 Act 2 of 1975.

36 Act 92 of 1996.

37 Section 10. See note 19 above.

38 Section 14. See note 20 above.

39 Section 12: Freedom and security of the person:

"(1) Everyone has the right to freedom and security of the person, which includes the right—

3.3.3 Right to life: unborn child

Due to the constitutional right to life,⁴⁰ the pro-choice approach regarding the termination of pregnancy did not receive unanimous acceptance in the South African community.⁴¹ The Act faced a constitutional challenge in the case of *Christian Lawyers Association of SA and Others v Minister of Health and Others*.⁴² The plaintiffs argued that the right to life, which provides that “everyone has the right to life,” applied also to unborn children from the moment of conception.⁴³ Therefore the plaintiffs sought an order declaring the Act unconstitutional in its entirety, because it infringed upon the foetus’s right to life, which is enshrined in section 11 of the Constitution. However, the Transvaal High Court in its legal interpretation of section 11 of the Constitution, found the word “everyone,” used to describe the bearers of the right to life, not to include the unborn child.⁴⁴ Accordingly, the foetus is not a legal *persona* under the Constitution and does not have the constitutional right to life.⁴⁵ Thus the court held that the right to life was not violated and upheld the constitutional validity of the *Choice on Termination of Pregnancy Act*.

3.3.4 Change in legal position

The recognition and protection of the pregnant woman’s human rights brought about changes of paramount importance in abortion legislation. Some of these changes are:

- Termination on demand

For the first time in the South African legal history, pregnancy may now be lawfully terminated on demand without the prerequisite that certain conditions must be present. The new Act permits a pregnancy to be terminated upon request of the pregnant woman during the first 12 weeks of her pregnancy.⁴⁶

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- (a) not to be deprived of freedom arbitrarily or without just cause,
 - (b) not to be detained without trial,
 - (c) to be free from all forms of violence from either public or private sources,
 - (d) not to be tortured in any way, and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (1) Everyone has the right to bodily and psychological integrity, which includes the right –
- (b) to make decisions concerning reproduction,
 - (c) to security in and control over the body, and
- not to be subjected to medical or scientific experiment without their informed consent.”

40 Section 11: “Everyone has the right to life.”

41 Scott and Robinson 2000:31-35.

42 1998 4 SA 113 T.

43 *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1117 F-G; 1118 A-C.

44 *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1122.

45 *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1123 B-C.

46 Section 2(1)(a).

The termination of pregnancy on demand is a far-reaching departure from the previous common law and statutory provisions.

- Wide grounds for termination

From the 13th up to the 20th week of pregnancy, the pregnancy may be terminated for medical or social reasons. The Act requires that a medical practitioner should be of the opinion that certain conditions are present. These conditions involve mainly:

- a risk to the health of the woman or the foetus,
- that the pregnancy resulted from rape⁴⁷ or incest⁴⁸ or
- that the pregnancy would “significantly affect the social or economic circumstances of the woman.”⁴⁹

After the 20th week, the pregnancy may be terminated to save the life of the woman or to prevent the foetus being born malformed or injured.⁵⁰ The Act requires that after the prescribed consultation, a medical practitioner should be of the opinion that the continued pregnancy would:

- endanger the woman’s life or
- result in severe malformation or pose a risk of injury to the foetus.⁵¹

A very wide range of circumstances and conditions are created by the Act for the termination of pregnancies from the 13th week. Many of the terms in the Act are very wide and not defined, eg “the social or economic circumstances” of the woman, the “pose a risk” of injury to the woman’s physical or mental health, the “pose a risk” of injury to the foetus and so forth.

These provisions constitute a substantial change from the previous legal position, where abortion was only lawful in very limited circumstances and under strictly prescribed control measures.

47 According to section 1 “rape” also includes contraventions of section 14 (voluntary sexual intercourse with a girl under the age of sixteen years) and section 15 (voluntary sexual intercourse with a female imbecile or idiot) of the *Sexual Offences Act 23/1957*.

48 Section 1 defines “incest” as the “sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them.”

49 Section 2(1)(b)
“(i) the continued pregnancy would pose a risk of injury to the woman’s physical or mental health; or
(ii) there exists a substantial risk that the foetus would suffer from severe physical or mental abnormality;
(iii) the pregnancy resulted from rape or incest; or
(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman.”

50 De Waal 2001:243.

51 Section 2(1)(c).

- The principle of legality

In terms of the principle of legality, criminal liability and punishment may only follow if a criminalisation clause as well as a penalty clause existed before the commitment of the offence.⁵² This principle was also confirmed in the Constitution. The accused person's right to a fair trial includes his or her right "not to be convicted for an act or an omission that was not an offence under either national or international law at the time it was committed or omitted."⁵³

Section 10⁵⁴ of the Act creates only a few offences. In short this section makes it an offence:

- for any other person than a medical doctor, or a specified mid-wife, to terminate a pregnancy in the first trimester of pregnancy;
- for any person to prevent the lawful termination of a pregnancy or to obstruct access to a facility for the termination of a pregnancy;
- if section 7, which mainly provides for the notification and keeping of records, is contravened.

The fact that only a medical practitioner, or a mid-wife in the first trimester of pregnancy, may legally terminate a pregnancy, clearly still criminalizes termination by unqualified persons, like backstreet-abortionists.

The contravention of a number of the provisions in the Act, are however not criminalised by section 10. According to Van Oosten⁵⁵ section 10's "narrowly defined offences stand in stark contrast with the wide range of circumstances and conditions imposed for (ostensibly lawful) terminations of pregnancy by the Act." Thus numerous provisions can apparently be contravened with impunity, eg the provisions that pregnancies must be terminated in specified facilities, that certain conditions must be present before a pregnancy may be terminated from the 13th week onwards and so forth.⁵⁶

52 Snyman 1999:36-50; Burcell and Milton 1997b:68-69.

53 Section 35(3)(l).

54 Section 10(1):

"Any person who-

(a) is not a medical practitioner or registered midwife who has completed the prescribed training course and who performs the termination of a pregnancy referred to in section 2 (1)(a);

(b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c);or

(c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

(2) Any person who contravenes or fails to comply with any provision of section 7 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months."

55 1998:73.

56 See the discussion by Van Oosten 1998:72-76.

Accordingly it seems that many of the restrictions imposed by the Act are not legally relevant, because it cannot be enforced. It appears that the Act primarily aimed at decriminalising abortion, but it is uncertain what the purpose is of including prohibitions with no legal measures to enforce it. In drafting the Act, the principle of legality, a basic principle of criminal law, was not adhered to. This lack of quality legal draftsmanship leads to a dilemma in the implementation and enforcement of the Act.⁵⁷

In the light of the above discussion, it is clear that the *Choice on Termination of Pregnancy Act* represents a radical departure from its common law and statutory predecessors. This departure resulted mainly due to the accentuating of the pregnant woman's human rights.

3.4 Housebreaking with the intent to commit a crime

A charge of housebreaking with the intent to commit "an offence unknown to the prosecutor" did not exist in our common law. However, section 262 of the *Criminal Procedure Act* 51 of 1977 authorised the state to charge an accused person with such an offence. The criticism against such a charge is the lack of sufficient detail to enable the accused to properly prepare a defence. The accused may be uncertain whether he or she is being charged with housebreaking with the intention to rape, murder, rob, steal and so forth. In *S v Woodrow*⁵⁸ the court stated that the validity of this charge has long been the subject of criticism by our courts and academic writers.⁵⁹ The South African Legal Commission invited proposals to amend this statutory provision.⁶⁰ This provision may face constitutional scrutiny, since it seems to be in conflict with the constitutional right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it.⁶¹

3.5 Murder and euthanasia

From a constitutional perspective, euthanasia calls for a resolution of conflict of interests. On the one hand the state has the duty to protect life, while on the other hand the person has the right, derived from the constitutional rights to dignity and to physical and psychological integrity, to end his or her life. Historically, the protection of life was favoured at the cost of individual freedom and physical integrity.⁶² Recently this approach was challenged in a number of cases in the United States.⁶³ After the 1996 Constitution, new South African legislation⁶⁴ also began to favour the freedom of choice approach.

57 Van Oosten 1998:76.

58 1999 2 SACR 109 E:111.

59 Snyman 1999:561-562.

60 1999:Discussion Paper 90: Project 101:64-65.

61 Section 35(3)(a).

62 De Waal 2001:242.

63 See note in De Waal 2001:242: footnote 21.

64 For example the *Choice on the Termination of Pregnancy Act* 92 of 1996.

3.5.1 Active euthanasia

Active euthanasia and assisted suicide are treated as murder by our common law.⁶⁵ The general principle that the termination of a person's life is unlawful, applies in our law.⁶⁶ The hastening of a person's death is ordinarily not justified and is therefore wrongful even when the person is terminally ill. It further remains unlawful, even though the motive for such killing is to end the patient's unbearable suffering. Accordingly a doctor was held criminally liable and convicted of murder in the case of *S v Hartmann*.⁶⁷ In terms of the current South African law, active euthanasia is considered as actively killing another person and therefore unlawful.

3.5.2 Passive euthanasia

Before the new constitutional order, the Supreme Court of Appeal⁶⁸ held that life does not have to be artificially preserved when a patient is clinically dead. Presently passive euthanasia by withdrawing life-sustaining treatment even if it causes the patient to die from natural causes, is not considered unlawful.⁶⁹

In the case of *Clarke v Hurst NO*⁷⁰ the court was faced with the legal question of whether it is lawful to withhold the artificial life support system of a patient in a persistent vegetative state. This case was decided before the new constitutional dispensation. The Bill of Rights was therefore not yet in force. However, Thirion J did review three decisions in American Courts, that held that criminal liability would not follow from the termination of the life of a patient in a persistent vegetative state.⁷¹ The conclusion of the Supreme Court of New Jersey in the matter of *Karen Quinlan* 70 NJ 10; 355 A 2nd 647 (N) 1976 rested in part on a constitutional bases, because it was stated that the patient's death would result from the exercise of her constitutional rights to privacy and self-determination.⁷² Thirion J concluded that this approach was not open to the Court in our law, at least not at that stage.⁷³ In the present case, the court held that the applicant would not act unlawfully by authorising the cessation of the artificial feeding, but the judgment did not rest on a constitutional basis.

The constitutionality of the different forms of euthanasia has not yet been considered by the courts after the promulgation of the new Constitution.

65 De Waal 2001:243.

66 Burchell and Milton 1997b:134.

67 1975 3 SA 532 C.

68 *S v Williams* 1986 4 SA 1188 A.

69 De Waal 2001:243.

70 1992 4 SA 630 D.

71 *Clarke v Hurst NO*: 637-640.

72 *Clarke v Hurst NO*: 639F-G.

73 *Clarke v Hurst NO*: 640A-B.

3.5.3 South African Law Commission

In 1998 the South African Law Commission in its report on "Euthanasia and the Artificial Preservation of Life"⁷⁴ dealt with the question whether the legalisation of euthanasia would be in line with the provisions of the Bill of Rights. Sections 9 (right to equality), 10 (right to human dignity), 11 (right to life), 12 (right to freedom and security of the person), 14 (right to privacy) and 36 (limitation clause) were considered in the arguments against and in favour of legalising euthanasia. The commission recommended that legislation be enacted to strike a balance between the state's duty to protect life and a person's right to end his or her life and in this way give legal certainty in this regard. The recommendations of the commission are incorporated in the proposed *End of Life Decisions Bill*.⁷⁵ Whether this proposed legislation will come into operation, remains to be seen.

4. Constitutional impact on sentencing in criminal courts

4.1 Death penalty

4.1.1 Right to life

In the well-known, ground breaking case of *S v Makwanyane*⁷⁶ the Constitutional Court declared the death penalty unconstitutional and invalid. The court regarded the rights to life and dignity as the "most important of all human rights, and the source of all other personal rights."⁷⁷ However, although the majority of the court found the death penalty also violated the right to life, Chaskalson J, who wrote the leading judgment, held the death sentence to be a violation of the right to freedom and security of the person.

4.1.2 Right to freedom and security of the person

The right to freedom and security of the person includes the right not to be punished in a cruel, inhuman or degrading way.⁷⁸ In the unanimous judgment, Chaskalson J found the death penalty to be a form of cruel, inhuman or degrading punishment and accordingly invalidated section 277(1)(a) of the *Criminal Procedure Act*, which provided for the imposition of the death penalty. This infringement of the right not to be punished in a cruel, inhuman and degrading way could also not be justified in terms of the limitation clause.

Therefore due to the human rights embodied in the Constitution, the death penalty was abolished as a form of punishment in the South African criminal justice system.

74 Project 86.

75 See Annexure C:313–326 of the report.

76 1995 3 SA 391 CC.

77 *S v Makwanyane* 1995 3 SA 391 CC: par 144.

78 Section 12(1)(e). See note 38 above.

4.2 Corporal punishment

In *S v Williams*⁷⁹ the Constitutional Court declared the provisions of section 294 of the *Criminal Procedure Act*, which provide for corporal punishment on juveniles as a sentencing option, unconstitutional. The court found that juvenile whipping was a cruel, inhuman and degrading form of punishment.⁸⁰ Therefore according to Langa J juvenile whipping is inconsistent with the right to freedom and security of the person and also with the right to dignity.⁸¹

This trend was followed by parliament by adopting the *Abolition of Corporal Punishment Act*,⁸² which repealed the provision in the *Criminal Procedure Act* for the whipping of adult males between the ages of 21 and 30 years.

5. Constitutional impact on criminal procedure

In the discussion paper on “The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing,”⁸³ the South African Law Commission identified numerous provisions in the *Criminal Procedure Act*, likely to be constitutionally scrutinised. Since the Commission’s report on this matter is not available yet, this article will only give an overview of some criminal procedure aspects that have already undergone constitutional scrutiny by our courts.

5.1 Justifiable homicide

The constitutionality of a police officer killing a fleeing suspect is a very complex issue.⁸⁴ The aim is to harmonise two distinct sets of constitutional rights, namely the rights of persons accused or convicted of crime and the right of the community to be protected by the state from crime.⁸⁵ The challenge is to strike a balance between the two sets of rights.

In short the present section 49(2) of the *Criminal Procedure Act* 51 of 1977 permits specified persons, like police officers, to use deadly force when lawfully arresting a person, reasonably suspected of having committed a Schedule 1 offence. However this is only lawful, if the officer cannot effect the arrest or prevent the suspect from fleeing other than by killing the suspect.⁸⁶

This stipulation has been criticised for being too vague in the way it justifies when force may be used. Seen from the suspect’s perspective, this provision, which authorises the intentional causing of death, is a *prima facie* violation of the suspect’s right to life.

79 1995 3 SA 632 CC.

80 Section 12(1)(e): see note 38 above.

81 *S v Williams*: par 92.

82 Act 33/1997.

83 1999 Discussion Paper 90: Project 101.

84 De Waal 2001:241.

85 Steytler 1998:2.

86 De Waal 2001:241.

On the other hand, the burden of proof which the present section 49 places on the arrestor to prove the existence of certain requirements on a balance of probabilities, before his conduct is statutorily justified, is according to Watney⁸⁷ inconsistent with the constitutional presumption of innocence as well as the right to remain silent.⁸⁸

A replacement for the present section 49(2) of the *Criminal Procedure Act* was already assented to on 20 November 1998 and published in section 7 of the *Judicial Matters Second Amendment Act 122 of 1998*.⁸⁹ According to Burchell⁹⁰ more weight is allocated to the suspect's constitutional right to life in the amended section 49.

On the other hand, it is questioned whether enough weight is given in the Amendment Act to the interests of those involved in law enforcement. New requirements must be met by the arrestor before the use of deadly force will be justified in terms of the Amendment Act. When a suspect resists arrest or takes flight, the Amendment Act in short requires that the arrestor may only use deadly force to protect himself or another person from serious bodily harm. It seems that police officials do not feel adequately protected by the proposed amendment when affecting arrests. The Minister of Justice, Dr Penuell Maduna, wants to put the amendment into operation, but Mr Steve Tshwete, the Minister of Safety and Security, as well as the Commissioner of Police, Mr Jackie Selebi, are not in favour of the new proposed Act.⁹¹ The date of inception of the Amendment Act is therefore still not set and proclaimed by the President. If the amendment of section 49 does come into operation, law enforcers might choose rather not to arrest a suspect than running the risk of being convicted of murder or culpable homicide.⁹²

The proposed amendment of section 49 is a logical consequence of the development of a human rights culture in South Africa. However, if the problems with which law enforcers are faced, are not addressed, the Amendment Act's protection of the suspect's human rights may be perceived as a contributing factor to the degeneration of law and order in South Africa.⁹³

The Constitutional Court in *Makwanyane's* case⁹⁴ made passing reference to the need for section 49(2) to be brought in line with the constitutional emphasis on the sanctity of human life. The court remarked that greater restriction may be placed on lethal force in making an arrest, but the court did not test the constitutionality of the present section 49.

87 1999:30.

88 Section 35(3)(h).

89 Published in GG 19590/11-12-1998.

90 2000:208.

91 *Die Volksblad*: 4/6/ 2001:2.

92 Watkey:1999:31.

93 Watkey 1999:30.

94 1995 3 SA 391 CC: 721G-H.

On 1 June 2001 the Supreme Court of Appeal gave new guidelines for the interpretation of section 49. The case concerned Justin Govender, who stole a car and was chased by the police. Govender, an unarmed 17-year-old youth, fled from the car. The police officer, inspector Cox, shouted at him to stop, fired a warning shot, repeated his warning to stop and then fired at Govender's leg.⁹⁵ The shot shattered Govender's spine. The Durban High Court found in favour of the police, saying that the police had acted reasonably.⁹⁶ However, the Supreme Court of Appeal subsequently found the test in the current section 49 to be inadequate and adopted the approach used in for example the United States, Canada, Germany, England and the European Court of Human Rights.⁹⁷ The Supreme Court of Appeal gave the following new interpretation to section 49:

Dit moet so geïnterpreteer word dat die gebruik van 'n vuurwapen of soortgelyke wapen (op 'n voortvlugtige misdadiger) verbied word, behalwe as die polisiebeampte of lid van die publiek redelike gronde het om te glo dat die verdagte 'n onmiddellike bedreiging van ernstige liggaamlike leed aan hom (die inhegtenisnemer) of lede van die publiek inhou, of dat die verdagte 'n misdaad gepleeg het waarby die toediening of bedreiging van ernstige liggaamlike leed betrokke was.⁹⁸

Whether the amended section 49 complies with the prerequisites of the Supreme Court of Appeal's judgement and whether this amendment will still come into operation must be finalised as soon as possible in order to obtain legal certainty.

5.2 Presumptions

5.2.1 Presumption of innocence

- Right to be presumed innocent

Every accused person has the constitutional right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.⁹⁹

The purpose of this provision was highlighted by the Constitutional Court in *S v Manamela*:

The purpose of the presumption of innocence is to minimize the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution a burden of proving the essential elements of the offence beyond reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial.¹⁰⁰

95 *Die Volksblad* 4/6/2001:1.

96 *Sunday Times* 2001:1.

97 *Sunday Times*: 2001:1

98 *Die Volksblad* 4/6/2001:1.

99 Section 35(3)(h).

100 *S v Manamela* 2000 3 SA 1 CC: para 26.

- Reverse-onus presumption

The reverse-onus presumption is usually phrased as follows: If the state proves fact A, fact B follows, unless the contrary is proved by the accused. This reverse-onus presumption impairs *prima facie* on the presumption of innocence, because it casts a legal onus on the accused to show on a balance of probabilities that fact B must not follow, if A is proved by the state.¹⁰¹ Thus it relieves the prosecution of the overall onus to prove the guilt of the accused beyond a reasonable doubt. Since this increases the risk of convicting an innocent person, the reverse-onus presumption has after the new constitutional order been successfully challenged in several South African court cases.

The Constitutional Court has been remarkably consistent in refusing to find justification for the violation of the presumption of innocence. In *S v Zuma*¹⁰² the court declared such a provision in the *Criminal Procedure Act* null and void, because it placed a burden on the accused to prove that a confession reduced to writing before a magistrate, was not freely and voluntarily made.¹⁰³

Section 40(1) of the *Arms and Ammunition Act* 75 of 1969 contains a reverse onus presumption to assist the State in proving "possession" for a conviction of unlawful possession of arms and ammunition. The Constitutional Court sat this provision aside as being unconstitutional, since this provision also violates the constitutional right of an accused person to be presumed innocent.¹⁰⁴

Section 245 of the *Criminal Procedure Act* provided that where an accused is charged with an offence of which false representation is an element and the state proves that the accused made that presentation, the accused is deemed to have made the presentation knowing it to be false. This section casted an onus on the accused of proving on a balance of probabilities that he or she did not have such knowledge. However, in *S v Coetzee*¹⁰⁵ the Constitutional Court also declared this presumption unconstitutional.

- Presumptions in the *Drugs and Drug Trafficking Act* 140 of 1992

Almost all the presumptions created by sections 20 and 21 of the *Drugs and Drug Trafficking Act* have been declared unconstitutional, because of the violation of the right to be presumed innocent.

The presumption in section 20 of the Act stipulates that when the state proves that any drug was found in the immediate vicinity of the accused, it shall be presumed that the accused was found in possession of it, until the contrary is proved by the accused. In *S v Mello and Another*¹⁰⁶ this presumption was declared in conflict with the presumption of innocence and therefore set aside.

101 De Waal 2001:631.

102 1995 2 SA 842 CC: par 15-16.

103 Section 217(1)(b)(ii).

104 *S v Mbatha*; *S v Prinsloo* 1996 (2)SA 464 CC.

105 1997 1 SACR 379 CC.

106 1999 2 SACR 255 CC.

The following presumptions, created in section 21, were also invalidated:

- if the prosecution proves that the accused was found in possession of dagga exceeding 115 grams, it shall be presumed, until the contrary is proved, that he has dealt in such dagga;¹⁰⁷
- if it is proved that the accused was found in possession of any undesirable dependence-producing substance, other than dagga, it shall be presumed, until the contrary is proved, that he has dealt in it;¹⁰⁸
- if it is proved that the accused was in charge of cultivated land on which dagga plants were found, it shall be presumed, until the contrary is proved, that he has dealt in it;¹⁰⁹
- if it is proved that the accused conveyed any drug, it shall be presumed, until the contrary is proved, that he has dealt in such drug, and
- if it is proved that the accused was in charge of an animal or vehicle and any drug is found on such animal or vehicle, it shall be presumed, until the contrary is proved, that he has dealt in such drug.¹¹⁰

The protection of this fundamental right to be presumed innocent, has indeed led to numerous changes in the law regulating evidence tendered in criminal cases. These law reforms are clearly in line with the recent development of a human rights culture in South Africa.

- Justification for some reverse-onus presumptions

In *S v Zuma*¹¹¹ the Constitutional Court stipulated that statutory provisions, which create presumptions to satisfy the need for the efficient prosecution of crime, are in some cases reasonable and not unconstitutional in general. Kentridge J noted that it is important to emphasise what the judgement does not decide: "It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist in this task."¹¹² Furthermore the court held that this judgement does not seek to invalidate every legal presumption reversing the *onus* of proof: "Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove."¹¹³

Although it is difficult to justify the reverse-onus presumption as part of the criminal justice system, the legitimate interests served by these presumptions were highlighted, when such a presumption was upheld in *S v*

107 *S v Bhulwana* 1995 2 SACR 746 CC.

108 *S v Julies* 1996 2 SACR 108 CC.

109 *S v Ntsele* 1997 2 SACR 740 CC.

110 *S v Mjevu* 1996 2 SACR 594 NC.

111 1995 2 SA 642 CC.

112 *S v Zuma*: 662 E-F.

113 *S v Zuma*: 662 F-G.

Meaker.¹¹⁴ The *Road Traffic Act* 29 of 1989¹¹⁵ provided, that for the purposes of proving driving offences on public roads, it is presumed that a vehicle is driven by its registered owner, until the contrary is proved by the accused. The presumption was upheld because:

- it only targeted drivers of vehicles;
- only after criminal conduct is first proved by the prosecution, is the presumption triggered;
- the accused can rebut the presumption relatively easy, because owners usually drive their cars themselves or know who is driving them at any given time.

De Waal¹¹⁶ regards this as a fresh, balanced approach, which is worth following.

6. Conclusion

In the light of the above discussion, it is clear that the new constitutional dispensation brought about major changes to the South African criminal law sphere. Case law and new legislation introduced substantial legal reform by interpreting and upholding constitutional provisions. However, while striving to bring current law in line with the Constitution, legislation should still be drafted with competence. To ensure quality and effective criminal law reform, new legislation must be drafted in accordance with the basic principles of criminal law.

The constitutional reform process has actually just begun. The Constitution, especially the provisions of the Bill of Rights, will undoubtedly continue to have a profound effect on the criminal justice system. Although the Constitution is the supreme law of the country, the legal profession and all other role players have the responsibility to continuously evaluate the legal system and even the Constitution itself. The endeavour to reach justice, remains the overriding goal.

114 1998 8 BCLR 1038 W.

115 Section 130.

116 2001:635.

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