Tough on crime and strong on human rights: The challenge for us all

RICHARD CALLAND AND THABANI MASUKU
Institute for Democracy in South Africa[1]

1 BACKGROUND

The transition to constitutional democracy in South Africa occasioned profound institutional and normative changes to the criminal justice system. It raised awkward and prickly challenges: to reorient the system so as to make it compatible with the new constitutional values, and enable it to apprehend and prosecute criminals within the confines and ethos of the Bill of Rights (Chapter 2 of the Constitution). The nub of the challenge for the criminal justice system was – and remains – a formidable one, and is well illustrated in the important Constitutional Court judgment of Judge Johan Kriegler[2]:

> "Although the transition to the new dispensation kept the general body of South African law and the machinery of state intact, the advent of the Bill of Rights exposed all existing legal provisions, whether statutory or derived from the common law, to reappraisal in the light of the new constitutional norms heralded by that transition. The retention of the existing legal and administrative structures facilitated a reasonably smooth transition from the older order to the new. But the transition did have an effect on the country's criminal justice system. People who had acquired specialised knowledge of the system, and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence. Particularly in the lower courts, where the bulk of the country's criminal cases is decided, judicial officers, prosecutors, practitioners and investigating officers were uncertain about the effect of superimposing the norms of a rights culture on a system that had evolved under a wholly different regime; and about the effect of that superimposition in a given case. Bail was no exception. On the contrary, much of the public debate, and much of the concern in official circles about law enforcement has been directed at the granting or refusal of bail."

1 Calland, formerly a practising member of the London Bar, is head of PIMS, the Political Information & Monitoring Service at Idasa; Advocate Masuku is senior constitutional analyst in PIMS, and a former clerk to Constitutional Court Judge Richard Goldstone. Masuku's contribution to the paper is based upon his profound belief in the South African Constitution, set against the harsh backdrop of what preceded it. Calland's derives substantially from a very different experience, acquired from – if South Africa is now a constitutional nirvana – the constitutional backwater of the United Kingdom. In this sense, our collaboration reflects another feature of the debate: it is a global one, in which the same challenge is to be confronted in the South and the North, in the first and in the third world.

2 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC): 774B.

Later in the judgment he says:

> "An important aim of this judgement is to show that the application of constitutional norms to the law and practice of bail does not complicate the task of judicial officers but clarifies it."[3]

In simple but cogent fashion, Judge Kriegler thus explained the constitutional position of the law of bail in our legal regime. What necessitated this examination was the uncertainty that suddenly faced the lower courts in many cases, culminating in the cases of *S v Dlamini; S v Joubert* and *S v Scheitekat* regarding the proper interpretation of the right to bail for the accused person in custody. Nowhere in the post-apartheid criminal jurisprudence has there been so much uncertainty as in the adjudication in a criminal trial of the rights of an accused to a fair trail on the one hand and the right of the public to be protected from criminals on the other. The requirements for fair criminal process were arguably already in existence, in theory, in pre-constitutional era common law. However, the criminal justice system was not completely ready to adjudicate criminal cases within the principles entrenched in the Bill of Rights when the Constitution came into effect. The transition of the criminal justice system from one which disregarded the basic tenets of a fair criminal process to one which had to operate within the strict requirements of the Constitution tested every principle of policing, arrest, prosecution and incarceration against the right to a fair trial, dignity of the person, privacy of the person and need for procedural fairness. The Constitution remains the static, unwavering document on which the criminal process must be based and which protects the rights of alleged criminals. But what makes this a welcome and timely publication, is that it raises an awkward and prickly challenge for us all (and by "we" we mean to say, progressive, pro-human rights, lawyers): to balance our approach to crime with our approach to human rights. There are, we contend, two ways of responding to the challenge: to take the comfortable option – the well trodden road in which we re-state past heterodoxies of procedural fairness and other 'non-negotiatables' of the pro-human rights progressive movement – or the uncomfortable option in which we subject each and every particle of our respective standpoints to the most stringent tests.

2 THE SUPREMACY OF THE CONSTITUTION[4]

The supremacy of the Constitution makes every aspect of law and conduct subject to it. Courts are obliged to declare as unconstitutional and therefore unlawful any law or conduct inconsistent with the Constitution.[5]

---

3 *S v Dlamini; S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC).

4 S 2 of the Constitution of the Republic of South Africa, 1996, states that '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.

5 The relevant sections read:
Powers of courts in constitutional matters
172 (1) When deciding a constitutional matter within its power, a court –
must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable, including –

[continued on next page]

Such laws and conduct must be struck down or 'modified' to ensure consistency with the Constitution. The Bill of Rights entrenches the protections that every accused must enjoy.[6] However, rights in the Bill of Rights are not absolute, they are subject to justifiable limitations.[7] This limitation provision will determine the content of the rights and their scope in given situations. This paper analyses the effect of the limitation provision on crime and human rights. It seeks to resolve the conflict between protecting the rights of the accused on one hand, and protecting the rights of the victim – the public interest – on the other.

3 THE IMPACT OF CRIME ON THE PROTECTION OF RIGHTS

Constitutional adjudication involves weighing up conflicting rights, and giving decisions based on an appreciation of the values contained in the Constitution. Faced with a matter involving crime and human rights, judges have had no problem stating the obvious – that crime must be deterred and that it is the duty of the court to ensure that, where evidence is sufficient, a convicted person is given an appropriate sentence. How well the criminal justice system is coping is a fair starting point for a debate based on a very simple proposition: that crime is a social evil that

---

(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.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Inherent power

173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

6 S 35 provides for the rights of the accused, arrested and convicted person.

7 S 36 reads

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subs (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

often leads to powerlessness and frustration; that it has the potential to undermine the often burdened resources of state; that it undermines individual and collective security; that criminal activities always violate the rights of citizens; that citizens must be protected against crime; and that criminals must be brought to justice. A crime-infested environment encourages a rapid collapse of ethics and morality, a rise in corruption and inefficiency, and often leads to deep social insecurity. Crime therefore carries the potential to undermine the imperatives of good and effective governance, to undermine the power of the state to protect human rights, and beyond this, the potential to threaten the democratic state itself. The courts are the prime custodians of the Constitution, and are enjoined by the Constitution to defend the rights of people whenever these are threatened.

4 THE ESSENCE OF THE CRIMINAL JUSTICE SYSTEM

The essence of an organised criminal justice system in modern governance is to deter crime, or achieve a substantive reduction of crime, the apprehension of criminals and their eventual incarceration. It has a central role in protecting citizens from abuse and insecurity. Its role has become indispensable in modern governance in constitutional democracies for two reasons: there is evidence that entrenched forms of crime and corruption have a disempowering effect on the capacity of government to fulfil its constitutional duties, and there is a recognition that stable government is a precondition for economic growth. Given, furthermore, the extent to which the current South African government's macro-economic policy relies upon foreign direct investment to drive its overall growth strategy, the increase in crime – or indeed the perceptions of the incidence of serious crime among potential investors overseas – threatens the prospects for such investment. The criminal justice system therefore derives its legal and moral authority from the requirements of stable governance, security of citizens and the need for economic growth.

In South Africa, the criminal justice system manages the constitutional duty of upholding the protection of citizens within the framework of a constitutional rights-based way of operating. This was a break from a system whose operation in the past was frequently characterised by violations of human rights. If the criminal justice system fails to meet its obligations, its credibility is at stake and the rights of citizens will be eroded, releasing the potential for authoritarian rule or chaos. This would be a breach of its constitutional duty. The criminal justice system is built on the institutional and normative vision encapsulated in the Constitution from which it derives its authority to take away certain rights of convicted criminals. But the question of how to successfully manage crime in South Africa within the confines of the Constitution throw the system into confusion, especially the lower courts, as observed by Judge Kriegler in the Dlamini case. How can justifiable limitations be placed on the protection afforded to the accused and convicted criminals? A cursory survey of

the Constitutional Court decisions dealing with the right to fair trial indicate the delicate balancing act required to achieve permissible and lawful convictions.[8]

5 THE ROLE OF GOVERNMENT

One of the major goals, and indeed the constitutional mandate, of government, is the creation of sustainable security structures for its citizenry. It does this by assembling a criminal justice system that has the capacity to discharge the requirements of criminal prosecution and punishment. It is a constitutional duty in terms of which the state must respect, protect, promote and fulfil the rights of its citizens[9] contained in the Bill of Rights.

The constitutional terrain on which crime must be combated is the subject of controversy and vigorous public debate. In short, the Constitution has become a popular scapegoat for poor policing, poor rates of conviction and a perception of rising, uncontrollable crime. Willie Hofmeyr, the head of the Asset Forfeiture Unit of the National Directorate of Public Prosecutions, has argued in support of the drastic powers given to his unit to confiscate proceeds or instruments of crime by saying that unless crime, especially organised crime, is controlled, the hard-won rights and freedoms enshrined by the Constitution will be worthless in the face of lawlessness. At a human rights seminar in October 2000, Hofmeyr spoke of his fear that anti-human rights forces would, for the purposes of their own political agenda, seek to disturb the integrity of democratic transition and to discredit the constitutional imperatives for crime control. Having first spoken intriguingly of how he thought that the democratic settlement in South Africa is in many ways vulnerable to "populist attack either from the left or the right", Hofmeyer went on to comment as follows:

> "I think it is interesting that some of the only really semi-successful – I would call them populist – challenges to the transitional process has been not on too few houses or too bad education or anything else. But it has been in the area of crime with organisations like Pagad,[10] here in the Western Cape, which essentially used what is perceived to be an inability to deal with crime effectively to advance their own political agenda; but one that includes a sort of radical anti-rights agenda as part of the programme."

---

8 *S v Zuma & others* 1995 (2) SA 642 CC: Right to fair trial – constitutionality of the presumption relating to the admissibility of confessions in s 217(1)(*b*)(ii) of the Criminal Procedure Act *S v Makwanyane and another* 1995 (3) SA 391 CC considered and declared unconstitutional the provisions allowing for the death penalty.
Osman and another v Attorney-General for the Transvaal 1998 (4) SA 1224 (CC): 1998 (11) BCLR 1362 (CC) dealt with the right to fair trial – the constitutionality of s 36 of the General Law Amendment Act 62 of 1955 (offence of being found in possession of goods reasonably suspected to have been stolen while being unable to give a satisfactory account of such possession). The Constitutional Court found these provisions to be constitutional.

9 S 7(2) of the Constitution.

10 People Against Gangsterism and Drugs, a vigilante group.

So far, so good; we believe that most people would share these concerns. But Hofmeyr went further:

> "If you go to communities in South Africa these days and talk about human rights you are not very popular . . . in many, many places people would rather have less rights than more crime. And I think that for me one of the gravest dangers to our transition to democracy is in not getting the balance right between how strong your Bill of Rights is and how effectively it protects individual rights on the one hand and the ability of government on the other hand to deal effectively with crime."

His conclusion is that if government is unable to "deal effectively with crime", then the hard-won constitutional rights will be swept away in a tide of anti-rights hysteria. This virtually amounts to saying that human rights may have to be ignored in order to save them. The point is laudable for its realistic attempt at the apparent contradiction of state responsibility to, on one hand, protect rights, and on the other hand, place justifiable limitations on them. However the thrust of this comment is that it is a constitutional responsibility of relevant organs of government to combat crime, and the state may not fail to do so. If, theoretically, the state is unable to meet this obligation, it would have failed to protect the Constitution, a duty which must never be abrogated. Hofmeyr's voice is not unique in its content. Policy-makers throughout the world are currently expressing this sort of helplessness. This is a central paradox of government at the outset of the new century.

Another example of the complexity of dealing with crime in a rights-based environment are the numerous constitutional questions asked about asset forfeiture permitted in terms of the Organised Crime Act. A recent article by AJ van der Walt (2000) provides fascinating insights into the struggle against organised crime. He analyses the potency of the conflict between individual rights to property and the state's constitutional obligation to act in the interest of public safety. He states quite rightly that civil forfeiture indicates a locus of potential tension between the protection of private property in the Constitution and public interest limitations on the right. State powers are invoked to interfere with private property, in circumstances that are almost secretive. Forfeiture involves a state action by which private property is lost to the state without the consent or co-operation of the owner because it is used for criminal activities or is itself a proceed of crime. Property is seized temporarily to secure evidence in a criminal trial or to establish jurisdiction or security; and contraband is often forfeited (and usually destroyed) because its possession is illegal. The purpose of civil forfeiture of private property is not to secure temporary control over property or destroy dangerous contraband, but to vest state ownership in the property for public benefit. In the US, some crime fighting organs have been funded partly from civil forfeitures. The scope in South Africa for forfeiture orders to include property regarded as instrumentalities or proceeds of crime affects both public safety and crime prevention. Where forfeiture is concerned, the conflict between state action and individual rights is heightened. The question must be answered by the courts when it is reasonable and justifiable to allow the public interest in crime fighting to override the protection of property rights, whether the process of forfeiture sanctioned by the relevant legislation

takes into account the due process requirement of the Constitution. There was controversy in South Africa about the constitutionality of provisions of the Organised Crime Act and many were found constitutionally wanting by the judiciary. However the asset forfeiture approach to crime control must be handled with care and sensitivity because it is a process that denies an accused's rights before he or she is found criminally liable. Due process and fair procedure must be scrupulous in order to justify such state action against individuals.

Despite Huntington's third wave of democratisation and Fukuyama's complacent statement of the "end of history" victory for liberal democracy, democracy is now imperilled ironically not by the excessive power of the state but by the lack of power of the state. What is needed now is for the state to be stronger in the face of the immensely powerful economic forces of modern global capital and the concurrent anti-social forces of globalisation (such as the dual phenomena of corruption and transnational criminal organisations).

States are no longer all-powerful. On the contrary, with the exception of the remaining superpower, the US, they manifest varying degrees of weakness. We have not yet fully absorbed this fact, and it is this powerlessness that has compromised the protection of human rights. This is particularly the case in relation to transnational criminal organisations (TCOs) (Williams 1997), particularly in societies in transition (Williams 1997; Buriarek 1998). Buriarek contends that in the case of transitional societies, crime may rise as a result of social instability and concurrent criminal opportunism, and public attitudes may change so that there are increased calls for repressive means of dealing with criminals. Interestingly, his opinion polling informs him that those Czechs who do not express trust in the police are more often in favour of the restoration of the death penalty (Buriarek 1998:220). According to this author, when people conclude that the state cannot deliver deterrence or suppression of criminal activity, they are more likely to believe in the death penalty or radical punitive eye-for-an-eye approaches associated with kangaroo courts and self-help instant justice methods.

In South Africa, a growing frustration with apartheid's criminal justice system led to communities taking law into their own hands through kangaroo courts. In this new constitutional dispensation, community frustration at the perceived inability of the state to keep down crime has been manifested in the growth of vigilante groups. The growth in vigilante activities is a return to self-help methods, expressing a different point of view on crime prevention, at worst a vote of no confidence for the performance of the criminal justice system.

The politics of the recent era have contributed to this trend; the politics of individual, as opposed to collective, responsibility; and the Thatcherite language of moral responsibility, have served this trend. As one criminologist describes it: "The pervasive image of the perpetrator of crime is not one of the juridical subject of the rule of law, not that of the social and psychological subject of criminology, but of the individual who has failed to accept his or her responsibility as a subject of moral community" (Rose 1996). This reflection of the politics of the individual, redolent throughout

the 1980s and 1990s, policy than a restorative one. If you are deemed to have broken means that people are more likely to think in terms of a punitive criminal the 'moral code', then you forfeit your claim to human rights.

This danger of societal disaggregation and the weakening of community is compounded by a concurrent global trend in which public goods – health care, welfare payments and pensions, and security – are commodified. There is a large body of literature that records not only the increasing inequality gap between the rich and the poor, but also the dissipation of the welfare state. Before, the state (at least in the social democratic countries of the North) would provide at least minimum levels of protection for free. Now those public goods are products to be purchased – for example, decent housing, decent schooling, decent health care and health insurance, and decent policing – inevitably excluding the poor. Private security, as we all know, is a massive industry in South Africa. Those who can afford to 'top-up' their security, and the security provided by the state, do so through private policing of some sort or another.[11] In any case, as statistics have shown, public policing levels vary greatly between poor and middle class areas.

Hence, it is the poor, the most vulnerable group of society, who suffer most from crime and its consequences. This leads one to the conceptual starting point of this paper: that the debate on crime and human rights is about power. This makes a difference, we submit, to the traditional bipolar approach to this subject between the "crime control" (tough on crime) school and the "due process" (strong on human rights) school of thought.[12] Crime control demands a high rate of conviction, and places a high degree of trust in the police, the integrity of police-obtained evidence. Due process, in contrast, starts from the proposition that it is better to let ten guilty people go free than to convict a single innocent one (Rose 1996:48). It is this tension that the Constitution sought to resolve by entrenching the Bill of Rights, making any derogation from protecting these rights subject to justifiable limitations.

Two significant points arise from this. First, the liberating effect of the Constitution; second, its constraining and restraining effect.[13] The liberating effect provides an opportunity for the criminal justice system to formulate sustainable means of crime prevention. This is important in order to build the structures that would enhance the legitimacy of the criminal

11 According to the findings of an Institute for Security Studies report, the private security industry in South Africa has an annual turnover of around R10 billion and has increased about five-fold since 1990 (see Irish 1999).

12 This is a crude summary of the theoretical framework devised by the American Herbert Packer (1968) as discussed usefully by Rose in the context of the contemporary UK debate (Rose 1996:47).

13 The limitation provision provides a threshold requirement in the interpretation and enforcement of the Bill of Rights. On of the most important questions that a court will ask is whether a violation of a right is constitutionally permissible under the limitation provision. Where it is permissible, there is a justifiable violation and, ironically, no violation of the Constitution.

justice in dealing with crime. This means that the prosecution of alleged criminals has to be done in terms of constitutionally permissible means. The principles set out in the Constitution enables those in criminal justice to secure not only legal convictions but morally justifiable ones. There is certainty about what is permissible police conduct in criminal investigations. For example, while in the past police-obtained confessions were sufficient to convict an accused, it is not possible now without corroborating evidence. Prosecutors and the police can no longer rely on unlawfully obtained evidence in order to secure convictions. There is certainty about what the police can and cannot do. This certainty has a liberating effect. It enables the law enforcement agencies to examine with greater diligence what is necessary to secure convictions and manage crime. The criminal justice system is thus offered new challenges for dealing with crime, but simultaneously constrained to act within the parameters of constitutionally-entrenched values.

The constraining effect of the Constitution is simply the other side of the same coin of its liberating effect. It is the limitation necessary to preserve and protect the rights of the accused without risking the individual or collective security of other individuals. This is the limitation often articulated in the adjudication of conflicting rights. The question for the police is how to secure evidence in a manner that will not contaminate and compromise possible convictions, and that calls for diligence in due process. Lessons from Canada are revealing for South Africa. While the Canadian Charter has its supporters who contend that, at least in the sphere of criminal justice, the Charter has provided important due process protection for innocent and for the vulnerable (Stuart 1998), it also has its detractors,[14] who argue instead that, in its fundamentally undemocratic way, it has served to protect the interests of the rich and powerful. The latter viewpoint argues, for example, as follows:

> . . . [Y]ou do not need a Charter of Rights to give concrete rights to accused persons. The Charter is much more and much less than that. It is a whole way of approving or disapproving of punishment in which the unrestrained power of the judiciary is central. Since the rights are merely incidental to legitimation, they are symbolic, discretionary, and conditional. This is what distinguishes constitutional rights from democratic rights, the rule of lawyers from the rule of law. They are meant to protect the system and not the public, and in the protection of the system the judges will ride roughshod over victims, offenders and anyone else who gets in their way. Constitutional due process does nothing about the mindless, ever-expanding repression except perhaps to make us feel better about it. (Mandel 1996).

Just as Mandel distrusts the legal system and its constituent players, Stuart's defence of the Canadian Charter derives from his fundamental distrust of what he calls the "expediency" of the political class. Thus, he believes the Charter provides the best protection against opportunist politicians with a short-term view who "dare not be softer than the courts" (Stuart 1998:332). The South African Constitution, following some of the Canadian Charter's principles on human rights, raises the same issues the

14 Most notably Prof Michael Mandel.

vulnerability of criminal prosecution within the principles of human rights protection. Different views have been expressed in public by different groups and public officials regarding the extent to which criminal prosecution has been enhanced or hampered by the presence of the Bill of Rights. Those who have argued that the Constitution has handicapped effective crime prevention have often called for the reintroduction of the death penalty in the hope that a secure society would be the result. Those who argue that the Bill of Rights has enhanced the potential for the criminal justice system to play its role effectively often support the retention of the current legal framework for crime prevention.

Whatever point of view one adopts, the central point is to recognise that unconstitutional means of controlling crime often lead to authoritarian rule and a collapse of the rule of law. There is evidence that a collapse in the rule of law is the beginning of dictatorship, an abusive police force and a flagrant violation of people's rights. A choice between entrenched legal principles limiting the capacity of state to interfere with individual rights and heavy-handed approaches to crime that place more emphasis on crime combating is a choice between freedom and oppression. The Constitution permits that a limitation of rights is possible within means that must be justifiable in an open and democratic society. The Constitution permits furthermore that, in extreme cases, rights can be suspended for purposes of restoring public order and protecting the integrity of state.[15] The suspension of rights for such purposes is deemed constitutional as it passes the test of 'legitimate government purpose' and is 'justifiable in an open and democratic society'. The Constitution does not prevent the criminal justice system from being efficient and thorough. In fact, it demands this. The criminal justice system must prosecute those who violate the laws and rights of others, but within a framework of values agreed to by this society and entrenched in the Constitution. The Constitution and the Bill of Rights enhance opportunities for good policing, successful prosecution and conviction. History shows policing outside the constraints of a bill of rights leads to anarchy.

Laws and legal systems must not only be efficient, but also legitimate. The legal system is not merely a technical body, it is a political one too. It provides some form of legitimacy for government to act. It can easily be exploited and manipulated by those in and with power. Systems that are used to take away or limit the rights of people must themselves be infallible or clearly function within constraints of law. The power of the police and the criminal justice system to pursue their constitutional responsibilities has been strengthened by the requirements for a fair trial. Criminal investigations contaminated by sloppiness and shoddiness will place insurmountable burdens on the courts to play a useful role in crime combating, a result that will erode the confidence of the public. Police conduct outside constitutional boundaries has a limited capacity to protect the citizenry.

15 S 37 of the Constitution states the circumstances in which a state of emergency may be declared.

Again, however, we must be prepared to ask ourselves tough questions: Is this a neat, but essentially idealistic view of the relationship between the Constitution and law enforcement, viewed through the rose-tinted spectacles of someone who desperately wants to believe that it is true? But what if it is not; what if some of the due process procedures derived from the Constitution do stand in the way of effective policing? Or can we simply side step that by saying that "effective policing is by definition human-rights based policing"? Policy makers and judicial officers must find the balance. But where does the balance lie? The balance can be found in three factors. Firstly in the institutional transformation of criminal justice system. Secondly in the creation of a national consensus on law and citizenry, through education, and by re-building and uniting a divided society, including the reorientation of key players in governance. And thirdly, by asking hard questions of the due process approach to criminal justice.

6 CHALLENGES FOR THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

6.1 Institutional transformation

This must be directed at enhancing the legitimacy of the authority to deal with crime. The current government is legitimate, but it runs a network of institutions that have had to earn some legitimacy. Transforming criminal justice institutions requires redesigning them so that they meet the requirements imposed by the Constitution. Besides being approachable, visible and accessible to the public, these institutions must be sensitive to the new legal ethos and capable of re-aligning their jurisprudential background in accordance with the Constitution. There must be co-ordination between the various institutions forming the criminal justice system. The prosecution and the police must work in circumstances that allow for greater effectiveness and accuracy in order to manage their crime prevention mandate. The various agents of the criminal justice system must co-ordinate efforts to avoid duplication, sloppiness, and lack of accountability. The material and literacy conditions of the police, prosecutors and all other relevant agencies must be improved through conferences with magistrates, judges and members of the civil society, and community structures. Courts generally are viewed as places of punishment and intrigue. Having inherited the character of the apartheid government, in which they were viewed with suspicion, courts must have a public relations strategy that encourages community co-operation but does not undermine their independence. Institutional transformation requires the strengthening and realignment of state resources and facilitating effective utilisation of these resources. The system should be more accountable, more responsive, and more transparent in the way it functions. Resource and budget allocation for the criminal justice system must motivate the officers working at every level. The administrative functions of the system must be equipped to deal with both simple and the complicated crimes. Lack of resources, or a misuse of these, or an inability to use the available resources wisely will often lead to frustration and disorientation, a consequence that will make human rights vulnerable to abuse.

Thus, we can offer a tentative South African perspective on the Canadian Charter debate: that the Constitution can not in itself be a panacea for our human rights ambitions. It is, to a significant extent, dependent on the capacity of the many other institutions of governance to give living effect to its provisions. That is a mighty challenge.

Turning to the second matter. The creation of a national consensus on law, morality and citizenry must accompany the concrete development of community and police partnership on issues relating to punishment and law. This partnership would no doubt demystify crime prevention and court processes. Lack of transparency regarding the operation of the criminal justice system leads to distrust. Through education and training, citizens are more able to fully participate in asserting their rights and making it difficult for criminals. The rights contained in the Bill of Rights must be made meaningful for the citizens of the country. Once the value of the Bill of Rights is appreciated, it must trigger a call for citizens to support the legal structures set up to protect them, and to do so within the parameters set out in the Constitution.

Finally, due process. In our commitment to due process, let us not be prime custodians of human rights, let us not be squeamish at the prospect of having every aspect of due process being tested. That we do so against the backdrop of the Constitution is our safeguard, and with the quality of independent and impartial judges at the Constitutional Court, we can be confident that it is a meaningful safeguard. Let us encourage the Hofmeyr approach – a creative approach to law-making that does not try and second guess the Constitution, but pushes the constitutional limits of what will help the law enforcement agencies to be effective. The courts need to coherently test every aspect of disputed legal principle against the Constitution. The Constitutional Court has developed a three-stage inquiry into constitutionality of law or conduct. This approach answers the following question; is there evidence suggesting a violation of the Constitution? If the answer is yes, then unconstitutionality has been established, then the second and crucial stage determines whether such a violation can be justified in terms of the limitation provision. If it can, then no order striking down the infringement can be made.

As we suggested at the outset, inequality of power should be the tool of analysis. Hence, due process that protects the arrested person both at the point of arrest and throughout the pre-trial period is most important. That is the period of greatest danger, especially with police officers who rely heavily on confessions as the basis of their approach to criminal proof. That is when individuals are at their most vulnerable, as Britain learnt when an appalling array of unlawfully obtained confessions during the 1970s and 1980s were exposed: the Guildford Four, the Birmingham Six, Winston Silcott and others. The problem is exacerbated when politicians tell the public that they are tough on crime (as UK Prime Minister Tony Blair and South African Minister of Safety and Security Steve Tshwete have done) and then have to be seen to deliver results. While ordering a news blackout on crime figures (as Tshwete has done) may seem to make the problem less severe, there is no way around addressing the need to improve resources and policing and solving more crimes. This is not easy

if you are failing to tackle the causes of crime. There is a body of literature which confirms that unemployment in particular is a major driving force behind lawlessness; "crime becomes a positive function of an index of 'relative deprivation', typically defined as relative lack of access to a normal or mainstream pattern of social participation by Marshall (1950) and Townsend (1979)" (Braithwaite 1979). As a result, politicians are forced to yield to pressure from law enforcement agencies to loosen the rules to make it easier for them to secure convictions, thus satisfying the expectations of the public. This is the danger now in South Africa, just as it was a danger in the UK in the 1970s in respect of the Irish Republican Army. A string of miscarriages of justice were the result of due process being defeated by a conspiracy of dishonesty from most quarters of the criminal justice system. It also led to what some writers, such as *Observer* journalist David Rose, call "noble cause corruption" – the notion that, although you are breaking the rules, you are doing so in support of the public interest.

The constitutional structure of South Africa provides guidelines for what constitutes due process. These requirements are key to the successful prosecution of crime and cannot be abrogated, namely the right to be informed of one's rights on arrest, the right to legal representation, the right to silence, the right not to be tortured, the right not to incriminate oneself, the right to bail in appropriate circumstances. These are all an integral part of criminal justice in a constitutional democracy. Derogating from these rights is unconstitutional unless such derogation can pass the constitutional test of justifiability in an open and democratic society. The rules of evidence allowing accused persons access to police dockets must be fair in that, while it allows the accused to prepare adequately for his or her defence, this must be balanced with what is in the interests of justice.

We are calling for a systematic audit of due process rules and procedures in terms of the Constitution. This review will have a triple purpose. First of all, to check that each and every due process rule and procedure conforms to the Constitution. Second, to weigh up its role in the criminal justice process and to ask the question 'is it necessary and important to a fair and just criminal system, or does the burden it creates for the criminal justice agencies outweigh its value?' Thirdly, the audit can thereby play an educating role. With each due process rule or procedure, the constitutional conservatives and 'doubting Thomases' within the police and the criminal justice system will be given the opportunity to explain how and why the rule or procedure makes their job unduly difficult.

At each point, counterbalances could also be sought. For example, interviews are not tape-recorded in South Africa. Since the miscarriages of justice in the UK referred to above, interviews must be tape-recorded. PACE – the Police and Criminal Evidence Act – was the embodiment of the due process protective array that liberals had been calling for, and which the police initially hated. They have become used to it. Confessions are relied on far less frequently to secure a conviction. There is better justice as a result. Slowly the police are regaining the public trust. They are doing so despite their own reluctance to transform – again the point about institutional transformation arises – as witnessed by the recent Lawrence Inquiry in the UK.

7 CONCLUSION

These then are what we submit are the truly tough questions we must answer. In conclusion, it is possible to be tough on crime and strong on human rights: it is not a zero-sum game. It is what is demanded by the Constitution and indeed possible within the constitutional jurisprudence developed so far. But to be both, to borrow Tony Blair's famous phrase, we must be tough on crime and tough on the causes of it. In other words, it is through the largely unchartered prism of socio-economic rights that we will discover how to balance the two imperatives. If we can navigate a macro-economic approach that channels the potential of the new global economic order towards realising social and economic rights, then we will begin the gargantuan task of being tough on crime without diluting human rights.

Along the way of this inevitably Sisyphusian challenge, we must examine the detail of our criminal justice systems, from the institutional construct and culture, to the procedures that govern both pre-trial and trial crime control. To do so thoroughly, both right and left must let go of some of their most deep-seated orthodoxies. The right must learn that 'good' constitutions do not create 'bad' societies (we are here using their own bleak, black and white pseudo-moralistic language); that only weak, lazy and cowardly governments blame their own constitutions for their failings as has been the case in South Africa recently,[16] and that humane criminal justice procedures designed to protect the weak and vulnerable do not threaten effective, well-resourced and well-trained law enforcement agencies.

We must not only accept, but invite and encourage innovative policy-making that will serve the constitutional right of human security, and will strengthen the capacity of the state to maintain the rule of law at a time when it is weaker than it has ever been before, not least in its contest with organised, and often transnational criminals, whose contempt for human dignity and for the poor and vulnerable must attract our own contempt. However – and this is our final word – when it is suggested that the human rights frontier should be rolled back in the name of being tougher on crime, we must apply the most rigorous of tests. Indeed while we have called for an audit of due process rules in this paper, we think that it is not only apposite but also right that the onus of proof should lie with those policy-makers who wish to weaken the due process rules and that their standard of proof should be the highest: that any dilution of due process is necessary beyond all reasonable doubt.

Sources

Braithwaite J *Inequality, crime and public policy* London: Routledge 1979

Buriarek J Democratisation crime punishment and public attitudes in the Czech Republic *Crime, Law and Social Change* 28 (3–4) 1998

16 Minister of Safety and Security Steve Tshwete's recorded remarks on bombings in the Western Cape suggesting that criminals will be brought to book 'at all costs' could suggest unconstitutional means-which would not stand up in court proceedings and therefore be unhelpful in the fight against crime.

Irish J *Policing for profit: The future of South Africa's private security industry* Pretoria: Institute for Security Studies (ISS monograph series no 39) 1999

Parker H *The limits of the criminal sanction* Stanford Calif: Stanford University Press 1968

Mandel M (ed) *The Charter of Rights & the legalization of politics in Canada* Toronto: Thompson Educational 1994

Mandel M Fundamental justice repression and social power in *The Charter's impact on the criminal justice system* edited by J Cameron Scarborough Ontario: Carswell 1996

Rose D *In the name of the law: The collapse of criminal justice* London: Vintage 1996

Stuart D An entrenched Bill of Rights best protects against law and order expediency *South African Journal of Criminal Justice* 11 (3) 1998

Van der Walt A 2000 Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause *South African Journal on Human Rights* 16(1)

Williams P Transnational organised crime and national and international security: A global assessment in *Society under siege: Crime violence and illegal weapons* edited by Virginia Gamba Pretoria: Institute for Security Studies 1997