A PERSPECTIVE ON RETROSPECTIVITY OF FUNDAMENTAL RIGHTS UNDER THE INTERIM CONSTITUTION

Paper 5
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1 INTRODUCTION

Soon after the commencement of the interim Constitution questions about its very commencement arose. That this should happen, is less surprising than the little energy devoted to such issues during the preceding deliberations. Surprising, too, is the absence of discussion on retrospectivity amongst the abundance of subsequent academic speculation about the impact of Chapter 3 (the Bill of Rights). The aim of this article is to supplement this neglect, to highlight some of the complexities involved and to suggest a workable approach to practical problems involving elements of retrospectivity.

The first question must be: Does the Constitution, generally speaking, operate prospectively or retrospectively? The answer in section 251(1) seems unequivocal: "This Act ... shall ... come into operation on 27 April 1994." As far as the Bill is concerned, section 7(2) stipulates that it shall apply to all law in force, decisions taken and acts performed during the period of operation. If the period of operation starts on 27 April, then, it seems, fundamental rights may only be invoked regarding post-26 April law, actions and decisions. Clear prospectivity, then.

Clear prospective operation ties in well with the idea of a clean break with the past, which is emphasised in the Preamble. There we read that the provisions of the Constitution arose from the need to create "a new order". Constitutionally speaking, a paradigm shift has occurred: The old order of exclusivity, blind authority, "first past the post", sovereignty of Parliament and residual freedoms (to name but a few characteristics) has been supplanted by a new order of inclusivity, justification, proportionality, a supreme Constitution and fundamental rights. It is no cause for wonder to notice how taken judges and commentators are with the novelty of it all.

But simplicity deceives. No godly hand wiped clean the slate of the past at midnight on 26 April 1994. Unfinished business was not finalized by the mere announcement of a new order. Pending matters remained undecided. The idea of continuity between past and present is emphasised by the inclusion of a whole chapter which facilitates the transition between two orders. Taking as premise that the Bill only operates vertically (between the State and its citizens), it is apparent that the criminal process or trial is an area in which issues involving retrospectivity will most frequently arise.

2 FIVE HYPOTHETICAL CASES

To illustrate the possible impact of retrospectivity on criminal procedure and the criminal trial, five hypothetical cases are outlined. They will be revisited as a conclusion to this article.

Case A: In 1985 A was convicted of blasphemy and fined R10 000. After his arrest A was questioned without any warning being given of his right to remain silent. Certain evidence

was elicited, which led to further investigation. On 26 April 1994, his case was finalized, as all the possible appeals had long been exhausted.

Under post-26 April law a new standard is set out in section 25(2)(a) - an accused person must be informed of his right to remain silent at arrest. If that had not been complied with, evidence subsequently elicited could be excluded as it was unconstitutionally obtained. Will A now (post-26 April) be able to successfully invoke the "new standard" to contest his pre-27 April conviction?

Another "new standard" under the Bill is the right to equality in section 8. As blasphemy (a crime at common law) only protects the beliefs and feelings of Christians, the existence of the offence seems questionable. May A now rely on non-discrimination on grounds of religion to attack the basis of his pre-27 April conviction?

Case B: B, a juvenile, was convicted for shoplifting early in 1994. He was sentenced to four cuts with a light cane. As an appeal was lodged, the punishment was not enforced.

On 27 April this appeal was still pending. Should B be allowed to rely on section 11(2) of the Bill, which in all probability will outlaw corporal punishment?

Case C: The case against C is one of fraud. On 26 April the case was almost halfway, as the state had just closed its case. The state case comprised numerous witnesses and lasted almost a year. C was without legal representation throughout.
One of the post-26 April "new standards" is the one in section 25(3)(e) - the right of an indigent accused to legal representation at state expense, if substantial injustice would result from a trial without legal representation. C now invokes section 25(3)(e). Should she qualify, if it is accepted that substantial injustice would otherwise result?

And what about that part of the trial already concluded? Should C be able to assert the right in section 25(3)(e) to have the witnesses recalled, and to have a trial de novo, with legal representation?

Case D: On 20 April 1994 D was stopped in a road block and asked to blow in a "breathalyser". She complied. Thereafter her blood was drawn. After 27 April she received a summons to appear in court on a charge of drunken driving.

After pleading she invoked section 25(1)(a) of the Bill, asserting that the traffic official's request to blow constituted a "detention", and that she had the right to be informed of the reason for her "detention". As this was not done, all the evidence obtained by the state was tainted and should be excluded. Should D be allowed to invoke this "new standard" in a pre-27 April setting?

Case E: Before 27 April E had been involved in conduct which amounted to the offence of sodomy, as it was defined at the time. No complaint was laid before 27 April. After a complaint was laid post-26 April, the case was investigated. E is brought before court and asked to plead. Should E succeed if he argues that sodomy no longer constitutes an offence?

3 DEFINITIONS

One's intuitive feeling could well be that these five cases are quite different, and the

implications of invoking the Bill will also differ from case to case. It might therefore be useful, at this stage, to distinguish between retroactivity, retrospectivity and perspectivity. The Canadian writer Driedger outlines the difference between the first two:

A retroactive statute is one that operates as of a time prior to its enactment.
A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

Retrospectivity, in turn, should be distinguished from prospectivity. A prospective statute operates forward, attaching consequences to events that take place after it was enacted. This distinction coincides with the difference between a "future consequence of a past event" (retrospective) and "a future consequence of an ongoing condition or state of affairs" (prospective).

Returning briefly to the five hypotheticals, invoking the Bill to attack pre-27 April convictions and sentences will be opening the door to retroactivity (case A). According to the definition, excluding the evidence in D's case, could be giving retrospective effect to the Bill.

Whether this distinction is of help when one analyses court cases, is doubtful. The two concepts of retrospectivity and retroactivity are used almost synonymously. In Kalla's case the judge refers to "a presumption against the retrospective operation of statutes". One of his fears of giving retrospective effect is that one would "trade in the certainty of 27 April for the uncertainty of ad hoc decisions". He ends the same paragraph with the statement that a decision "that this constitution has retroactive effect may have vast unforseen ramifications".

4 SECTION 241 (8)

Practitioners soon faced practical problems, as many cases containing pre-27 April elements came before our criminal courts. Most of these cases fell in the ambit of B and C of the hypothetical cases - the proceedings were in some way already "pending" at the dawn of 27 April.

Does an accused person in such a "pending" trial qualify for the protection of the Bill? In other words - may she or he successfully invoke the post-27 April new standards? Lawyers delved into the Constitution and came up with an answer, they thought, in section 241(8). But rather than giving a clear solution, section 241(8) led to four divergent schools of thought on its interpretation:

4.1 The reluctant interpreters

The appellate division falls into this category. In S v Pekeer the question whether the imposition of the death penalty is consistent with the Constitution was referred to the Constitutional Court. The court conceded that more than one interpretation of section 241(8) is possible:

Die staat steun weliswaar op die oorgangsbepalings vervat in artikel 241(8) van die

Grondwet, maar aangesien daar meer as een moontlike uitleg van hierdie artikel bestaan, is dit wenslik dat die vertolking daarvan ook aan die Konstitusionele Hof oorgelaat word.

In another case the same court held that it was doubtful whether the appellate division was at all empowered to interpret section 241(8). In S v Sixaxeni the Cape Supreme court observed that the true scope of the sub-section is "problematical" and that two opposing interpretations were "eminently arguable". As both interpretations would result in the same outcome, no conclusive finding on the issue was necessary in that case.

4.2 All fundamental rights excluded in "pending proceedings"

A second approach originated among Transvaal judges. To them section 241(8) presented an insurmountable obstacle to all the rights guaranteed in the Bill if proceedings were pending on 27 April.

The first case in this line of decisions was S v Lombard. The applicant was charged with fraud and corruption, pertaining to events which took place between 1985 and 1988. He first appeared in court in January 1993. In due course the State proceeded with its case. Numerous postponements followed for, amongst others, evidence on commission in London and the observation of the applicant in Weskoppies (psychiatric) Hospital.

The applicant applied for legal aid from the available structures. It was denied mainly because of the expected duration of the case. On 16 May 1994 he applied to the Transvaal Provincial Division to be afforded legal representation at state expense. This application was brought in terms of section 25(3)(e) of the Constitution. It was argued on 18 May 1994. Judge Hartzenberg refused the application, finding that section 25(3)(e) cannot be invoked by an accused whose trial started before 27 April 1994. The decision was based, in the first place, on the plain meaning of the wording: "op die oog af ...".

The court then addressed the argument that section 241 does not form part of Chapter 3 and cannot limit it. Chapter 3 guarantees certain fundamental rights, which are already limited in Chapter 3 itself, by section 33. The argument does not convince, the court holds, because section 25(3) and section 241(8) are not in conflict or incompatible. They are compatible because the administration of justice requires stability and continuity. Persons already found guilty and those whose trials have already started, cannot now claim retrospectively rights which were not available to them before the Constitution's commencement.

Hartzenberg J seems to rely heavily on a perceived threat to legal certainty. In the process he used a version of the "slippery slope" argument, in that he warns against a destabilization of pending and finalized cases alike. He seems to reason that no distinction could be made according to the stage of development of a case.

Thereafter, Kirk-Cohen J analysed section 241(8) in S v Vermaas. Notwithstanding the fact that parts of the Vermaas analysis has been co-opted into this interpretative school, a closer look reveals that his remarks are merely obiter. Kirk-Cohen poses a question and sets out two lines of argument. Throughout he uses the wording "ek verwys", as he sets out and refers to the different arguments. He then concludes:

"Daar bestaan teenstrydige menings en dit is ongewens en onvanpas dat ek die punt nou beslis", and refers the matter to the Constitutional Court.

The other Transvaal judges more appropriately grouped here are Van Dijkhorst J, who decided Kalla v The Master of the Supreme Court, Pretoria and De Klerk v Du Plessis, as well as Marais J, who decided S v Coetzee.
In Kalla Van Dijkhorst J found that section 241(8) is not ambiguous. If each word in the sub-section is given a meaning, the "meaning is plain".

The judge then proceeded (obiter) to consider the effect if the wording of section 241(8) had been ambiguous. He remarks that there is a presumption against the retrospective operation of statutes. This should also be applied to the transitional provisions in the Constitution, as there is "no reason to apply a different test".The judge's statement, however, does not refer to the important exceptions to the general rule against retrospectivity. The presumption may for instance be rebutted if a provision favours all subjects of the state affected by its operation (against the state). This consideration seems eminently applicable to the provisions of the Bill pertaining to the criminal trial. The main purposes of the rule against retrospectivity is not to interfere with vested rights or to unduly burden an individual subject. Another ground for rebuttal may be the fact that a provision deals with evidence or procedure.

Van Dijkhorst J also mentions the fact that the drafters could have clarified intended retrospectivity in no uncertain terms. The inverse could, however, also be argued. The Bill guarantees certain rights to "all persons" living under its recently created "new deal". To deny these rights to a substantial group of individuals negates the essential content of the Bill in their respective cases. Such an inroad into liberty cannot be presumed. If that had been intended, surely the rights could have been qualified in Chapter 3.

A third aspect the judge refers to, is his fear that "the certainty of 27 April 1994" will be traded in for "the uncertainty of ad hoc decisions". The examples cited may give cause for concern. But they all relate to horizontal relations (private-law disputes). In the criminal sphere these concerns are different. It is suggested that an "all or nothing" approach as far as retrospectivity is concerned should be avoided. Rights could be considered individually on a case by case basis, with emphasis on the specific consequences of applying a specific provision of the Bill retrospectively. The fact that dire consequences follow from retrospectivity in one case, should not cloud one's vision of the benefits or advantages of retrospectivity in other cases.
In the De Klerk case Van Dijkhorst (again in a private-law dispute) confirmed the views set out in Kalla.

Two nodding heads on the Natal bench in the local division Durban and Coast may be added. Thirion J in S v Saib took as starting point (on which no argument ensued) that in pending proceedings the law should be applied as if the Constitution had not been passed. The issue to be decided in that case was when "proceedings" were "pending". A broad construction was given to "pending proceedings", following the common law definition. In S v Ndima Findlay AJ found no reason to disagree with Thirion J. In neither of these cases was comprehensive argument on the issue addressed.

4 .3 Territorial jurisdiction only: No fundamental rights excluded in "pending proceedings"

The Eastern Cape produced a different perspective. In S v Smith the "plain language" evidence of the previous school was echoed, but in order to support a very divergent

argument. In Kalla the Smith finding on this issue was described as comments "which may well be an obiter". This seems not to be a true reflection, as section 241(8) was raised as an in limine obstacle to raise section 23 of the Bill. The point had to be and was indeed decided.

Froneman J (Kroon J concurring) in Qozeleni v Minister of Law and Order accepted the ambiguity of section 241(8). He then proceeded to seek the interpretation which "fits best with the fundamental concerns of the Constitution". He concluded that section 241(8) deals with continued territorial jurisdiction (his italics). In Gardener v Whitaker Froneman had occasion to reconsider this conclusion, but was not convinced by subsequent decisions and argument from other schools that his approach was "clearly incorrect".

Without reference to any decided cases, Erasmus J took the same approach in S v Shuma. He remarks that the provision is "not a model of clarity". The first part "appears to exclude" constitutional protection in pending cases. Three other factors however convinced him that section 241(8) deals only with jurisdictional matters (and not substantive law or procedural matters).

- The proviso indicates that it deals with jurisdiction.
- All the other subsections of section 241 deal with jurisdiction.
- This view accords with the presumption of statutory interpretation that provisions should as far as possible be construed to favour the individual against the power of the state.

In the Ciskei Heath J in S v Majavu followed a similar approach, finding section 241(8) to be a "territorial" provision:

When section 241 is read as a whole, it becomes clear that section 241(8) makes provision for the area of jurisdiction in which a court was operative and it is provided in terms of this subsection that such a court would continue to be operative in such an area of jurisdiction in which it was operative prior to the Constitution becoming operative. It is therefore a territorial provision. Section 214, therefore, does not exclude the operation of the Constitution as far as pending matters are concerned.

4 4 Only fundamental rights of a procedural nature excluded

This school originated in the Cape. In S v Williams Farlan J (Conradie J concurring) drew a distinction between fundamental rights of a substantive and procedural nature. Substantive fundamental rights could be applied to proceedings pending on 27 April 1994; procedural rights not. The court gave this ruling "because of the serious practical problems" that would result if procedural rights were applied to pending proceedings.

It is at once clear that an existing rule of statutory interpretation (that provisions relating to procedure and evidence should be given retrospective force) is overruled. No reference is, however, made to this fact and no motivation is given. The reasoning of the court was clearly influenced to attain a specific outcome. The court first found that the Constitution was not intended to allow cruel, inhuman or degrading punishment in cases after 26 April 1994. From this "result", the court had to develop a principle, in stead of stating a principle and applying that to the facts.

Froneman J offered some telling criticism of the Williams judgment:

- It does not account for the exception against retrospectivity in procedural matters.
- The distinction between substance and procedure is often difficult and not very helpful.
- Just as good a case may be made out for the application of the Bill to procedural as to substantive fundamental rights.

A slavish deference to rules of statutory interpretation is not advocated here. One remains heedful of the fact that presumptions are "utilised to compensate for the lack of ... constitutional criteria". In our context, some presumptions may well have served as protection of the individual against state authority. But insofar as presumptions may enhance the broader value system of a new Constitution they should, in my view, still find application. Especially if the very scope or ambit of new constitutional criteria has to be determined, presumptions may serve a useful purpose.

This approach was subsequently followed, broadly speaking, in two Transvaal decisions. Cloete J, in his very thoughtful analysis in Shabalala v AG of Transvaal, rejected the first two approaches. An individual is not excluded from exercising rights in the Bill, but for a very circumscribed exception related to procedure. Not "procedural fundamental rights" but the application of fundamental rights to a case in which a procedure in conflict with the Constitution had already been followed, is excluded. He gives the example of section 115 plea in terms of the Criminal Procedure Act or a "trial within a trial" in terms of section 217(1)(b)(ii) of the same act. In Jurgens v The Editor, Sunday Times, Eloff JP followed the Shabalala decision, finding that "parliament had procedural matters in mind in enacting" section 241(8).

4 5 Suggested approach

The approach to the interpretation of section 241(8) suggested here, is:

(i) There is clearly no clarity about the wording. Any claim to the contrary cannot stand in the light of the differences outlined above. All the schools must now concede that some element of ambiguity precipitated the different approaches.

(ii) According to ordinary rules of statutory interpretation, in such a case the interpretation favouring the individual should be adopted. This is also in line with fundamental concerns of our Constitution as a whole.

(iii) The most favourable interpretation is one according to which the sub-section does not exclude any constitutional protection to individuals. In such an interpretation 241(8) should deal with jurisdiction only.

(iv) The meaning of the wording can obviously not be negated in the process of giving content to a statute. It is suggested that an approach which takes the wording of 241(8) as a whole, as well as its context into account, should be followed. Neither the sub-section nor parts thereof should be viewed in isolation.

(v) Section 241(8) forms part of chapter 15 (General and Transitional Arrangements). Section 241 is entitled "Provisional Arrangements: Judiciary". Section 241(1) regulates that all courts in the national territory shall remain duly constituted until changed by a competent authority. Section 241(10) stipulates that all laws regulating jurisdiction and procedure in courts of law shall remain in force, until repealed. Section 242 informs us that jurisdictional areas of courts are to be rationalized - that will be done by laws. The laws in force will remain in force, until repealed by a competent authority. The courts will remain functioning in the national territories, until changed.
Section 241(8) concerns those cases affected by this change in jurisdictional areas, where "proceedings" were already "pending". It means that such a matter will be finalized in the jurisdictional area where it was initiated.

(vi) If an appeal arises or review proceedings are instituted, proceedings must be brought before a court having jurisdiction "under this Constitution". This may refer to the territorial changes brought about under the provisions of the Constitution, and is still consonant with the approach suggested.

(vii) If this approach is not adopted, the one in Shabalala's case should be followed. Excluding constitutional application to a "procedure" pending on 27 April is based on a coherent interpretation and will only minimally impair individual rights.

5 CANADIAN APPROACH

Section 35(1) of the Bill enjoins us to seriously consider applicable public international law and invites us to have regard to comparable case law in interpreting the Bill. Its relative recent commencement suggests the Canadian Charter of Rights and Freedoms as a fruitful source of such comparison.

The Charter came into force on 17 April 1982. One section, however, only took effect three years later (on 17 April 1985). No explicit provision is made in the Charter either for retrospectivity or for pending cases. If the approach suggested above is correct, this is another similarity between our Bill and the Canadian Charter. Consequently, it was left to the courts to give clarity through their decisions.

The general approach adopted is that the Charter operates only prospectively - it does not have retroactive or retrospective force.

The Charter can for instance not be used to invalidate a discrete pre-Charter act, such as a specific conviction or sentence. In R v Jack post-Charter acquired rights of religious freedom could not be used to invalidate a conviction for an offence committed before the Charter came into force. Invoking the Charter "to reach back and reverse the liability which clearly existed on the basis of the facts and the law in existence at the time the offences were committed" will be of no avail.

This approach is based on the long standing rule of statutory interpretation - the presumption against retrospective operation of statutes. The approach is often linked to the wording of section 24(1) of the Charter:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or

denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In R v James it was held that the protection against unreasonable searches and seizures could not be applied to seizures carried out before the Charter came into force. Section 24 could consequently not be invoked to exclude evidence obtained in such a search at a trial taking place after 17 April 1982. The court's decision in James is primarily based on the wording of this section. The court held that a person's rights "as guaranteed by this Charter" have not been infringed where the seizure takes place prior to the proclamation of the Charter, even where the search or seizure was unreasonable. Section 24 can therefore not apply. "One applies the law in force at the time when the act that is alleged to be in contravention of a Charter right or freedom occurs".

The simplicity of the state rule is, again, deceitful, for two reasons:
"The first is an exception allowed to the general presumption against retrospectivity. If a provision deals with procedure and practice, the presumption does not apply. To the contrary, it is substituted with one in favour of retrospective application. Crucial hereto is the distinction between substantive law (or rights) and procedural law (or rights). Drawing a dividing line between substance and procedure is often a very daunting and sometimes impossible task. In R v Webster the accused was 17 years old at the time it was alleged that he committed an offence. At a time when he was not yet tried, the age of persons subject to the exclusive jurisdiction of the Youth Court was changed from 18 to 16 years. The Court held that the provisions of the Young Offenders Act were substantive, rather than procedural. Applying them to the case of the accused would lead to retrospectivity, which is not allowed. This finding was based on the court's view that the provisions in question deal with the status and liberty of a person. "Few provisions in law are more substantive". ¨

Not only the distinction between substance and procedure, but also that between prospective and retrospective had proved to be problematic. The court allowed applicants to successfully invoke the Charter if a "current or ongoing violation" of a right occurred, even though the violation was linked to a pre-Charter event. In such cases no issue of retrospectivity arises, the courts found. The determining question hereafter is when in a sequence of events the violation "occurred".

In approaching this crucial question it seems to be preferable for the courts to avoid an all or nothing approach which artificially divides the chronology of events into the mutually exclusive categories of pre and post-Charter. Frequently an alleged current violation will have to be placed in the context of pre-Charter history in order to be fully appreciated.

The main issue to be determined in such cases seems to be whether retrospectivity is at stake or whether a current or ongoing violation is occurring. If a current or ongoing violation is addressed, the Charter is invoked prospectively. If a court interprets an event as such, issues of retroactivity or retrospectivity do not arise at all. This was one way in which courts ensured equitable and reasonable results. The following examples illustrate this:

Introduction of self-incriminating evidence

An accused person was tried pre-Charter. A retrial was ordered. During the retrial (post-Charter) the accused elected not to testify. The prosecution however led as part of its evidence-in-chief the accused's testimony at the first trial. The accused was convicted.

The accused claimed that his rights under section 13 of the Charter had been violated. This section points that a "witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings ...". The Supreme Court in R v Dubois found that the accused's rights had indeed been infringed. The right against the introduction of self-incriminating evidence crystallizes at the time the evidence is sought to be introduced in proceedings - notwithstanding the fact that the evidence predates the Charter.

Trial delay

Every person charged with an offence has, under the Charter, the right to be tried within a reasonable time. Wilson J saw this as a right "the purpose of which is to prohibit certain conditions or states of affairs", making it "particularly susceptible to current application".

In R v Daigle Rothman J said the following in an application to have a delay in a case which started before 17 April 1982 declared constitutionally unreasonable:

With respect, I do not believe that the issue is whether the Charter is to be given a retrospective or retroactive effect. The trial of the accused is now. Since the accused is being tried now and since he now has the right under the Charter to a trial within a reasonable time, then surely the court has a duty, once the issue is raised, to consider the quality of reasonableness of a trial at this time and whether it meets the requirements of section 11(b).

At best, any argument in justification for the delays that occurred prior to the coming into force of the Charter would go merely to the court's appreciation of the "reasonableness" of those delays. It does not deprive an accused of his right to invoke section 11(b).

Although the right to a trial within a reasonable time may be a new right created under the Charter, this does not mean that, in assessing whether or not that right has been infringed, the court cannot examine the time elapsed prior to the Charter.
Similarly the issue of retrospectivity was found not to arise in R v Antoine. Section 11(b) only applies to post-Charter trials. It does not operate retrospectively "because a part of the requisites for its operation are drawn from a time antecedent to its coming into force, nor because it takes into account past events".

Conditions constituting arbitrary deprivation of liberty or cruel and unusual punishment
In R v Konechny it was clearly stipulated that a person convicted and sentenced before 17 April 1982 may after that date invoke the Charter to claim that he is arbitrarily imprisoned or that the punishment amounts to cruel and unusual punishment. Retrospectivity does not come into play, as a current condition or state of affairs is challenged.

Re Mitchell and The Queen dealt with the continued imprisonment after the Charter of an habitual prisoner, sentenced to an indeterminable detention in 1970. On habeas corpus the prisoner approached the court. The court remarked that no issue as to retroactive or retrospective application arises. "This application is based upon alleged infringement of the Charter occurring at the present time as a result of the continuing incarceration of the applicant".

Equality rights affected

The possibility of a continuing discriminatory practice under section 15 of the Charter was accepted in Re McDonald and The Queen:

The respondent does not seek what he submits is a retroactive or retrospective application of section 15, that is, he does not ask to have the steps taken in the proceedings against him before April 17, 1985, set aside or declared void. Rather he says that his submission involves an entirely prospective application of the Charter. He seeks only those benefits of the Young Offenders Act that would be applicable to the proceedings from April 17, 1985, forward. He submits that regardless of what the case was before April 17, 1985, there is now a situation of inequality that infringes section 15 and that this situation requires a remedy. I believe that this argument is sustainable on the authorities.

6 UNCERTAINTY OF "NEW STANDARDS": THE AMERICAN APPROACH

It is quite likely that "new standards" may not be apparent from the face of the Bill, but will only be given definite content in subsequent court decisions. Take D's case in the hypotheticals. The crucial issue will be what "detention" is. If regard is had to standing practice and the common law definition of the term, a strong argument may be made out that asking a motorist to undergo a "breathalyser" test does not constitute "detention". A different argument is also quite possible, especially if regard is had to Canadian decisions in this regard.

Contrast section 25(2)(a) with 25(1)(a): The wording of section 25(1)(a) is clear. The meaning of "arrest" is unproblematical, compared to "detention". The right to silence is well known. Enforcement authorities knew exactly what they had to comply with as from 27 April 1994. Non-compliance constitutes an infringement of the Bill on any subsequent occasion. But can non-compliance with section 25(1)(a) be enforced in the same way? Does a clearly defined duty to inform a person in D's position of the reason for her detention arise as from 27 April 1994? Reference to the American Constitution sheds some light on this issue.

The American Constitution was drafted by a constitutional convention in 1787, containing no bill of rights. Subsequent thereto a number of amendments were adopted. Some of these impacting on criminal justice are the fourth and fourteenth amendments. The fourth guarantees the right to be secure in one's house and person against unreasonable searches and seizures. This came into operation after ratification by the required number of states in 1791. The fourteenth places an obligation on states not to "deprive any person of life, liberty or property, without due process of law". Ratification was completed in 1868. One may think that retrospectivity would not arise in this context. Wrong.

The reason lies in the jurisprudence of the American Supreme Court, which gave interpretation to the amendments in later years. Mere existence in the abstract does not impact on the legal system. Only subsequent application to concrete cases crystallize rights and require changes to the law.

The US Supreme Court's view on retroactivity and retrospectivity went through a long evolution. Older decisions should not be quoted without taking into account the stages of development.

One of the first decisions on this issue was Linkletter v Walker. The facts illustrate the issues

involved: On 28 May 1959 L was arrested for burglary. After he had been booked into jail, police officers conducted a search of his house and business without a warrant. Under the law as it stood this search and the ensuing seizures were held to be valid. On 19 June 1961 the decision in Mapp v Ohio overruled the law as it stood when the searches and seizures took place. Under the Mapp ruling the evidence seized in L's case would be excluded because it was unconstitutionally obtained. The court (with a 7 to 2 vote) found in Linkletter that the Mapp rule had no retroactive operation to cases finally decided prior to the date of the Mapp judgment. The rule did apply retroactively to the parties to the overruling case (Mapp) and all other cases pending on direct review at the time the decision was given.

Even more than Mapp, the Supreme Court's decision in Miranda v Arizona reverberated through the American enforcement agencies and public alike. In this case it was decided that an accused person in custody need only respond to interrogation with full knowledge of the right to remain silent. Confessions made in the absence of intelligent waiver is excluded as possible evidence. In Johnson v New Jersey it was found that Miranda is applicable only to those cases where the trial began after the decision in Miranda was given. The "new standard" introduced by Miranda did not apply to cases still on direct appeal, but only to cases begun after the date of the Miranda decision. The court took a pragmatic approach, holding that in criminal litigation concerning constitutional claims "the Court may in the interest of justice make the rule prospective ... where the exigencies of the situation require such application".

In two 1967 cases (US v Wade and Gilbert v California) the rule was simultaneously announced that evidence of identification, which was tainted because the accused was exhibited to identifying witnesses before trial in the absence of counsel, should be excluded. The applicant in Stovall v Denno approached the court on habeas corpus, invoking the rule in Wade and Gilbert to a trial finalized before those decisions. The finding of the court was that the new standard applies only to identification parades (or "confrontations") conducted after the decisions in Wade and Gilbert. No distinction should be drawn between convictions "now final" and convictions at various stages of trial and of direct review. This was concluded after taking into account the degree of reliance on the "old" standard and the burden on the administration of justice if the new standard was applied retroactively.

The criteria a court should use to determine whether "the exigencies of the situation" require prospective operation of a "new standard", were set out:

The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

One of the major points of criticism against the approach at that stage was the fact that similarly situated convicted or accused persons were treated dissimilarly. In Mapp, for instance, the court selected applicants from a number of possibilities. The applicants affected directly by the Mapp decision, in which the new rule was announced, were granted relief. As the rule did not operate retrospectively, all other potential applicants (by chance not selected) were denied relief.

These criticisms led to the decision in Griffith v Kentucky. A clear distinction was here drawn between cases on direct review and habeas corpus applications (cases already

"finalized"). The court held that a "new rule" had to be given retrospective effect to cases on direct review throughout.

Unlike a legislature, we do not promulgate new rules of constitutional procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. but after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply the rule to all similar cases pending on direct review ... Second, selective application of new rules violates the principle of treating similarly situated defendants the same.

As far as "finalized" cases are concerned, the current position is set out in Teague v Lane. The first question a court has to decide is if a "new rule" has been announced in a particular case:

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government ... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Unlike cases on direct review, the decisions in cases already "finalized" should not be unsettled without very specific factors necessitating that. This is so because"(a)pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality. the criminal law is deprived of much of its deterrent effect".

There are two very specific instances when retroactive application of "new rules" may be allowed in "finalized cases". These are:

- A new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.

- A new rule should be applied retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty.

This last factor was further explained as referring to "new procedures" without which the likelihood of an accurate conviction is seriously diminished.

7 THE HONG KONG APPROACH

Reference is made to the recently adopted Hong Kong Bill of Rights, emphasising the fact that Northern American jurisprudence has in no way any claim to final answers.

The Hong Kong Bill of Rights commenced its operation on 8 June 1991. Since then the principle was restated that since there is no provision to such an effect, the statute which created the Bill of Rights does not operate retrospectively.

Two cases seem of relevance. In S v Lam Wan-Kow it was confirmed that the validity of proceedings concluded before 8 June 1991 cannot be attacked on grounds of the Bill of Rights. This applies to cases heard after 8 June 1991. "However, certain procedural rights,

such as the right to legal aid or the right to a fair hearing, may apply to the appeal proceeding ...".

In another case, R v Li Kwok Wa and Chiu Chi Kwong, the distinction between substantive and procedural (evidential) matters was revisited. In July 1991 the accused were convicted of offences under the Drug Ordinance. The court relied on certain presumptions. In September 1991 these presumptions were declared unconstitutional as from 8 June 1991. The conviction was set aside, the court holding "that the effect of the repeal of the presumptions was that a trial judge could no longer rely on them after the operative date, even in relation to an offence committed before 8 June 1991".

8 CONCLUSION

8 1 Suggested approach

Before revisiting the five hypothetical cases, some remarks on a general approach:

- Section 241(8) does not solve the issue of retrospectivity of the Constitution and the Bill. ¨ The Constitution's silence on this issue implies that ordinary rules of interpretation apply.

- In general the provisions of the Constitution are not to be given retrospective or retroactive effect.

- The Bill, in so far as it applies to criminal law and criminal procedure, grants benefits to individual detained, arrested, accused and convicted persons. An exception to the presumption against retrospectivity should be allowed, as no vested rights are affected and no other persons are adversely affected.

- No blanket rule about the retrospectivity of the Bill is suggested.

- A ruling on retrospectivity needs to take into account the consequences of applying provisions retrospectively in a given case. Considerations, such as those set out in the American case of Stovall v Denno, might override the exception against retrospectivity.

- Once a case has been "finalized", different considerations may apply, as set out in the American case of Teague v Lane.

- Merely placing an alleged violation of the Bill in the pre-27 April context does not amount to retrospectivity. Pre-Bill events
  may be taken into account in deciding on a current and ongoing violation of a right.

8 2 Revisiting the hypotheticals

Case A : A's challenge against the constitutionality of his conviction on the ground that he was not informed of his right to remain silent, can be approached in two ways. Under the Canadian approach, constitutional challenge seems to be excluded, as the case was "final". Under the American approach the outcome could be different, as the new standard could be construed as one "without which the likelihood of an accurate conviction is seriously diminished".

A's challenge against the conviction on the ground that blasphemy no longer represents an offence will also be rejected under the Canadian approach. As decriminalizing a common law offence must amount to placing "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe", under the American approach a finding that blasphemy no longer amounts to an offence will be applied retroactively.

It is suggested that we should follow the American approach. The Constitution represents a new order and a new society. The values of this society should penetrate the society as a whole. The old values should not be kept alive merely because they are followed in the relative obscurity of prisons around our country.

It should not be possible, on the one hand, to decriminalize offences which amounted to discrimination on grounds of race, sex, sexual orientation or religion and, on the other, to keep imprisoned those convicted of these offences. Many of these issues have been and will be solved through amnesty or pardons at the political level. It should be noted here that the genesis of the new negotiated order was the release of Nelson Mandela on a criminal charge of the old order.

Case B: Invoking the protection of section 11(2) on appeal amounts to an application of the law as it stands. If the appeal is rejected and B is given corporal punishment, it will amount to a "current violation". No retrospectivity is involved.

Case C: Although C's trial pre-dates 27 April, invoking the right in section 25(3)(e) on any day thereafter does not involve retrospectivity. Denying C that right could constitute an "ongoing violation" of her right.

Trying to invalidate the pre-27 April proceedings could amount to a retroactive application of the Bill. In general the presumption against retroactivity applies. Because of the fact that only benefits accrue to the individual, this presumption may be overridden. The Stovall factors have to be considered, however. The "effect on the administration of justice of new standards" and the "extent of reliance by law enforcement authorities on the old standards" should weigh heavily against retroactivity in this particular case.

Case D: The standard in section 25(1)(a) is too vague to become enforceable against enforcement authorities as from 27 April 1994. The Constitutional Court has to clarify exactly what the ambit of this section is. Once that is done, the "new standard" (if any) applies to enforcement activities from the date of the decision forward.

Case E: No issue of retrospectivity is involved. The Constitutional Court will in all likelihood find that sodomy is in conflict with the prohibition against discrimination on grounds of sexual orientation. Once that is settled, punishing E for a non-existing offence will amount to a "current or ongoing" violation of his rights.

In conclusion: As in other discussions on the Bill, the remarks here are speculative. No final answers are suggested. The underlying and recurrent theme remains: There are more questions than answers. In answering questions about retrospectivity, though, post-dating constitutional benefits should be avoided.