

**KEEP IT
CONSTITUTIONAL**



Episode 18

RIGHTS OF THE DETAINED

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The Keep It Constitutional campaign is a 20-part series brought to you by the Foundation for Human Rights. The campaign aims to provide South Africans - particularly learners - with an introduction to the Constitution and its contents. The campaign consists of animated episodes, audio episodes, and lesson plans.

For more information visit www.keepitconstitutional.co.za.

The lesson plan is designed to assist educators and group leaders lead an introductory session on the Constitution. Educators can follow the lesson plan word-for-word, but may improvise as desired.



Episode 18: Rights of the detained

Time required 45 minutes

- Learning objectives
- People retain rights, regardless of what they have done, including when they have committed crimes
 - People who are suspected of crimes have a range of constitutionally-protected rights, to ensure that they don't suffer abuse and to ensure that they aren't punished before being convicted
 - Only courts can convict people of crimes and impose sentences
 - There are a range of different theories about punishment, including deterrence, rehabilitation, retribution, incapacitation and restoration. The theory or theories that a society chooses reflects upon the manner in which a society thinks about wrongdoers

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- Resources
- Keep It Constitutional animation series: Episode 18
OR Keep It Constitutional radio series: Episode 18;
 - Handouts 1 -3, attached at the end of this lesson plan
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Introduction

Time required 5 minutes

Educator:

Let's think about what human rights are. Can anyone tell me what you think human rights are?

ADVICE TO EDUCATORS

Allow the learners to answer.

Answers should revolve around the fact that all humans have human rights, merely by the virtue of the fact that they are human.

Educator:

Ok, so what do we have to earn our rights?

ADVICE TO EDUCATORS

Allow the learners to answer.

Answers should reflect that humans don't have to do anything to earn their rights - they have them because they are human.

Educator:

What happens when other people's rights clash with ours? Can our rights be limited?

ADVICE TO EDUCATORS

Allow the learners to answer.

Answers should reflect that the learners understand that human rights can be limited.



Educator:

Here is an example of when rights might be limited - a situation where two sets of rights clash. The Constitution gives everyone the right to freedom of expression. This means that we all have the right to express ourselves. The Constitution also gives everyone the right to an education - the opportunity to learn and to be educated.

It could be that expressing ourselves inappropriately in a classroom would interfere with other people's right to education. In this situation, our freedom of expression might be limited, in favour of not interfering with other people's freedom of expression.

When our rights clash with other peoples' do we lose those rights?

ADVICE TO EDUCATORS

Allow the learners to answer.

The learners should understand that when rights clash, someone might temporarily lose their ability to assert their right - for example, there may be a restraint on the ability of an individual to claim their right, at a particular time. However, this doesn't mean that they have lost the right. In other situations, they would be able to claim their right fully, without it being limited.

Educator:

Sometimes people's rights aren't limited by other people's rights, but are limited by the State. Examples of situations where the State limits someone's rights is when they are taken into custody by the police, when they are suspected of committing a crime, and when they are convicted of a crime, and sentenced to time in prison. The Constitution contains a series of rights that are specifically aimed at people who are suspected of a crime. Let's hear a little more about these rights.



Play video/radio episode 18

Time required 5 minutes



Discussion

Time required 23 minutes

Educator:

To understand our rights under the criminal justice system, we firstly have to understand the criminal justice system. Can anyone tell me what the criminal justice system is?

ADVICE TO EDUCATORS

Allow the learners to answer.

The criminal justice system is the system of law enforcement that is directly involved in apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offenses.

Educator:

There are six different parts to the criminal justice system in South Africa. The police service, the prosecutor, the courts, and the prison system. Each of these parts has a very important role to play in the criminal justice system, and a very important role to play in protecting the rights of everyone who is dealing with the criminal justice system.

The **police** are involved in investigating crimes, and with arresting people that they suspect of committing crimes. They give **prosecutors** a docket, containing the results of their investigations. Prosecutors consider whether the person has a strong enough case to charge the suspected criminals, and, if they decide to prosecute, they take the case to **court**. The first stage of the court process is a bail hearing. Bail is something that is really important, and links to the rights we are going to talk about in a minute. In brief, when someone is charged with a crime, they can apply for bail. They pay a sum of money, the amount of which is set by the court, and are released until they are convicted. The accused person gets the money back when they come back to court for the trial. A trial is when evidence against an accused presented to the court, and the judge or magistrate decides whether the prosecutors have proven an accused person's guilt 'beyond reasonable doubt'. 'Beyond reasonable doubt' is an important phrase to remember. It means that someone can only be found guilty



if there is no realistic doubt that they committed the crime. Whether this 'beyond reasonable doubt' standard is met at the trial determines whether the accused person is found innocent or guilty. If they are found guilty, they might be sentenced to time in the **prison system**.

Looking at how the system works, we can summarise it into three:

1) There is the pre-trial stage

The pre-trial is everything that happens before the trial takes place. This might include actual appearances in court, such as bail hearings, or an initial court hearing.

2) There is the trial stage

The trial stage is when an accused person appears in court, before a presiding officer or judge, to decide whether the person is guilty or not guilty.

3) There is the post-trial stage

The post-trial stage occurs after the accused person has been found innocent or guilty. If the person is guilty, then they will be sentenced. They may be sentenced to time in prison, they may have community service, or they may have a suspended sentence.

The Constitution contains a range of rights that apply to all three of these stages.

ADVICE TO EDUCATORS

Break the learners into pairs.

Hand out Handout 1 to each learner - the section 35 rights, for arrested, detained and accused persons.

Ask each pair to work out which of the section 35 rights apply to which stage (pre-trial, trial, post-trial).



Allow the learners 5-6 minutes to work through each of the different elements of section 35. Emphasise to the learners that some of the rights might apply to more than one stage.

When discussing in class, answers should cover the following:

Pre-trial:

- Section 35 (1)(a), (b), (c), (d), (e) and (f)
- Section 35 (2)(a), (b), (c), (d), (e), (f)
- Section 35 (3)(g), (h)
- Section 35(4)
- Section 35(5)

Trial:

- Section 35 (2)(b), (c), (d), (e), (f)
- Section 35(3)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o)
- Section 35(4)
- Section 35(5)

Post-trial

- Section 35 (2)(e)

Educator:

Before we go any further, let's spend a moment talking a little bit more about bail. Has anyone heard the phrase 'innocent until proven guilty'? Which section of section 35 is this presumption? What does it mean?



ADVICE TO EDUCATORS

Allow the learners to respond.

At section 35(3)(h), the Constitution protects the right to be presumed innocent. Answers should reflect the idea that people mustn't be treated as guilty by the State until they have been convicted in a court. 'Innocent until proven guilty' is also known as the 'presumption of innocence.' Everyone is presumed innocent until they have been proven to be guilty, beyond reasonable doubt.

Educator:

So, if everyone is presumed innocent until a court has had the opportunity to consider the evidence regarding an accused. Sometimes it can take years before a court hears a case though. What happens when someone hasn't been granted bail?

ADVICE TO EDUCATORS

Allow the learners to respond.

If someone hasn't been granted bail, they remain in prison.

Educator:

Since everyone has the right to have their trial begin and conclude without reasonable delay (found at section 35(3)(d), do you think it is a problem if people aren't granted bail?

ADVICE TO EDUCATORS

Allow the learners to respond, giving their personal perspectives. After hearing from the class, hand out Handout 2, and allow the learners 4-5 minutes to read it.

After the learners have read the Handout, ask them if their perspective on bail has changed, and ask them to tell the class why it may or may not have changed.





Class exercise

Time required 11 minutes

Educator:

Why do we protect the rights of people who have been convicted of wrongdoing?

ADVICE TO EDUCATORS

Allow the learners to respond.

Everybody has rights. Even if some of a person's rights are limited, they still have rights like human dignity, and the dignity of everybody - including people convicted of offences - need to be protected.

Educator:

The intrinsic rights of every human is one reason for us to hold our criminal justice system to a high standard. But we also need to think about what the point of punishing people is. I think that everybody agrees that if someone does something wrong, there needs to be punishment. But what is the purpose of punishment? There are a few different kinds of theories.

ADVICE TO EDUCATORS

Keep the learners in pairs.

Hand out Handout 3 - each learner should receive a handout.

Educator:

In your pairs, read about the different theories of punishment. Discuss in your pairs which theory you find most compelling.

ADVICE TO EDUCATORS

Keep the learners in pairs.



Allow the learners to discuss in their pairs for 5 minutes, and to decide which theory they think is most valid. Spend 5-6 minutes hearing from different groups which theory they find the most compelling.

Prompt the learners with the following questions:

- Whose needs should be considered when punishment is imposed?
- Does the punishment we impose say anything about our society?
- What role do rights play in the imposition of punishment?
- How can society uphold rights in imposing punishment on wrongdoers?
- Is it possible to combine any of the theories?

Educator:

We've seen that there are several different theories of punishment. There isn't necessarily a wrong or right answer about which is best. However, in our constitutional democracy, we need to protect the rights of everyone, including people who have done wrong.



CONCLUSION

Time required 1 minute

Educator:

The Constitution protects the rights of people who have been accused of crimes and taken into detention, and the rights of people who have been convicted of crimes. The protections are different, because the suspected wrongdoers and people convicted of crimes are at different stages. It is important to remember that the point of the justice system is to find out who has committed a crime, and all of the steps before a conviction should try to avoid punishing people.



HANDOUT 1

Constitution of the Republic of South Africa

SECTION 35: ARRESTED, DETAINED AND ACCUSED PERSONS

- (1) Everyone who is arrested for allegedly committing an offence has the right—
- (a) to remain silent;
 - (b) to be informed promptly—
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right—
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and



- (f) to communicate with, and be visited by, that person's—
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.



(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.



HANDOUT 2

Sibusiso Mavuka: 10 years in prison, 91 court appearances, no convictions

By Lee-Anne Bruce and Palesa Madi

Published on 18th September 2018, on Ground Up (www.groundup.org.za)

Sibusiso Mavuka's youngest child was only five months old when he was first arrested along with eight other men and placed in detention in Johannesburg's "Sun City" prison. His son is now ten years old, and Mavuka has watched two of his fellow accused die in custody - yet he has never been convicted of any crime.

Mavuka appeared in court 91 times before he gave up trying to keep track of his appearances. He and his co-accused have suffered almost endless postponements for various reasons. Because their cases are being heard together, all six of them need to be present at every court appearance. So do all their lawyers. Every time one of them is ill, or they are not brought to court on time, or one of their lawyers can't be there, the case has to be postponed yet again - often for several months at a time.

And that's when they have consistent legal teams. Mavuka has been forced to change lawyers at least three times because he couldn't keep paying private attorneys and had to find lawyers who would represent him free of charge. He is currently being represented by Legal Aid. Though he was arrested in 2008, his trial only began in October 2016 and has not yet been completed. Mavuka's case is a kind of perfect storm: everything that could go wrong has gone wrong and kept his trial date moving for over 11 years while he sits in prison.

But, his case is not unique. Mavuka is one of over 40,000 people in South African prisons awaiting trial - making up over a quarter of our entire prison population. Detaining any person on remand should be the exception rather than the rule, but this is not the case of most people entering our criminal justice system.

Instead, accused persons are often denied bail and forced to remain in prison. Granting bail requires weighing up factors like the likelihood someone will appear in



court, how much they can afford to pay, the number of charges they are facing and the seriousness of the charges. Many people are denied bail for something simply beyond their control: the police have not been able to verify their home address and therefore do not know exactly where to find them if they do not appear in court.

In Mavuka's case, he has applied for bail a total of six times - with no success. Being denied bail has a huge impact on people's lives. It means that they are forced to remain in prison, often for several years and sometimes for crimes they did not commit. In some cases, they remain in prison for a longer period of time than the sentence they would serve if they were convicted. People who have not been convicted of any crime are forced to remain in overcrowded facilities which expose them to diseases like TB and HIV and poor treatment. This is in conflict with the principle that someone charged with a crime should be assumed innocent until proven guilty.

Both being forced to remain in prison and waiting years for a trial to be finalised are issues of access to justice. We have seen a few famous trials play out in the South African media, with men like Henri van Breda and Oscar Pistorius accused of very serious crimes. Many people have commented on the supposed lengthy postponements in these cases. But, compared to cases like Mavuka's, it is clear these cases which catch the popular attention are dealt with swiftly by our courts. Van Breda was convicted of murder three years after killing his family; Pistorius was first sentenced less than two years after his arrest. Both men spent those years out on bail.

They are the exception. Far too many people have a story like Mavuka's. Many arrested and detained persons are facing multiple constitutional rights violations. Mavuka and his co-accused will once again appear before the Kagiso Magistrate's Court on 26 September, when their trial will (hopefully) continue.

Nelson Mandela said: "No-one truly knows a nation until one has been inside its jails. A nation should not be judged on how it treats its highest citizens, but its lowest ones."

This year marks what would have been Nelson Mandela's 100th birthday. It is a year we have chosen to celebrate his legacy, to focus on his qualities as a leader and as a struggle icon. While much has changed since Madiba's 27 year detention for



fighting apartheid, the conditions of our prisons and the treatment of our prisoners remain terrible.

As we come closer to the end of the Mandela 100 celebrations, we should take the time to reflect on the lives of persons who are imprisoned - many of them unjustly, just as Nelson Mandela was.

HANDOUT 2

Theories of punishment

1. Retribution

Retribution, as a theory of punishment, says that people who break the law deserve to be punished based on the seriousness of their crime. The State is responsible for imposing punishment, and is expected to provide a sentence that is comparable with the crime. As a result of the State taking the theory also focuses on creating a more peaceful society, as it is meant to prevent vigilante justice - which is when people take justice into their own hands. By both punishing the offender for their wrongdoing and preventing vigilante violence, society is made more peaceful.

2. Deterrence

Deterrence is aimed at preventing other people from committing the same crime, and aims to do so by imposing harsh punishments. The cost of punishment is supposed to be too high, so people will make sure that they don't commit the offence - they would be too scared of the offence. This punishment isn't just aimed at the offender, as it is meant to deter others in society as well as the offender.

3. Rehabilitation

Rehabilitation aims to prevent crimes taking place in the future by changing the thinking and behaviour of wrongdoers, changing the wrongdoer to a law-abiding member of society. Rehabilitation focuses on the wrongdoer and on society. It aims to improve the life of the wrongdoer by helping them change their life and the choices that they make, and, in the process, to make society safer. There are lots of different programmes that focus on rehabilitating wrongdoers - some of these take place in places like prisons, while others may not involve prison sentences.

4. Incapacitation



Incapacitation aims to prevent crimes taking place by preventing the people who commit crimes from having the opportunity. It does this by removing wrongdoers from society - by 'incapacitating' them. The main focus of this punishment is creating a safer society, rather than on the wrongdoer. Examples of deterrence include prison sentences, the death penalty, and house arrest.

5. Restoration

Restoration focuses as much on the victim as on the wrongdoer. The aim is to 'restore' things to the way that they were before the crime took place. Although this may not be completely possible, by paying compensation or by paying some form of compensation, the victim's harm may be lessened. This approach is based in the belief that the needs of the victims are often overlooked by the justice system.

