

Litigating Innocence in the Era of Forensic Law: The Problem of Wrongful Convictions in the Absence of Effective Post-Conviction Remedies in South Africa

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Abstract : The right to fairness and access to appeals and reviews enshrined under the South African Constitution seeks to ensure that justice is served. In essence, the constitution and the law have put in place mechanisms to ensure that a miscarriage of justice through wrongful convictions does not occur. However, once convicted and sentenced on appeal the procedural safeguards seem to resign as if to say, the accused has met his fate. The challenge with this construction is that even within an ideally perfect legal system wrongful convictions would still occur. Therefore, it is not so much of the failings of a legal system that demand attention but mechanisms to redress the results of such failings where evidence becomes available that a wrongful conviction occurred. In this context, this paper looks at the South African criminal procedural mechanisms for litigating innocence post-conviction. The discussion focuses on the role of section 327 of the South African Criminal Procedure Act and its apparent shortcomings in providing an avenue for victims of miscarriages to litigate their innocence by adducing new evidence at any stage during their wrongful incarceration. By looking at developments in other jurisdiction such as the United Kingdom, where South African criminal procedure draws much of its history, and the North Carolina example which in itself was inspired by the UK Criminal Cases Review Commission, this paper is able to make comparisons and draw invaluable lessons for the South African criminal justice system. Lessons from these foreign jurisdictions show that South African post-conviction criminal procedures need reform in line with constitutional values of human dignity, equality before the law, openness and transparency. The paper proposes an independent review of the current processes to assess the current post-conviction procedures under section 327. The review must look into the effectiveness of the current system and how it can be improved in line with new substantive legal provisions creating access to DNA evidence for post-conviction exonerations. Although the UK CCRC body should not be slavishly followed, its operations and the process leading to its establishment certainly provide a good point of reference and invaluable lessons for the South African criminal justice system seeing that South African law on this aspect has generally followed the English approach except that current provisions under section 327 are a mirror of the discredited system of the UK's previous dispensation. A new independent mechanism that treats innocent victims of the criminal justice system with dignity away from the current political process is proposed to enable the South African criminal justice to benefit fully from recent and upcoming advances in science and technology.

Keywords : innocence, forensic law, post-conviction remedies, South African criminal justice system, wrongful conviction

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