

## **REFLECTIONS ON THE RULE OF LAW AND THE CRIMINAL JUSTICE SYSTEM IN SOUTH AFRICA**

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The Preamble of the South African Constitution and its vision is something that one wants to live for and prepared to die for when it states that when we adopted the Constitution as our supreme law it was because we wanted to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law". This is powerful and transforming language.

The rule of law goes beyond mere formal legality, it is "Justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression". Document of the Copenhagen meeting of the Conference on Human Dimension. The constitutional guarantee of the right to a fair trial is underpinned by the rule of law in criminal proceedings and therefore makes the rule of law a reality. This is a crucial aspect that seeks to protect and promote respect for human rights including the rights of the accused person.

We all want the law to be consistently enforced and applied fairly and in an evenhanded manner. Our law (South African) is derived from four (4) sources namely, the Constitution; Legislation; Common law and Case law. One of the founding values of our democratic state is the supremacy of the Constitution and the rule of law. Section 2 of our Constitution emphatically states that any law or conduct that is not consistent with the Constitution is invalid and that all obligations imposed by our Constitution have to be fulfilled. Whilst the rule of law is applicable to both criminal and civil law my subject for the day will be confined to criminal law and the criminal justice value chain. By mentioning the value chain, I would like us to focus beyond policing and the police when we talk about crime and adopt, a comprehensive and an integrated approach to crime that is Constitution based as captured in the National Crime Prevention Strategy that was adopted in 1996.

Whilst acknowledging that the primary and constitutional responsibility of the police service is to " prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law", there are other important role players whose legal mandates also have a bearing on the work of the police. These are the departments of Justice and Constitutional Development and Correctional Services, Social Development, Local government, Health, Housing, Education, Sports and Recreation etc. The question is what happens when the police are perceived to have failed or are failing in the execution of their mandate in terms of section 205(3) of the Constitution. It does not matter whether fear of crime and

criminals is real or perceived, we have to deal with it.

An integrated approach makes us go beyond law enforcement and makes us look broadly at safety and security issues. The principles governing national security state that " National security must reflect the resolve of South Africans as individuals and as a nation to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life". These principles are an affirmation of a new integrated approach to crime combating and crime prevention, they also talk to the socio-economic conditions that have a bearing on levels and types of crime. Fighting crime is everybody's business. The fight against crime must be depoliticized. Crime is not a political football to be kicked around.

The law enforcement agencies have to employ crime combating and crime prevention strategies and tactics within a human rights framework outlined in our bill of rights. This poses a difficult challenge to law enforcement agencies that used to thrive and flourish in an era of human rights violations aimed at suppressing popular political dissent and now have to carry out their functions and apply the law in a Constitutional democracy. This calls to the fore not only for a massive change in attitudes but also the acquisition of new skills and the adoption of new training techniques. This also becomes even more challenging when they have to uphold and enforce the law in a climate of rising crime levels as well as the unacceptable and disgusting increase in the killing of police officials. This is further complicated when the people and victims of crime are calling for the police to be tougher on suspects and for courts to impose stiffer and harsher sentences.

This is also at the time when the public confidence and trust in the police is low therefore their legitimacy is questioned. This lack of confidence and trust manifests itself in citizens not reporting certain crimes to the police and resorting to taking the law into their own hands and carrying out vigilante attacks , " necklacing" of suspects. This has the tragic consequence of eroding the authority and the legitimacy of the police. The state then loses the monopoly of using force when confronted with situations that require the use of force. When criminals no longer fear the police but actually start attacking and killing them, we start having non- state forces and unlawful means of resolving disputes existing side by side with the state machinery.

Given the above scenario it is easy to descend into a police state and for the police to be tempted to take short cuts and want to be seen to be tough on criminal suspects at the risk of falling foul of the Constitution making themselves possibly guilty of violating section 35 in particular. In this regard allow me to single out section 35(3) amongst many others I could have chosen. Given its centrality please allow me to quote the section in full:

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 facility 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 proceedings.
- (i) to adduce and challenge evidence.
- (j) not to be compelled to give 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.

Given the constitutional dictate and the rule of law imperative on one hand and the deteriorating crime situation on the other, the police have to ensure the efficiency and effectiveness of their operations whilst at the same time observing and promoting the bill of rights in our Constitution. Central to this theme and all the attendant challenges is the notion of a fair trial. A thorny issue for the police, the prosecutors, the defence and the judiciary is always how to deal with evidence that might have been unlawfully obtained. Section 35(5) takes us out of this by directing that such evidence will generally be inadmissible if its admission would render " the trial unfair or otherwise detrimental to the administration of justice". This does not close the door to the admissibility of such evidence but the test would be surely the manner in which it was obtained. I can't imagine the admission of evidence obtained as a result of torture for instance. Though we have the UN Convention Against Torture, we know that there are still some states which in violation of this Convention still extract confessions through torture in the "war against terror".

There is a clear correlation between the efficiency and effectiveness of everyday policing on one hand and the popular support for democratic policing and strengthening the rule of law on the other hand. There is no doubt that efficiency and effectiveness breed and nurture public confidence and trust in the police thereby inducing respect for the law and law enforcement authorities thus reducing if not eliminating incidents of people taking the law into their hands.

People will not only start reporting crimes but also give the police information about suspects and when that happens as a matter of routine the relations between the police and the communities are sure to improve. Public trust and confidence are earned. It is the conduct and diligence displayed by all the role players in the criminal justice system that create this public confidence and trust in the criminal justice system. One of the critical issues is the willingness and capacity of these role players to deal with corruption amongst themselves. The police, prosecutors, magistrates and judges must fight corruption in their own ranks as well. The importance of a corruption free criminal justice system can never be gain said. Certainly, we do not want our police officers, prosecutors and judges to accept bribes. Bribery undermines good governance and poses a threat to democracy.

Section 199(6) clearly prohibits any member of the security services from obeying a " manifestly" illegal order. The drafters of our Constitution obviously not oblivious of our recent past of a brutal police force under apartheid and also desirous of strengthening our democracy decided to establish multi-party parliamentary committees to conduct oversight of all security services. This was meant to "give effect to the principles of transparency and accountability. This arrangement finds expression in section 199(8) of our Constitution.

For the purpose of this address my focus is on the police. For the police to be able to do their work efficiently and effectively they must be depoliticized. Actually, in fact and in law, this arrangement is found in section 199(7) of the constitution which categorically states that" neither the security services nor any of their members, may, in the performance of their functions-

- (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
- (b) further in a partisan manner any interest of a political party.

The police therefore, need to be protected or immunized from what may be called inappropriate political pressures or influences. If we are to achieve this purpose then safeguards must be put in place hence my earlier reference to oversight bodies that should ensure that the police act in a manner that is consistent with the Constitution. This supervision can best be done by bodies outside of the police services, Independent Police Investigating Directorate, the Public Protector, Human Rights Commission, the office of the Police Ombudsman (whose focus is the investigation of complaints against the police that relate to police inefficiency and a breakdown of relations between the police and any community)and NGO's like the Institute of Security Studies and others.

The recruitment practices of the police must also be consistent with section 195 (i) of our Constitution which demands that the "public administration must be broadly representative of the South African people with employment and management practises based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation". The call for

a democratic police service is a basically a constitutional duty because it does no more than require the police to be responsive to the needs of the people and the needs of government itself. The biggest challenge is for the police to accept that they have to be accountable to outside oversight bodies and institutions unfortunately experience has shown that the police are averse to such accountability, they think that they are overly policed. They normally view it as an attempt to control their operations and management. Anything from outside is viewed with suspicion.

It is important to talk about the credibility of the police and trace the source of their legitimacy. Prior to 1994, the South African government lacked legitimacy because the apartheid government was elected by the white voters only, the black majority was excluded from the electoral process. That government relied on the repressive machinery of the state and the police force was a vital cog in that repressive machinery because they were the enforcers of the apartheid laws and therefore enjoyed no respect and credibility. Post 1994, the police through enforcing the new laws are custodians of the new Constitution and consequently of the new constitutional democratic order.

They are supposed to derive their legitimacy from the legitimacy of the new democratic government, de jure yes they are legitimate but de facto no, they are not. Public confidence and trust is earned and is not automatic by virtue of being a state institution. Allegations and sometimes proven cases of corruption, bad behaviour and poor conduct of the police including abuse of power tend to tarnish their image no matter how small that number is. In order to address this legacy of a credibility and legitimacy deficit, our Constitution provides for civilian oversight of the police by establishing the civilian secretariat and an independent police complaints body called the Independent Police Investigating Directorate(IPID).

Despite these two civilian bodies there is still a gap in the handling of complaints against the police. Section 6 of the Civilian Secretariat Act mentions complaints for the first time in (j) but even then, it talks about assessing and monitoring the " police service's ability to receive and deal with complaints against its members". The Civilian Secretariat, therefore, has no powers to institute investigations into complaints, it only assesses and monitors the capacity of the police to do so. The police on receipt of complaints against themselves conduct their own investigations. This obviously will not boost public confidence.

IPID only investigates complaints against the police that have a criminal element eg deaths in police custody or death as a result of police action; discharge of an official firearm by any police official; rape; torture or certain corruption matters. Complaints relating to poor service delivery or performance are not catered for. Section 206(3) empowers provinces to monitor police conduct, to oversee the effectiveness and efficiency of the police service, to promote good relations between the police and any community as well as to assess the effectiveness of

visible policing. This is an important responsibility entrusted to provinces. In order to give provinces teeth section 206(5) further enables provinces to " investigate or appoint a commission of Inquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community.

This is how the Khayelitsha Commission of Inquiry into allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha was established and the subsequent office of the Western Cape Police Ombudsman which is the first and currently the only office of its kind in South Africa. The office of the Police Ombudsman through investigating complaints of this nature seeks to enhance police efficiencies and effectiveness as well as to promote good relations between the communities and the police in the Western Cape. If such objectives were to be achieved then there would be more public confidence and trust in the police and their credibility and legitimacy enhanced.

In speaking about the rule of law and the criminal justice system, public education is key. One of the vexing questions on public education is the understanding by members of the public of issues like bail provisions, legal guilt and factual guilt or factual innocence versus legal guilt. These are complex notions for ordinary members of the public to understand. In the eyes of the public, an accused person who was seen to have killed another person can not possibly be acquitted of a murder charge or culpable homicide. As far as they have seen with their own eyes that accused person is guilty and must go to prison. Ordinary members of the public do not know or do not accept that the state must prove its case beyond any reasonable doubt before the accused person can be convicted. The possibility of a poor investigation or badly managed crime scene or even a poor presentation of evidence by the prosecutor who might be up against an experienced and smarter defence attorney is beyond their comprehension. As far as they know, the police have done their job it is the courts that are failing them.

There are also people who are in prisons for years because of errors made by the courts, factually innocent people found legally guilty as opposed to the factually guilty ones who have been found legally innocent and are roaming the streets and probably continuing their reign of terror and criminality because of incompetence and inefficiencies in our criminal justice system. These errors and inefficiencies and strict adherence to the rule of law can actually lead to the undermining of the criminal justice system that we want to strengthen! No wonder some people speak of the " law being an ass!".

The public needs to know how the criminal justice system works and the roles and responsibilities of each role player in the chain. What is also important is that citizens must know their rights and obligations including the rights of victims of crime as well as the rights of the criminal suspects including the convicted

offenders. The basic tenet of the rule of law is that state or public power must not be exercised arbitrarily. The notion of equality before the law and that the law equally protects us and that no one is above the law should be entrenched in all constitutional democracies where the Constitution reigns supreme. The fact that there is pending litigation involving the President when corruption charges against him were dropped by the National Prosecuting Authority as well as litigation around the improvements on his house where the Public Protector has directed that the President must out of his own pocket pay for those upgrades that she found not to be part of the security upgrade of his home, is a healthy sign of our criminal justice system.

The fact that South African investigators and prosecutors were successful in the investigation and prosecution of a National Police commissioner for corruption is yet another indicator of a strong criminal justice system. The latest achievement is the conviction and sentencing of the AbaThembu King to a 12 year imprisonment term reduced from 15 years by the Supreme Court of Appeal. This shows that Kings and Presidents are not above the law. These are healthy signs of a working criminal justice systems despite the continuing high levels of crime.

In this regard the South African prosecutors and judiciary have passed the test despite some recent wobbles. The true test lies in an independent prosecution service and an independent judiciary backed up by an equally independent legal profession. A criminal justice system that is in sync with the rule of law is one that ensures parity of arms between the prosecution and the defence in criminal trials. Lawyers play an important role in ensuring a fair trial and constitute one of the fundamental pillars in establishing an effective criminal justice system. The public defender system and provision of legal aid to an indigent accused is meant to avoid substantial injustice which might occur if the accused were to appear without a legal representative.

In one international conference discussing these matters a fundamental question was raised which perhaps this conference might want to attempt to answer: "Is the shortest path to a strong justice system in a fragile democracy, the slow building of competence in the police and other law enforcement institutions or does it require a forceful stand on issues of corruption, bias, political violence and intimidation?"

I would like to conclude by making a reference to a passage in the report of Khayelitsha Commission of Inquiry when it refers to fundamental changes that we seek to achieve in our society. "every institution of government needs to bear this constitutional project in mind in determining its mandate and its conduct: none more than SAPS. Given that SAPS's institutional predecessor was complicit in the enforcement of unjust apartheid laws on a daily basis, SAPS must define itself in contra distinction to its predecessor. The relationship between the apartheid police and the black communities they policed was often hostile and

fraught.

When the Constitution emphasizes the importance of " promoting good relations between the police and the community as it does in sections 206(3) and 206(5)(a), it does so mindful of this history. It is one of the many provisions in the Constitution that is best understood as an avowal of " never again". Never again shall we allow communities to be oppressed unjustly by state law enforcement agencies. Never again shall we tolerate a relationship of hostility and hatred between the institutions of the state and the people of our country".

Thank you.