

Impunity 1; Rule of Law no score

This was a good week for the Guptas. A judge in Bloemfontein ordered the Assets Forfeiture Unit to release their assets and a parliamentary committee is losing momentum on its probe into how they got South African passports from Home Affairs.

Gone are the days when you could send out a posse to track them down and bring them home – dead or alive.

“Deadly force” has the ring of Marikana to it. So it seems to be avoided at all costs. Giving criminals a huge advantage. On the other hand, Police Minister Bheki Cele budgeted R7.2 billion (that’s a B) to cover the costs of litigation for unlawful arrests, in one year. It seems that the police are arresting the wrong people?

And now the Minister is excusing the boys in blue for committing crimes, on the grounds that they have to infiltrate criminal gangs. So when heists are being carried out they must play out their part in the unfolding drama. (Like in the movie ID, this can cause an identity crisis for the cops.)

This raises the question: when is leniency actually cowardice?

Mayor Mashaba has been complaining for months that when it comes to breaking immigration laws, Home Affairs is not doing its job. They do not buckle down on the border jumpers.

Protesters are “managed” by the police when they burn tires and lay rocks on the road, using rubber bullets and tear gas. Meanwhile they are allowed to block roads in a country where other citizens are supposed to have a right to the freedom of movement.

The “culture of silence” wraps around women and child abusers like a blanket of protection.

The State agrees to pay the legal fees for top officials who have had their fingers in the till. The latest estimates are that R100 billion has been drained out of Treasury, limiting its ability to spend on legitimate government programming. But it must still fork out the suspect’s legal fees.

Recruitment is the most lenient of all – for example, Captain KGB’s hiring by law enforcement, when he was not only a convicted criminal, but he had skipped handing himself in for a 10-year jail sentence. People are hired for all the wrong reasons – including patronage and affirmative action. Competency is relatively low on the list of selection criteria when it comes to hiring. Few people dare to connect the dots between this and the projected 2 percent growth rate for the Economy.

So why is leniency winning? Why is being strict no longer in vogue? Seven reasons come to mind:

First, the diffusion caused by the number of agencies that can respond. First you have to decide whether your case is Civil, Labour or Criminal. Do you go to see a lawyer? CCMA or SAHRC? Or which of the various police departments, like the Hawks and SIU? Or you can go to a Section 9 institution, perhaps the CGE or the Public Protector. Often victims are told that they are in the wrong place, or that they must try another agency first. The Public Protector will send you away if you have never spoken to another agency, saying they must be contacted as a last resort.

Victims get bewildered and demoralized inside this labyrinth of options. What's worse is the way that desk officers use it (intentionally) to duck responsibility. It's far easier to send a victim away to another agency, than to tackle the case.

You also get multiple investigations going on concurrently. Take State Capture for example. It is being investigated by Parliament, Judge Zondo's Commission of Inquiry, the Hawks, the NPA, and Pravin Gordhan's "Project Re-Capture". The good news is that when one fails, another might succeed. The bad news is the diffusion that this causes. The judge's decision to return assets to the Guptas can be cast in this light. He certainly is not a "hangin' judge".

Second, the rights of the suspect cause huge distortions. Yes we have a Bill of Rights and suspects do have rights. They are innocent until proven guilty. But victims have rights too, and these tend to be played down. Especially if the bank-robbers are black and the banker who has been robbed is white. Most policemen and women are black too, so there is an inevitable affinity when it comes to scenarios like these.

There are exceptions that prove this rule – like the Anti-Land Invasion Unit. When it is deployed to counter unlawful land occupations, there is a visible clash between black "squatters" and the police. The same can be noted when police confront protestors; most people on both sides are black.

However, when rights clash, the "historically disadvantaged" tend to come out on top. Rights do clash – in every country. Freedom of expression clashes with the right to dignity. Another example that we see frequently is the clash of gender rights and those of our traditional culture. Both are enshrined in our Constitution. But when the rights of victims clash with the rights of suspects, it appears that suspects are given the benefit of the doubt. No matter how much evidence there is awaiting Trial.

Third, the police seem to be as much concerned about performance ratings as they are by good old Justice. They are chagrined to open a case that they do not think can be solved, because one obvious performance criteria is how many of the cases opened are solved. So they rather tell you that they have opened an "investigation". This is one way that victims are disadvantaged compared to suspects. In doing so, the police are basically "cooking the books". They are distorting reality. It comes across as leniency, causing law-abiding citizens to lose faith in law enforcement. And very possibly encouraging criminals that they can get away with murder, as long as they don't get caught in the very heat of the moment.

Reasons 4, 5 and 6 are similar – they amount to internal interference with investigations. First you have political interference, the abuse of power. Then you have the "moles" in the ranks of the police. These may be from either State Security or from the Mafias. It has come to light that the State Security Agency set up PAN (Principal Agents Network) which has been operating unlawfully. One way the PAN agents operate is to distort police investigations. It is just as obvious that there is collusion between some police and organized crime. On all these counts, there are plenty of examples in the media. This also comes across as leniency, diluting the deterrent element of the Rule of Law. Long before cases reach Trial, you can find someone to plead for you (on the sly) in the corridors of power.

Seventh and last, there are simply biases. They come with different labels like affirmative action, elitism, crony capitalism, or "white minority capital". Maybe this is just the on-going tension between blacks and whites? It cannot be denied that Non-racialism is under a lot of pressure in society. This

plays out in police investigations, at times. In fairness, it does not always play out this way. It depends largely on the extent to which individual investigators are committed to Non-racialism.

One thing is not affecting this abiding sense of leniency – and that is political ideology. It is not true that only right-wing dictators can impose Law and Order. Socialist and communist countries have done so too. Sometimes un-democratically, but the Labour movement and Socialist International are both committed to the Rule of Law within Democracy. So this trending to leniency is not coloured either blue or red. It is deeper than that, it is “rot” in the law enforcement system. This makes it complicated to root out the rot in government and society, when law enforcement itself is partly rotten. This explains why the clean-up operation is going so slowly.