

The citizen and the law : certain rights and limitations

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Introduction

South Africans have reached the point where they are fed up with the crime situation in our country. Tony Leon describe it best by referring to the situation as "gatvol vir misdaad". There is a tendency amongst South Africans to try and to restore order themselves. In doing so, they will have to take cognizance of the fact they the law limits their efforts to do so. Although we all feel that we would like to support **Mapogo Amatamaga** - we have to realize that we are forbidden by law to go beyond the parameters of the law.

By implication, this topic deals with the topic of self policing. I am not a lawyer - but a policing scientist and this paper will focus on a policing perspective on this issue. Readers involved in the legal fraternity must bear with me -let us share some ideas about my interpretation of the practical realities regarding the rights and limitations for concerned citizens.

What readers may read, may not sound very attractive to some people who are eager to learn more about the law which should enable them to make their respective surrounding a safer place. As far as safety and security issues are concerned, all of us must realize one thing - the situation in South Africa is not what we would like it to be. Fact of the matter is we inherited the situations and the question is now what can one do to improve our own safety. Everybody must understand that in order to help to protect themselves, they will have to work within the parameters of the law.

General background safety and security obligations

The present Government won the previous election (in fact previous two elections) and South Africa is now regarded as a Constitutional State where certain democratic principles determine the actions of inter alia citizens and the police. As a policing scientist, I am aware of the fact that the majority of the community (who are prepared to render assistance to the police) do not have adequate knowledge of how policing in a democratic society is functioning.

Everybody wants to live in a safe and secure society where peace and harmony prevail. This state of being will only be achieved if there is law and order in that specific society.

The **Government** must create the necessary structures (e.g. the Criminal Justice System and role players involved in that system) which are responsible for the creation and maintaining of order in society.

The Criminal Justice System refers to that components or governmental departments which are responsible for the execution and the enforcing of laws. The laws are promulgated by Parliament. The **police** must execute the law. This is done by means of proactive (preventative) measures to ensure that citizens obey the law. If citizens fail to obey the law and cause disorder, it is expected from the police to restore that order by investigating the case. Once the case has been investigated, it is the duty of the **court** to speak the law. In other words, the court must determine the guilt or innocence of the alleged offender. If the court convicts the offender, it is the responsibility of the **correctional services (Prisons)** to comply with the decision of the court (in other words to ensure that the prisoner will serve the sentence imposed by the court).

Why community involvement in policing matters? Why do we have to know our rights and limitations about the law if the SAPS are bound by law to protect us?

Why should we as members of the community get involved in crime prevention activities to safeguard ourselves? Should the police as the executive arm of the Government not shoulder their responsibility to safeguard us? The situation is unfortunately, not all that simple.

Since the general elections in 1994, the security situation has change dramatically for the inhabitants of South Africa. The era of the so called "total onslaught" gave way to a policing philosophy where the expectations and demands of the community regarding their safety and security, were for the first time taken into consideration by declaring safety and security as a constitutional right. This is in contrast with the so called traditional policing before 1994 where the police enforced unacceptable laws on an arbitrary manner on citizens. The Constitution and the South African Police Services Act (Act 68 of 1995) provide for the establishment of Community Policing Forums where the community can take actively part in the policing of their respective areas.

Taking the present crime situation into consideration, it is difficult to convince local communities that there is really a political will from the Government to address the crime problem adequately. The National Crime Prevention Strategy (NCPS) and the Police Plan (Policing Priorities and Objectives) mean little to victims of rape and other violent crimes.

There exists an urgent need for citizens to reevaluate safety and security services in South Africa

The exodus of experienced police officials (linked with the moratorium on the recruitment of new members

between 1995-1997) from the SAPS- contributed largely to the unbearable crime situation in South Africa.

The SAPS lost 25 percent (30,000) of its work force (due to resignations, voluntary retrenchments ,etc.) since the ANC took over in 1994. The investigation of case dockets is to say the least chaotic. More that 600,000 cases were not finalized and carried over to 1995. The average workload of a detective is in some instances more that 50 case dockets which make it impossible for them to investigate cases properly. Only the naive will believe that these cases will be solved - given the heavy burden the police have to cope with to give attention to more recent cases.

Due to the inability of the SAPS to prevent or even control crime effectively, it is important for them to manage crime by using as many community resources as possible.

With regards to this aspect, community policing compels CPF's to activate citizens to help the SAPS and other law enforcement agencies to find solutions for the crime problem.

The way in which terrorists or lets call them freedom fighters and their supporters were hunted down and prosecuted successfully by members of the old South African Police Force, is incomparable with what we experience today from the South African Police Service, the Courts and even the Correctional Services. It seems as if the whole Criminal Justice System is on the verge of a total collapse. If the SAPS are successful (and not on strike) in the apprehension of criminals, then more than often the courts are not so successful in the prosecution of such criminals. On the other hand, if the courts do their job properly (if the prosecutors are not on strike) by convicting and sentencing criminals to imprisonment, chances are that the criminals may escape (by bribing the guards or police) or by being released much sooner (due to amnesty or even by mistake) than the public and the courts anticipated.

The following table indicate how "effective" the Criminal Justice System is functioning at present in South Africa (Institute for Security Studies, 1998):

Crimes committed 1000

Crimes reported 450

Crimes solved 230

Perpetrators prosecuted 100

Convictions 77

Imprisoned 36

Sentenced to longer than 2 years 8

Rehabilitated 1

If one evaluates these statistics everybody will agree that we must assist the police in their endeavors to create and maintain a safe and secure environment for everybody living and working in our areas.

In a recent article (Intersearch, September 1999) the political analyst , Dr Jan du Plessis, mentioned that the creditability of South Africa was rated 47 out of 59 countries - 5 places lower than previous ratings. The main reasons were the crime situation, unemployment and the non effectiveness of the public service. It is alarming to note the SAPS was rated the lowest as far as effectivity was concerned. The National Commissioner , George Five mentioned on 18 August 1999 at the launching of the BTech Degree in Policing at the Pretoria Technikon that 38,000 (of the 134,000 members of the SAPS were not on the required literacy level. What is the purpose of having police officials at stations who are not literate to read or write? Or who are not in a possession of a drivers license to render a proper service - given the importance of reaction time to respond to serious offenses. The question which arises is - Do the police have the ability to redress this problem?

What are my rights when I am confronted by the police?

It is a fact that the "mushrooming" of private security companies in South Africa (and in our own neighborhood) can be regarded as a motion of no-confidence in the public policing structures. The fact that there is an Anti Corruption Unit operating in the SAPS (as well as the Independent Complaints Directorate investigating alleged offenses against police officials) corroborate such a perception. The numerous reports in the media about police misconduct compels citizens to keep abreast with their rights regarding safety and security.

The object of policing is **not absolute**. It is therefor not concerned with law enforcement **at the cost** of social order, but rather with the execution of law **in the interests** social order - "Order Maintenance" requires that the state of order will be protected in the interests of both society and of the individual.

This means that the task of policing SHOULD be carried out in such a way that order is reinforced by respect for individual rights. Justice under the law can only exist when judicial standards are applied fairly and impartially

Police powers should be based upon the broad scale of general prevention - mild in its operation - effective in its results, **having justice and humanity for its basis, and the general security of the State and Individuals as its ultimate object.**

The complexity of policing is realized when it is placed within the context of constitutionalism. If we say that constitutionalism means limited government, it means above all that abuse of police power must be limited. **They must therefor exercise their power and authority in accordance with the Bill of Rights**

What are my rights as a Lawful citizen?

The Constitution guarantees my right to life, freedom of movement, speech, association etc. as long as my rights do not infringe on the rights of another individual or the State. If someone infringed on my rights, I can demand the police to intervene. If there is not sufficient time to notify the police, I can sometimes, within the limits of the law, act to defend myself against the perpetrator who endangers my life or my property.

The Criminal Procedure Act(sec 42) give private persons the right to arrest someone, without a warrant, in the following circumstances:

- Any person who commits or attempts to commit in his presence or whom he reasonably suspects of having committed a **First Schedule** offense (that is serious offenses like murder, rape , robbery, etc.)
- Any person whom he reasonably believes to have committed any offense and to be escaping from and to be hotly pursued by a person whom such private person reasonably believes to have authority to arrest that person for the offense;
- Any person who he sees engaged in an affray;

The **Lawful Occupier / owner or person in charge of property or premises** may also arrest a person, on behalf of the owner, who contravened certain offenses with reference to **the arms and ammunition and the drug trafficking act**. Other examples of statutory provisions conferring special powers of arrest on private persons are **the National Parks Act** and **the Civil Aviation Offenses Act**.

In the event of resistance to the arrest of a suspect for the contravention of a **First Schedule offense**, the private person may use the necessary force which should enable him/her to effect the arrest. **There are however limitations (strict rules) which have to be complied with before an alleged offender may be stopped** in such a way.

Before the amendment to sec 49 of the CPA, **the arrestor** could have used maximum force to overcome resistance to the arrest. That includes the killing of the accused which, **if the killing of an alleged suspect complied with the requirements set out in the Criminal procedure Act**, could be considered as justifiable homicide. The way in which the law has now been changed means in effect that not only a private person, but even police officials, may only use force to effect the arrest if **that force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm**;

The same applies if the suspect attempt to flee in order to escape the lawful arrest . Maximum force can only

be used if "**there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or that the offense for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm**".

The way I interpret this means in fact that if you witnessed someone killing, raping or robbing your wife and that person runs away, you are not allowed to use maximum force to stop that person - unless you can prove that there is a **substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest (or the stopping of the person) is delayed. Which will not be so easy to prove.**

The proposed amendments to the **Arms and Ammunition Act** are just as absurd. For instance - if you are not in possession of a fire arm license, you are not permitted to use someone else's firearm - not even with the permission of the owner. In the event of using such fire arm to protect oneself, one can however **ON GROUNDS of THE COMMON LAW** plea self-defense or necessity as a ground for justification. In such a case the burden of proof will rest on the individual to prove that his/her action complied with aspects such as that there was no other means of defense, that the attack on has already started and that any other reasonable man would have acted in the same manner.

The Minister of Safety and Security promised that this act will be referred back to Parliament for revision.
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What are your rights to restore wrong doings?

If you were a victim of crime, it is the duty of the Director for Public Prosecutions to start the legal proceedings on the behalf of the state and/or the complainant in a court of law when he/she is of the opinion that there is sufficient evidence that an offense has been committed.

It often happens that an accused is not prosecuted by the state. In such a case, it is the prerogative of the private person to start with a private prosecution.

A private prosecution can be instituted by any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which the individual suffered as a result of the commission of an offense. A private prosecution can also be instituted by the husband in respect of the wife, or the parents on behalf of the children or the next of kin of any deceased person. The condition is that the private person must produce a document signed by the public prosecutor that he had refused to prosecute and the person must pay R1000 to start the proceedings. The presiding officer may also determine a further amount to be deposited as security for the costs which the accused may incur in respect of his defense.

Constitutional rights when legal proceeding are instituted against some one

Any person arrested for an alleged offense:

- Has the right to be informed about the allegations against him
- Must be informed about the fact that he/she is not compelled to make any statements and statements made by them can be used in evidence
- Has the right to be assisted by a legal practitioner - the person has to be notified about this right. If he/she cannot afford legal assistance, it will be provided by the state (free of charge if).
- Must either be charged within 48 hours or released. - unless he/she appeared before a court where the case is remanded for further investigation.
- The person can apply for bail and should be released unless the court decided that the person has to remain in custody.
- Such a person , if not released, has the right to visits by family.

A court therefor has a duty in certain cases to determine before the commencement of the trial whether the absence of legal representation would prejudice the accused to such an extent that continuation of the trial without legal representation would clearly result in an unfair trial. If a court decides that the accused should be assisted by a legal representative, it should refer the matter to a legal aid scheme.

Requirements for a lawful arrest

- The first requirement for a lawful arrest is that the arrest must have been properly authorized.
- Secondly, the arrester must exercise physical control over the arrestee by limiting the latter's freedom of movement. If a person does not submit to custody, an arrest is effected by actually touching his/her person, or if the circumstance so require, by forcibly confining his person.
- Thirdly, the person arrested must be informed of the reason for his arrest. If the arrest takes place in terms of a warrant, the person arrested must be handed a copy of the warrant upon demand.
- Lastly, it is required that the person arrested be taken to the appropriate authorities as soon as possible. This means that the arrestee must as soon as possible be brought to a police station or, if the arrest was made in terms of a warrant, to the place stipulated in the warrant.

Arrest with a warrant

A warrant of arrest is issued by a magistrate or justice of the peace upon the written application of a director of public prosecutions, a public prosecutor or commissioned police officer in which full details are given for the application of the warrant. A warrant of arrest is executed by a peace officer and will remain in force until

it is cancelled or until it is executed.

Arrest without a warrant

Arrest without a warrant may be executed in circumstances where the delay caused by obtaining a warrant will enable a suspect to escape, or where evidence may be destroyed. However, such an arrest may only take place if there are special circumstances justifying the arrest.

Powers of private persons to arrest without a warrant

In terms of section 42 of the CPA, a private person may, without a warrant, arrest

- Any person who commits or attempts to commit in his presence or whom he reasonably suspects of having committed a **First Schedule** offense (in such a case the private person may pursue that person and any other private person to whom the purpose of the pursuit has been made known, may join in and assist therein);
- Any person whom he reasonably believes to have committed any offense and to be escaping from and to be hotly pursued by a person whom such private person reasonably believes to have authority to arrest that person for the offense;
- Any person whom he is by any law authorized to arrest without warrant in respect of any offense specified in that law; and
- Any person who he sees engaged in an affray.

What obligations are there in respect of private citizens under the law?

The furnishing of name and address.

A peace officer may call upon the following persons to give full details regarding their names and addresses:

Any person who commits an offense, or whom he reasonably suspects of having committed any offense or who may, in his opinion, be able to give evidence with regard to the commission of any offense. If such a person fails to furnish his full name and address, the peace officer may arrest such person and detain that person for a period not exceeding twelve hours until the name and address so furnished have been verified.

Is there a duty to arrest?

Generally there is not a duty to arrest but a police official may call upon any male between the ages of 16 and

60 to assist the police officer in the execution of a lawful arrest. Failure to render such assistance constitutes an offense.

The obligation to testify

The Criminal Procedure Act provides that any person who can provide information regarding an offense has to reveal that information to the police. If a person fails to do so, such a person may, in accordance with section 205 of the CPA, be summoned to appear before a presiding officer and to answer the questions put to him by the presiding officer.

The obligation to notify the police of the commission of an offense

Citizens are compelled to notify the police about the following offenses: High treason, offenses under the Drug Trafficking Act and the Protection of Information Act.

What is my moral obligation regarding safety and security?

Community Policing Forum initiatives

There are formal ways in which members of the community can get involved in policing issues. One of them is to join the Reserve Police. On completion of the required training, members have (once they are on duty) the same rights (power and authority) and obligations as members of the SAPS. Such members are rendering an invaluable service to their respective communities.

Another way to get involved is to become a member of the Community Policing Forum. Members of all race and gender are invited to attend such meetings and see what the police and the community can (and have indeed) achieved.

I would like to mention the success of the CPF's at Centurion to readers. During 1996 (under the competent leadership of PW de Jager from Wierdabrug) the 4 CPF's Wierdabrug, Lyttelton, Laudium and to a lesser extent Erasmia formed a formidable partnership with the Town Council of Centurion. The CPF's established a Section 21 Company. The Council of Centurion has allocated R1,5 million to the Section 21 Company (The Centurion Community Protection Company - CCPC) to be utilized for ensuring the safety and security of its residents. All the Community Policing Forums in the area are represented on the executive.

To overcome the manpower problem, police officials are contracted to work overtime on their rest days to curb specific problems. The company (CCPC) has also donated four brand new and fully equipped vehicles to the respective stations whilst important equipment, e.g. computers for the implementation of a modus operandi

system, night sight binoculars, etc. were obtained for the use by the police. Another four vehicles were sponsored by Daewoo and Daecare to be used for policing duties. Vehicles were for the first time made available for the exclusive use by reservists - on the condition that the vehicles must operate on a 24 hour basis. Drivers were selected and sent on a driving course at BMW South Africa. The vehicles are cared for by the drivers themselves. A driver of the year award is awarded to the best candidate in the form of a cash prize and a certificate.

At this point in time, there are 65 police vehicles in the Centurion policing area. It is however alarming to note that 45 of these vehicles have more than 120,000 km on the speedometer and will to be withdrawn from the road by the police if they encountered any major problems. It is to be born in mind that none of that vehicles will be replaced if any of them is boarded.

It often happens on some stations that it is only the vehicles of the CCPC that is available for policing duties.

The four police stations are equipped with the Excaliber program which will allow the police, when the system is functioning, to communicate via computers in order to establish the whereabouts and exchange information regarding local criminals.

The Council has so far donated the same amount annually to the CCPC to be utilized for policing services.

Since the founding of the CCPC (November 1996) up to December 1998, the following positive results were obtained:

Number of police officials involved 1,160

Arrests performed 3,318

Number of operations conducted 724

Total man hours worked 59,688

Amount paid out for overtime to police officials R1,492,200

These hours worked and the arrest made do not include the hours and arrests made during the normal tour of duties of the police officials. By utilizing these resources, we have succeeded in maintaining a reasonable crime rate in Centurion - but you will agree that one murder or one rape is a murder or rape too many.

- **Drug problem**

The CCPC bought a device which will enable the police to establish whether someone was exposed to a situation where drugs were involved. This device (The ACON, 1 STEP MULTI DRUG TEST) can also be used by parents who are suspicious about their children. Our aim is not encourage parents to lodge complaints

against their children, but to help them to identify problems and to take remedial steps. The mere presence of such a device in the home may deter children from crossing the line. Our aim is to supply it at an affordable price to parents and the police.

Test for 5 substances - cocaine, opiates, cannabis, amphetamines and methamphetamine

The CCPC is also busy with negotiations with Insurance companies for the re classification of Centurion in order to try to get a better deal for the people staying in Centurion. I formally request you to join the Association (Phone Ronelle 653-6022)

Human Rights versus human responsibility

The saying goes that liberty or freedom is accompanied by responsibility (and sometimes accountability). To make South Africa a fair and just society, every citizen should be concerned with the effective functioning and structuring of the Criminal Justice System. It is therefore important that every body must not only keep on demanding that their rights must be protected - they must also shoulder their responsibility to cultivate a culture of human responsibility - towards the government, the Constitution and their fellow citizens alike. There must be collective efforts, from both the community and the police to cultivate these values. These sense of collectivity should be based on strong family bonds, from childhood, and shaped and nurture as a culture - and not an aspect to be enforced at adulthood.

Conclusion

I conclude this topic with a few wise words regarding law and order and order maintenance need to be constantly borne in mind:

"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it" (Theodore Roosevelt).

"Lawlessness is not less such, but more, where it usurps the functions of the peace officer and the courts" (Harrison).

"There is no liberty worth anything which is not liberty under the law" (Eisenhower).