POLICY DIRECTION IN RELATION TO STATES REVERTING TO HUMAN RIGHTS RESTRICTIONS ON THE BASIS OF POPULAR SENTIMENT AGAINST RISING CRIME

Wilfried Schärf

1. In the South African transformation process there was at the beginning, in the 'honeymoon phase' (1994-6), a strong emphasis on the rights of the accused person. This was the natural (?) response to many years of state abuses of the accused person during apartheid. The pendulum had swung to the most liberal side of the HRs arc. But while the breakdown of the old form of social control began, its substitute did not become noticeable in the short term and crime rose dramatically while state's attention was focussed inwardly on policy formulation (for three years) and then transformation of state institutions for another 5 or more years. In 2001, seven years after democratisation, the capacity of the criminal justice system is still limited: crime is still unacceptably high, the police are still weak and inefficient. Conviction rates are dropping mainly due to a mass exodus of experienced prosecutors (caused by short-sighted human resources policies), prisons still have a recidivism rate of between 87 and 92%. This is despite considerable foreign aid and many innovative pilot projects and considerable investment in a state-sponsored human rights and accountability infrastructure. The high-profile, specialist units such as the newly created (1998) National Directorate of Public Prosecutions recruited a strong contingent of civilians as opposed to existing police personnel to strengthen capacity and integrity. It also introduced the tradition of prosecutor-led investigations in high profile cases.

2. From 1997 onwards the pendulum began swinging back towards the centre and then to the right-of-centre as the rights of accused people were balanced against the rights of the victim/s and the general sentiment of poor communities, who remained by far the most common victims of violent crime (and the bulk of the electorate). Tougher bail laws, involving a partial reversal of the onus of proof for bail applications in serious crimes, mandatory minimum sentences for certain serious crimes, tougher prison conditions were part of the changes. So too were asset forfeiture in relation to organised crime in keeping with a RICO mentality. New terrorism legislation is pending as is a dramatically new law on rape and sexual assault.

3. The low capacity of the state during its own transformation generated non-state forms of policing which emerged in various forms. A huge explosion of private security for the middle classes was the first. In the poor communities there developed occasional revenge attacks and lynchings, resort to street gangs and taxi organisations as sporadic enforcers of 'local values'. Vigilantism also reared its head in several forms, one in the north of the country as paid-for-on-the-spot justice (Mapogo-Matamaga) the other in the south as an anti-drug-and-gang organisation which metamorphosed into an anti-state group, which the police then branded as urban terrorists.

4. Ironically, in the southern example, the state's attention shifted to prosecuting the anti-drug organisation to such an extent that the drug-dealers and gangs had a relatively trouble-free time from the law during 1997-2001, despite a large number of their leaders being assassinated by PAGAD.

5. There are a few reflections that are appropriate from this brief sketch:

    1. Post-transition societies are very complex, and a sophisticated analysis of the dynamics of the process is vital to strategic interventions. The SA experience to date demonstrated the importance of a sense of fairness in the introduction of new crime-related policies in post-transitional societies: Fairness relating to the balance of rights of the accused, the victim and the broader community. But also fairness to the officials whose job it is to implement the new policies and programmes. If they aren't considered as key players and kept on board in the formulation of the policies, their demoralisation and ideological resistance to the changes can frustrate the entire enterprise, putting greater pressure on the state to resort to draconian, paramilitary and emergency-type measures. I believe that this is true for all types of transition, be it negotiated transitions, or 'implosions of the old regime' transitions.

    2. HR organisations thus have to play a suitably complex role: Holding the state to account for abuses (SA still has two deaths in police custody, or as a result of police action, per day); assisting the state with analysis, skills training and policy development; and contributing to legislation implementation and monitoring. Walking together in learning about post-transitional dynamics. This brings the confrontational role into tension with the advocacy and partnership roles. In the early phases most NGOs played the assistance role, but since the 'executive presidency' of the Mbeki era (1999) a more adversarial relationship is developing with the state. The 'bulldog ministries' (Police and Justice) have adopted a go-at-it-alone lets-get-tough approach and have distanced themselves from the media and NGOs.

6. The strategic interventions in 1 above need to have short, medium and long term components, so that everyone knows that it is going to take a while to address the high-crime problems. This will prevent the government from lurching from one fire-fighting project to another, where all that changes is the name of the operation. And the role of not only the government needs to be spelt out but all role-players in the post-modern partnership crime-prevention style.

7. It is important to examine the method by which the state transformation took, or is taking place. Trying to move too fast for the capacity of the bureaucracy can have, and has had, negative consequences. The bureaucracy goes into resistance or overload mode and becomes the obstacle to transformation. If it does so unevenly, the system gets out-of-synch and the workers in one part of it get demoralised by the others. That in turn generates public distrust and can result in vigilantism and negative perceptions of the system which inclines a weak state (which the transforming states inevitably are in the criminal justice arena) to resort to tougher legislation or implementation strategy. The blockages in awaiting trial are the most common consequence as

the move from confession-based prosecutions to evidence-based prosecutions requires a different method of operation, for which the professionals aren't equipped. Similarly, moving too slowly can also generate negative fallout. Seeing that there is as yet no template for the transformation of the bureaucracy, it is important that popular expectations are managed more realistically throughout the process. There is a tension between the state wanting to show successes against crime in the short term and bringing the bureaucracy along with it.

8. The state no longer has monopoly of HR abuses: Civilians generate armed quasi-militia in the form of taxi warlords fighting for scarce income opportunities, vigilantes and street gangs. HR abuses have to be seen in wider context than before. Violence becomes the 'economic' commodity with which to improve competitive advantage and increased market share, or to bring about an entry into the market. Violence adopts a distinct economic value in the context of a weak state and blocked opportunities in the economy.

9. Crime is a very broad catchall term. It needs to be disaggregated so that more sophisticated and nuanced strategies can be adopted towards different forms. Accordingly, a response against rape and other sexual assaults, the scourge of SA, will have to be very different from a strategy that looks at other crimes generated by poverty and desperation. Similarly, crimes of the powerful, and corruption, require different alliances, so there is scope for a range of different types of organisations to play their part.

10. HR organisations should provide the state with ideas and arguments about successful crime prevention and greater efficiency of the criminal justice system. Vera Institute has piloted two important projects for the Ministry of Justice: A pre-trial project which substantially raised the efficiency of the justice system in coming to a well-informed decision about bail, and thereby reducing prison overcrowding and the likelihood of dangerous suspects being released on bail. Similarly, it ran a successful two year car-hijacking investigation-cum-prosecution project in the area where hijacking was the highest in the country. Sadly, the hand-over to the state was botched by the state which promoted the newly skilled staff to other departments and units where their 'hijacking' expertise was not needed.

11. Similarly HR organisations can and should research international successes in crime reduction that do not resort to draconian measures. For example, the victimised public does not care what happens to people in prison as long as they are warehoused out of harm's way. But they need to understand that in many countries life imprisonment does not literally mean life. Inmates will return to civil society some day and therefore re-integrative and rehabilitative training needs to take place.

12. The unproven effectiveness of the death penalty also needs to be placed in the public debate by expert organisations so that searches for alternatives can take place.

13. Some NGOs in SA have taken it upon themselves to assist the different parts of the criminal justice system to operationalise new legislation. It entails ensuring that the new tasks in new laws are incorporated into the job-description of the police, for example, and that the new tasks are included in the promotion criteria rather than being perceived as a goodwill gesture to the public by a few conscientious cops. Such operationalisation training is now increasingly taking place ahead of the promulgation of the new law so that the police do not lose face when new laws remain unenforced for years because of bad synchronisation of promulgation and training.

14. Since 1999 SA introduced a new policy that all new laws had to be presented to parliament with projected cost implications so that budgeting and staffing needs could be assessed in the parliamentary discussions. This has been very important as it has enabled the synchronisation of budget cycles and implementation time-tables.

15. Human rights organisations should become involved in monitoring the implementation of new laws/initiatives so that the public debate can be informed by credible success indicators and that government statistics are not the only source of knowledge on the topic.

16. Similarly, most countries that have an authoritarian past have little understanding about social crime prevention. Crime prevention to them means a security agency response. HR organisations need to research for examples of successful social crime prevention projects and feed them into the public debate, or even convene the public/private partnership to implement them.

17. The method of staging, funding and implementing social crime prevention needs to be developed which suits the social capital of a country. In SA, state-civil society partnerships are common. They draw on the expertise and resources of all levels of government as well as the NGOs and CSOs through localised forums such as Community Policing Forums, Community Safety Forums and development forums. In my view it is desirable to have a National Crime Prevention Strategy, but some countries have opted for lesser projects along similar lines such as Uganda's Chain-linked project. Malawi intends developing a NCPS in due course.

18. Of critical importance, of course, is the calibre of leadership at all levels in a society. If a country, province or city has leadership which is prepared to try experiments and is open to suggestions about how to manage crime better without derogating from HR principles, CSOs and HR organisations have a good chance of protecting their interests while keeping crime at manageable levels. One can reduce the FEAR of crime without actually reducing the incidence of crime. Information emerging out of victim surveys is very important here. It can let people know under what circumstances they are likely to be victimised.

19. A good relationship to the media or control of one's own media is obviously crucial in this field in which perceptions play such an important role and where the bad-luck stories can be balanced with crime prevention