

## Unfinished Business

### The architecture of police accountability in South Africa

By David Bruce

#### Introduction

The African National Congress that emerged in South Africa after its unbanning in February 1990, the return of its exiled members and 'surfacing' of those who had been operating underground, was a political party with little expertise in the field of policing. But the first formal positions on policing issues that emerged from its 1992 policy conference, articulated in the ANC policy document *Ready to govern*, gave substantial emphasis to police accountability. Not only did this say that the new police service would be 'accountable to society and the community it serves through its democratically elected institutions' but also that policing should be 'based on community support and participation' and that policing priorities would be 'determined in consultation with the communities they serve'.<sup>1</sup>

To some degree these ideas were carried forward. An elaborate architecture of oversight of police was established by means first of the 'interim' Constitution that came into effect on 27 April 1994,<sup>2</sup> and then by the 1995 South African Police Service Act<sup>3</sup> and the 1996 'final' Constitution.<sup>4</sup> Police in South Africa are indeed by law accountable to democratically elected institutions.

At first it may also have appeared that direct accountability to communities was to become a central building block of policing in South Africa. Major emphasis was given to the role of Community Police Forums (CPFs) in the 'interim' Constitution, their foremost function described as 'the promotion of accountability of the Service to local communities.'<sup>5</sup> But there was one factor that trumped all others in shaping the structure of control of police that emerged in South Africa. The police had been principal instruments of maintaining apartheid and were seen as potentially a key threat to the

transition, particularly if they remained in the hands of regionally powerful groups opposed to full democracy.

Police reform, it was understood, needed to take place at a national level. Fearing that 'the devolution of powers to the regions would insulate lower levels from change' the ANC believed that the South African Police 'could only be reformed from the centre'.<sup>6</sup> At a conference in 1992 for instance, one of the key architects of ANC policy on the police argued that a regionalised system of policing 'would lead to jurisdictional problems and inadequate civilian control' and that 'a more centralised force would also ensure that uniform standards could be applied to police conduct'.<sup>7</sup>

The ANC's position was thus that a regionalised system of policing 'would be dangerous as it would allow transformation to take place at different speeds across the country and would offer the opportunity for regionally-based political parties to use the police for their own ends'.<sup>8</sup> It therefore resisted any model of government that conceded substantial levels of regional autonomy in relation to the police. This, it feared, would enable regions to resist its transformative agenda, at worst feeding into the danger of regional instability and secession. Ironically, despite the fact that their erstwhile political masters were in favour of a regional system<sup>9</sup>, senior South African Police (SAP) officials who were involved in discussions over the structure of policing in South Africa were inclined to align themselves with the ANC position, as regionalising the police would undermine their own 'ability to control change'.<sup>10</sup>

This paper raises questions about whether the strongly centralised system of governance of police that has emerged in South Africa as a result of decisive influence of these concerns continues to be functional to policing in South Africa. As a result of the process of en masse recruitment over recent years the SAPS now employs over 190 000 people, making it one of the biggest police services in the world.<sup>11</sup> Centralised political control over such a large bureaucracy may have drawbacks such as limiting the potential for responsiveness, innovation or new ideas. In the US for example it is apparent that the highly decentralised system of policing has supported innovation and experimentation and the advancement of policing. This paper is not however concerned to advance the US or any other model of policing governance but to focus on the current architecture of control of policing in South Africa and examine questions about possibilities for strengthening this architecture in such a way as to support a greater degree of flexibility, innovation and responsiveness within the policing system.

Anticipated amendments to the South African Police Service Act may provide an opportunity for reconceptualising the approach to governance of the police. If there are possibilities for strengthening accountability then it is important that these be identified or a key opportunity may be lost. This paper is therefore concerned to explore questions concerning the architecture of accountability and control over the South African Police Service<sup>12</sup> with a view to strengthening the democratic nature of this control. A major part of the paper examines the historical experience with CPFs and the question of the potential for CPFs to serve as instruments of accountability. Thereafter the paper briefly discusses other options for consolidating local level accountability of police before focusing on the question of provincial powers in relation to policing, particularly in relation to the issue of provincial influence on policing policy and the appointment of the provincial commissioner.

The paper argues for an incremental approach to the devolution of control over policing that focuses on strengthening the powers of the provinces. Capacities to direct policing at the local level, the paper argues, are too uneven and underdeveloped and models that idealise the idea of local level control are unrealistic. There is greater potential to strengthen the existing provincial secretariats and the provincial executives should be provided with powers to develop policing policy in so far as this does not conflict with any national policing policy, as well as greater powers over the appointment of the provincial commissioner. Before engaging with these issues the paper engages with the meaning of the term accountability, arguing that in discussing accountability there is a need to differentiate between a 'limited' and a 'fuller' meaning of the term.

## The meaning of accountability

Though the two issues are not completely distinct this paper is concerned with the accountability of police 'organisations' rather than that of individual police officers. The type of police accountability that is the focus of this paper is therefore concerned with 'the broader organisational policing policies' and with 'overall priorities, resource allocation and policing styles' rather than 'the accountability of individual policing agents as they go about their day-to-day activities'.<sup>13</sup>

Accountability very loosely is about answerability – who one answers to, what one is required to answer to them about, and so on. Though the meaning and interpretation of the term has been expanded on at much greater length<sup>14</sup> for the purpose of this paper it will be adequate merely to differentiate between two meanings of the term.

- In the first, more limited, use of the term to be accountable means that one has an obligation to explain and, implicitly, respond to concerns or queries that may be raised relating to one's explanation.
- In the second fuller use being accountable to someone means being subject to their authority – not only that one has to explain things to them but that one takes direction from them.<sup>15</sup>

Depending on the sense in which the term is used it therefore potentially has substantially different meanings. In its more limited sense accountability of the police, to the community for instance, might merely have been understood to imply that in relation to the police obligation to cooperate and work in partnership with communities, the communities had a bit of power to demand explanations from the police about the approaches and policies they were implementing. Accountability in this sense is concerned with issues of communication, the provision of information and implies some level of transparency. Inherent to it is a reciprocal dimension in that the process of communication requires that the police answer to, and thereby implicitly hear, community concerns and so it carries within it a dynamic of inclusion.

This nevertheless falls short of what is implied by the term in its fuller meaning. In the latter sense it is not just about inclusion but about power and control. If CPFs, for instance, were to be an instrument of accountability in the latter sense then this would imply that the police answer to and receive direction from them. By implication, in this example, CPFs would then be in a position of authority over police and involved in the formulation of policing policy.

## Community Police Forums

### *The perfect formula – CPFs and the South African transition*

It seems reasonable to argue that one of the most successful aspects of efforts to transform police in mid-1990s South Africa was the establishment of Community Police Forums (CPF's). In a context of the widespread animosity and distrust between community members and police in the immediate aftermath of apartheid, the creation of CPFs at each police station in South Africa provided a setting for representatives of community formations and police to 'find each other' and work through some of their mutual mistrust and antagonism. More broadly their establishment sent out a powerful signal that police would henceforward need to work in a manner that involved acknowledgment of community perceptions and taking on board the concerns of community members. Though the initial interactions between community members and police within CPFs were often fraught with tensions<sup>16</sup> and multiple sources of frustration on both sides, within a relatively short period of time CPFs helped facilitate a shift in perceptions of the police. Not that public attitudes to the police became uniformly positive. But to a significant degree the public assessments would revolve around questions of the efficiency of police and criminal justice 'service delivery' and integrity (corruption) whilst oppressive police behaviour became far less significant as a public preoccupation, other than in the case of 'outsider' groups such as black immigrants, sex workers (or at least those involved in street soliciting), and marginal young men involved in criminalised or semi-criminalised lifestyles.

CPFs were not the sole reason for these shifts. The police transformation project of the mid-1990s was multi-dimensional. It included, for instance, changes on the symbolic level (including a new rank system, uniform, insignia and colour for police vehicles), a new training curriculum reflecting an emphasis on human rights standards and, as indicated, the establishment of an elaborate though often ineffectual machinery of oversight of which CPFs were understood to be a part. Along with the integration of the former South Africa Police (SAP) with ten homeland police forces to form the SAPS there was also considerable emphasis on improving the representation of black and female South Africans in the higher rank structure.<sup>17</sup> Nevertheless it would seem that CPFs played a central role in this process, initially in providing a forum for antagonisms to be resolved, more gradually, in many communities, enabling police to establish alliances with community power brokers and other community members amenable to working with them.

The concept of CPFs may be seen to have emerged from developments in policing in 'Western' countries. In the preceding decades the concept of 'community policing' had emerged as the central concept shaping police reform in the US and England, stimulated by perceptions that the key challenge facing police was that they needed to be able to engage more closely with community members and 'lessen their distance from the community'.<sup>18</sup> In England and Wales 'police community consultation groups' of one kind or another (some of them called community police fora) had been established by all 43 police authorities particularly after the 1981 Scarman report on riots in Brixton foregrounded issues of community relations.<sup>19</sup> CPFs then were an example of 'policy transfer'. In the context of the times they seemed to be, and in some ways were, the ideal instrument, custom-made for the South Africa of that time.

### ***Shifts in the constitutional and legislative framework***

Those directing police reform initiatives in South Africa clearly saw the concept of community policing and specifically the idea of 'community police forums' as a key dimension of the reform process. The significance attached to them is reflected in the fact that they were provided for at some length in policing provisions of the Interim Constitution (Act 200 of 1993). This indicated that it would be necessary for provision to be made for CPFs in terms of the Act which, it was required, would be passed by Parliament regulating the South African Police Service.<sup>20</sup> First mentioned of the possible functions of these forums, the Interim Constitution indicated, was to be 'the promotion of accountability of the Service to local communities and cooperation of communities with the Service'.<sup>21</sup> This would appear to suggest that at least some of those formulating these provisions subscribed to a belief that CPFs would be instruments of accountability in the fuller sense of the word, that through CPFs the local policing agenda would be community driven and community 'owned', and that CPFs themselves were therefore an instrument for civilian control over the police.

But even between the passing of the Interim Constitution in late 1993 and that of the SAPS Act in early 1995 there appears to have been a downgrading of the importance attached to the 'accountability' function of CPFs. No doubt also reflecting the impact of a different drafting team<sup>22</sup>, by means of the SAPS Act of 1995 'partnership', 'cooperation' and 'communication' were the functions of CPFs given pre-eminence in the first three clauses of the section on the functions of CPFs. Accountability was now downplayed being relegated to a secondary place in the fifth sub-clause of the section.<sup>23</sup> The new 1996 Constitution<sup>24</sup> made no mention of CPFs. This was in some ways appropriate. CPFs were now institutionalised by means of the SAPS Act. But it also reflected the fact that they were no longer seen as a central component of the architecture of control over the police.

### ***Disputes over the meaning of accountability***

The importance and meaning of the accountability function of CPFs was not only an apparent source of contestation within constitution- and legislative-making processes but also more broadly. Whilst no one who wished to maintain political credibility would really have disputed that there was a need for accountability to communities, some of those involved in the process of police reform in the mid-1990s would have emphasised the fuller meaning of the term whilst others would have

focused on the more 'limited' one. Contestation over the meaning of accountability was therefore a question tinged with ideological dimensions. For some accountability was largely in effect a means of facilitating the flow of information and therefore a necessary adjunct to cooperative working relationships. For others accountability was part of a commitment to a deeper form of democracy in which the SAPS would be transformed through becoming, in a deep sense, instruments of the community. This implied that CPFs would become something potentially more radical, what Gordon describes as a 'public-empowering opportunity that would help consolidate the South African democracy'.<sup>25</sup>

As early as 1992 a report of the 'Community Policing Working Group'<sup>26</sup> expressed serious reservations about the idea of direct community control over police.

Because of the prevalence and nature of community conflict and the lack of a tradition (or the difficulty in the context of repression) of accountability, community control over policing poses dangers. Complete local autonomy of policing in the South African context raises the spectre of the police being drawn into intergroup conflicts as participants rather than mediators and 'problem solvers'. This concern arises from the experience of organic 'community courts' and civic controlled self-defence units or anti-crime initiatives which have often represented the interests of small and powerful sectors of the community through coercive and violent means to the detriment of human rights, increasing fear and intimidation.<sup>27</sup>

Nevertheless, when CPFs actually started being established many CPF members believed that, by virtue of their participation in these forums, they now had direct authority over the police.

Within the SAPS many officers regarded [CPF] as a necessary evil, required to bring citizens in contact with the police, but having little impact on the day-to-day conduct of policing. Disputes arose between community police forum members and the local SAPS as to the operational independence of the police. Community police forum members demanded that the police do what they said, and the police refused. Legally, the police were generally on solid ground, but that enhanced the impression that community policing forums were simply 'toy telephones'.<sup>28</sup>

Similar tensions are referred to by Minnaar:

A survey of police officers in Gauteng Province revealed that the introduction of community policing simply meant to them that the community should help them in fighting crime. This was diametrically opposed [...] by communities especially those who had suffered at the hands of the old apartheid police [...] Most communities viewed the new form of (community) policing as an opportunity to change the balance of power in their communities and make the police accountable to community needs and structures (via the CPFs). Accordingly, especially in the poorer and largely black communities (townships), community policing was 'about the control of the police and much less about preventing crime'.<sup>29</sup>

Both approaches to interpretation of the term may be seen to have had risks associated with them but they were risks of a different order. In relation to the first more limited meaning of the term the principle risks were perhaps that accountability would be superficial – that police would go through with the motions of accountability whilst continuing in much the same way. In the second fuller deeper meaning of the term the risks would have been quite different. Echoing some of the concerns raised more than a decade earlier by the Community Policing Working Group, Julia Hornberger states that:

If we take the idea of community policing seriously – in the sense that it provides a mechanism through which the policing and justice system are indeed shaped by the people and therefore achieve popular legitimacy – then we will have to be aware that we will produce forms of violence that are not those usually envisaged by the Constitution.<sup>30</sup>

Those who thought of police accountability to community in more radical terms than it has been suggested, may have had a relatively benign, even romantic view of communities.

'The very idea of community can make us ignore the reality that communities are hugely divided, socially and economically uneven, and competitive, and that crime is not something alien to, or outside of, communities. As long as we simply see crime as 'ugly and repulsive' to communities [...] we neglect the fact that it is woven into the everyday moral logics of those communities who have experienced a historical distance from the formal law.<sup>31</sup>

One of the consequences of the CPF experience then was to highlight issues relating to the nature of 'communities' in South Africa. In a society characterised by high levels of inequality, in part a consequence of many years of institutionalised racial discrimination, it is not surprising that there should be wide differences between communities in terms of not only their normative character, but also in terms of the resources and capacities which they are able to deploy. These differences have been one of the defining features of the CPF experience in South Africa.

### *The longer-term experience of CPFs*

CPF's were therefore a core component of the police transformation project of the mid-1990s, and, it may be argued played a crucial role in reconfiguring the police-community interface in the mid-1990s. Nevertheless commentators have often been unenthusiastic or even completely dismissive about the role that they have played in the longer term. Many appear to believe that CPF's have generally been ineffective. In so far as they have been able to play a more dynamic role, it is generally believed, this has been almost exclusively in middle-class communities. In these communities CPF members are often more educated (including for instance retired lawyers or other professionals) and therefore able to contribute substantive skills to the assistance that they provide to police, whether this is in taking statements in the charge office or raising funds to better resource police stations. In so far as they have been effective, it is generally believed, this has been in providing assistance or other support to police. In poorer areas, including many of the areas most affected by violence and crime, it is generally believed that CPF's have been largely ineffective. Minnaar for instance describes these as 'either non-active, dysfunctional, or merely a police controlled talk shop'<sup>32</sup>. According to a 2005 report on police accountability, whilst some CPF's have been involved in 'proactive partnerships' for others 'the relationship has deteriorated to the point of consisting of desultory and irregular meetings with police commanders, which gain the respect of neither the public, nor the police'.<sup>33</sup> (Note that the CPF's being discussed here are the CPF's that have a formal relationship with the SAPS. A to some degree discrete phenomenon is that where the title of 'CPF' is appropriated by informal community groups who act largely independently of the police as vigilante groups sometimes 'for hire')<sup>34</sup>.

A slightly more positive view is provided by Maroga who carried out interviews with CPF members and police representatives connected to the Alexandra, Parkview and Brixton police stations in Johannesburg. Though this is a very small sample of police stations only one of them is in an elite area. In each of these stations, her study concludes, 'the police were expected to explain their activities and plans relating to the policing of the station precinct'.

As CPF's have no authority over the police station management, the accountability is neither directive in nature, nor does it seek to control police activities. Overall, the accountability relationship between the local police station and the CPF's is indirect and appears to be dependent on the nature of the relationship between the station's management and the CPF's at a particular time. [...] A common dynamic appears to be that as long as CPF's are working in relatively close partnerships with the police stations, there is a relative free flow of information from police management to the CPF's. Relationships tend to break down when members of the CPF's become overly critical or start to play what is perceived to be too much of a watchdog role.<sup>35</sup>

CPFs then, it is suggested by Maroga, are instruments of partnership. They can perform a function as instruments of police accountability in the more limited sense of the term. In this type of role they are not necessarily subservient to the police or intimidated by them and do ask questions of them, in so doing articulating their concerns to police. At the same time one should be cautious about assuming that the concerns that they articulate are those of the 'community'. Some CPFs members may be 'tuned in' to community perceptions and concerns but CPFs as a general rule cannot be seen to represent communities. Minnaar indicates for instance that community elections were tried

but became a waste of time because very few community members turned up at community meetings, particular interest groups, such as minibus taxi associations got their members voted onto a local CPF thereby dominating proceedings with their narrow crime concerns, or even criminals infiltrated and became privy to policing activities in their areas of operation.<sup>36</sup>

Rather than being composed of community representatives they often 'consisted of local individuals who had a specific interest in improving police performance'<sup>37</sup>. But whether representative or not, CPF members are as a general rule not able to provide the type of guidance to police that would be appropriate were the police to be accountable to them in the fuller sense of the term. In this respect the experience in South Africa echoes that with community consultation forums in Britain

when the public do make suggestions, these often appear of limited value in shaping the annual policing plan: individuals either repeated their immediate local concerns (parking, dog mess, etc); or suggested 'concerns of the moment' from the national media (road rage, school security). Such contributions tended to be unhelpful for strategic planning at a force-wide level.<sup>38</sup>

The key issue here is that members of the public who are involved in policing on a part-time voluntary basis are rarely able to provide coherent direction to police.

Most citizens do not know much about police work and how police do their work, yet they are expected to hold them accountable. How do you begin to hold someone accountable for something you yourself know little about?<sup>39</sup>

This, for instance, has also been an issue in the United Kingdom (England and Wales) where

[t]he key mechanism of local police governance, the police authority, still does not have sufficient resources of staff or expertise to provide an effective independent review of, and input into, local policing policies.<sup>40</sup>

This is not to say that engaging with the perspectives and experiences of residents is not important to local level policing. But providing coherent direction to police requires people who are dedicated and capacitated to perform this role and are able to compare different sources of information rather than simply imposing their own views. As a rule CPFs have not been able to engage with police in this way. They are therefore potentially instruments of accountability in the more limited meaning of the term but not instruments for accountability in its fuller sense.

In so far as CPFs have been at all effective in South Africa this may primarily be seen as having been in relation to their partnership function. As Maroga observes 'the relationship between the CPFs and the police station management in each of these cases was relatively positive' and the CPFs 'were involved in projects that assisted the police such as fund raising, assisting with the running of victim empowerment centres and mobilising communities to attend various sub-forums'. It would therefore appear that it was these factors that facilitated the flow of information from police to the CPF members rather than formal obligations on the part of the police. The principal value of CPFs then is the partnership function that some of them perform. When they perform this function it is conducive to the development of a relationship between police and community members which facilitates accountability in the more limited sense.

## **Other options for locally based accountability**

If CPFs then are not effective instruments for local level accountability (at least in the fuller sense of the term), can local government perform this role? Shaw for instance argued that this was a viable option. 'What has remained lacking is real power – the ability of elected local representatives to tell the police what to do, control the budget for them to do it, and effectively measure their performance thereafter'.<sup>41</sup> The current situation is that policing, at least in so far as it applies to the SAPS, is not within the mandate of local authorities (some local governments have established municipal police services and the authority to control these subject to the framework put forward in legislation).<sup>42</sup> Ironically one of the groups that have resisted greater local government authority over policing have been CPFs.

In early drafts of the 1998 White Paper on Safety and Security it was suggested 'that elected local governments should have more powers in determining how policing should be conducted in their areas' but this 'was fiercely opposed by some leaders of community police fora who felt their position were being usurped. The proposal in the White Paper was subsequently watered down to suggest that elected local representatives should be encouraged, not compelled, to sit on the fora'.<sup>43</sup>

One factor that might have been seen as providing support for this type of argument was the existence of the police 'Area' command structures at sub-provincial level with at least some of these having a rough alignment with some local government areas of jurisdiction. The 'Area' offices had jurisdiction over groups of a dozen or more police stations. But subsequent to these having been dissolved in the mid 2000s<sup>44</sup> there is now no equivalent authority structure of police at this level. The idea put forward in the 1998 White Paper referred to by Shaw, that local government work through CPFs, implies dispersed engagement by ward councillors rather than coherent local government driven policy direction provided to police command structures with equivalent areas of jurisdiction.

But even if the political will existed to re-establish the 'area' command structures, this time with areas of jurisdiction more consistently aligned with local government, this would only bring into focus the key problem. Accountability of police requires people who are dedicated and capacitated to perform this role. Up to this point South Africa has struggled to sustain the capacity to perform this function consistently and effectively at any level of government. Considering the more generalised crisis that has characterised local level government it can hardly be productive to allocate jurisdiction over policing to it at this point.

If neither local government nor CPFs are likely to provide credible instruments for controlling police at local level, what then about the Community Safety Forums provided for in an official policy document?<sup>45</sup> Essentially these are intended as mechanisms for coordinating the work of government departments, and other formations, in addressing local safety issues that 'traditional policing could not and does not deal with'.<sup>46</sup> With areas of jurisdiction aligned with local government they are intended to involve representatives of a variety of components of government (including amongst other the SAPS and local government) as well as CPFs.<sup>47</sup> At this point it may premature to say whether or not these are likely to be successful. There may be some useful functions that they perform. Nevertheless they are essentially local level governance structures that police are supposed to participate in towards addressing broader societal issues. If they function effectively they may impact on how the police carry out their work. But they are not intended as instruments of authority over police.

## **The powers of the provinces in policing matters**

The 1996 'final' Constitution not only made no reference to CPFs. It also reaffirmed and consolidated the centralised control over the SAPS that had already been entrenched by means of the 'interim' Constitution. Most distinctively policy making power was now explicitly vested in the national minister though he or she was required to formulate national policing policy after consulting the

provinces.<sup>48</sup> The consolidation of centralised national control over the SAPS was not only at the political level through the sole policy making power exercised by the minister but also, within the police, through the office of the national commissioner appointed by the president 'to control and manage the police service' in 'accordance with the directions of the national policing policy.'<sup>49</sup> The national commissioner was also to be responsible for the appointment of provincial commissioners. Though it is required that this be done with the concurrence of the provincial executive, the national minister is responsible for mediating between the parties in case of a deadlock.<sup>50</sup> This tips the balance of power, in the event of a dispute, towards the national level. Whereas the Interim Constitution made express provision for provincial legislatures to 'pass laws not inconsistent with national legislation regarding the functions' of the SAPS<sup>51</sup> the new Constitution appears to have further restricted the capacity of the provincial legislatures to pass legislation pertaining to policing matters.<sup>52</sup> A key feature of the new constitutional and legislative provisions was that a fairly elaborate architecture for oversight of police was established.<sup>53</sup> Whilst emphasising accountability, these provisions, to a very large degree, centralise control over police at national level.

The logic of these provisions is now carried forward into the newly passed Civilian Secretariat for Police Act.<sup>54</sup> Rather than being instruments of the provincial government, the Act appears to conceive of the provincial secretariats as in many ways instruments of the national Civilian Secretariat for Police. In setting out the functions of the provincial secretariats the Act for instance provides that:

17. (1) In order to support the objects of the [national] Civilian Secretariat referred to in Section 5 and subject to the principles of cooperative governance and intergovernmental relations contained in Chapter 3 of the Constitution, each provincial secretariat must –
- (a) align its plans and operations at the provincial sphere of government with the plans, policies and operations of the [national] Civilian Secretariat; and
  - (b) integrate its strategies and systems at the provincial sphere of government with the strategies and systems of the [national] Civilian Secretariat.<sup>55</sup>

While the Constitution does provide room for intervention by provincial governments on policing matters, ultimately 'provincial governments find themselves on a slippery slope in terms of the exact nature of their authority over the SAPS'.<sup>56</sup> Provincial executive may indeed intervene in terms of Sections 206(3),<sup>57</sup> (5)<sup>58</sup> and (6)<sup>59</sup> and sections 207(3)<sup>60</sup> and (6).<sup>61</sup> But, in terms of the Constitution, the provincial executives have to tip toe around these provisions for fear of being accused of taking over the policy development role of the national minister. In so far as they wish to venture into questions of policy they may only do so in terms of the parameters set down in Sections 206(1), (2) and (8) which in combination mean that their ability to shape policy is exclusively through attempts to impact on the national policy that the national minister is supposed to develop. This creates a number of difficulties:

1. Despite the provisions of Section 206(1) and 206(2) policing policy is essentially set at a national level and this therefore places each provincial executive in the position of having to follow a somewhat circuitous route in ensuring that national policing policy is sufficiently responsive to the needs of their province.
2. The policy process provided for dramatically complicates the burden imposed on the national policy-making process. In addition to clarifying national level imperatives the national policy has to accommodate the various policy-making needs of the nine different provinces. Accommodating these differences is fairly cumbersome with the likely result that national policy is often delayed. This undermines the potential for responsive policing policy.
3. Finally in so far as any policy developed at national level does not engage with specific issues on which there is a need for provincial policy, the provinces are effectively neutralised in developing policy to address these issues.

The provincial level offices of the SAPS are critical instruments for management of police on a province-wide basis. What follows from this is that it is also critical that the provincial police management is subjected to meaningful oversight and that provincial governments have the clear

authority to input on and engage with provincial police commanders around provincial policing policy.

The significance of the role of the provincial executive in policy making is clearly somewhat different from that of the provincial legislature. In terms of Section 199(1) the SAPS is constituted as a 'single police service'. As a single police service it may not be appropriate for the SAPS to be governed by different pieces of legislation. However the need for responsiveness motivates that the provincial executive should be able to set policing policy, particularly in so far as such policy does not conflict with any policy which has been set at national level. Clarifying the authority of the provincial executive over the SAPS would also empower the provincial legislature indirectly partly as the legislature can impact on provincial level policy making but also because there would be greater clarity as to what the MEC is accountable to the legislature for.

It is not clear if it is still relevant, as was the case in the mid-1990s, to ask whether any initiative towards strengthening provincial powers may pose threats to stability? While 'ensuring a peaceful transition' is no longer a key political imperative and South Africa appears to be a stable country, it would be foolish to try and prophesy exactly what the future holds for South Africa or to completely dismiss the potential for localised or provincially based groups to seek to 'use the police for their own ends'. A cautious approach to addressing this issue to expanding provincial policy making powers would therefore be to follow the example of the policy making power of the British local policing authorities. These have the power to make policing policy in so far as this is not in conflict with national policy.<sup>62</sup> This would mean that the national minister would maintain the authority to overrule provincial policing policy measures.

Alongside strengthening the policy-making powers of provincial government with respect to policing it would be valid to also provide the provincial government with a clearer role in relation to the appointment of the provincial commissioner, while operating clearly within the framework of consultative and cooperative governance. Instead of the national commissioner having the power to appoint the provincial commissioner, this should be done by the provincial premier acting with the concurrence of the national commissioner. This would be an important step towards confirming the accountability of the provincial commissioner to the provincial government.

As Shaw notes 'the devolution of policing power does carry some dangers of greater corruption or misuse of the police by local politicians'.<sup>63</sup> Increasing the powers of the provincial executive in relation to policing matters would also increase the scope for inappropriate interference with policing at the provincial level. Such interference or influence can potentially undermine the integrity of policing, for instance by preventing investigations into favoured individuals or otherwise using police resources for inappropriate purposes. The strengthening of provincial policy-making powers therefore should be accompanied by measures to ensure the transparency and accountability of provincial executives in directing the police. For instance legislation could provide that copies of all provincial directives to the police are presented to the national minister and the provincial legislature.

Provincial governments should therefore have greater direct authority in relation to matters of policing policy in so far as this does not conflict with national policy. Flowing from this it also proposes that the provincial commissioner should be appointed by the provincial premier in consultation with the national commissioner. The central proposals made in this paper are not radical but call for a subtle shift in the balance of power intended to strengthen the existing framework so as to address weaknesses within it. This is apparent from the fact that:

1. The proposals retain the central role of the national minister in setting national policing policy. They provide the national minister with the authority to over-rule provinces in relation to matters of policing policy with the provinces being able to set policy that does not conflict with national policy. This is therefore a framework for a dual system in which the national minister puts forward a national policy while provincial governments are able to put forward complementary policies which are more finely attuned to the needs of the provinces.

2. The proposals relieve the national minister of the burden of having to develop a national policy which accommodates all the nuances of the different provinces. This enables the national minister to set policy in terms of imperatives at the national level.
3. The proposals enhance the potential for policing policy which accommodates national level imperatives but is also directly responsive to the specific needs of each province. Provinces will be placed in a position where they can develop policy in terms of their identified needs whilst ensuring that this is consistent with national policy. This circumvents the need for the cumbersome process provided for in the current constitutional provisions where provinces have to go through the national minister in order to ensure that provincial needs are accommodated in the national policy.
4. The proposals seek to enhance transparency by ensuring that provincial directives to the police are presented to the national minister and the provincial legislature, thereby reducing any risks of provincial political interference which may follow from increasing provincial authority.

A further benefit of these proposals is that they clarify the authority of provincial governments in relation to policing matters so that provincial governments may hold police accountable to policies in so far as these do not conflict with national policy. In so far as it not only clarifies, but also increases their authority in relation to policing matters, it is appropriate that they should appoint the provincial commissioner as they will become more directly responsible in the event that he or she may fail to perform.

## **Conclusion – strengthening governance of police in South Africa**

Not all democratic societies have decentralised policing systems. Countries such as Nigeria, France, South Korea and El Salvador amongst others all have a national policing system.<sup>64</sup> In addition in some countries such as the United Kingdom (specifically England and Wales) that do have a decentralised policing system, the tendency over recent years has been for central government to exert greater control over police through establishing uniform standards.<sup>65</sup> Nevertheless there continues to be space for local authorities in the United Kingdom to shape policing policy in so far as this does not conflict with the policy directives of the Home Office. A survey of international policing and international policing trends therefore does not support any simple formula as an ideal system for governance of the police. Likewise in South Africa provincial and even more so, local, governments have often been characterised by problems and it would obviously not be appropriate to suggest that any wholesale decentralisation of control over police in South Africa will magically improve policing. It would be a mistake to adopt a simplistic dichotomy that stigmatises centralised democratic control over police and applauds the devolution of such control.

If we step back and ask the question ‘how do we strengthen governance of police in South Africa?’ the first observation that would appear to be pertinent is that the current architecture of control over the police is indeed highly centralised. In terms of an incremental (and therefore more practical and pragmatic) approach to strengthening accountability the appropriate point at which to focus at this point is therefore in the devolution of powers to the nine provinces.

As Shaw stated a decade ago, ‘The SAPS remains one of the largest police agencies in the world; given its size it is often an unwieldy and, on the ground, unaccountable instrument. [T]he current system is too centralised’ being the ‘result of a political bargain rather than any sensible review of what policing in South Africa should look like and do [and] sits uncomfortably within the context of democratic South Africa’.<sup>66</sup>

If we do not idealise local level accountability it nevertheless remains true that the SAPS, now even more so than it was at the time at which Shaw was writing, is simply too large an organisation for control over policy to be exercised in a meaningful way at a central level.

At the same time the experience with civilian policy-making in the policing field has not been overly reassuring. Perhaps the most credible example of civilian policy making to date, the 1998 White Paper on Safety and Security, was unfortunately not aligned with the political will to implement it and so had little impact. Shortly afterwards 'institutional restructuring of the Department of Safety and Security [...] resulted in a significant disempowerment of the national secretariat' with 'the oversight functions envisaged for the Secretariat retained by the SAPS'.<sup>67</sup> Efforts dating back to 2009, to re-establish the national Secretariat, of which the new Act is a manifestation, provide hope that a credible national policy-making capacity will be re-established, though it may require some time for it to become fully operational in this respect.

In addition to the national Secretariat it would appear more realistic to hope that this capacity can be nurtured within the provincial Secretariats associated with the nine provincial governments than at 'local' or CPF level. Knowing that provincial governments themselves are not all of equivalent caliber suggests that devolving some policy-making powers to the provinces would be likely to have mixed results. This would mean that some provinces would be likely to become more responsive than others. In so far as others may lag behind, a national policy standard could continue to provide the default position. The national secretariat could also focus on providing policy support to those provinces experiencing greater difficulty in this regard.

With one or two exceptions, up to this point state institutions capable of credible policy-making for police in South Africa have not been sustained. It therefore would not be true to say that the policy-making and accountability arrangements provided for in the current oversight architecture have resulted in many missed opportunities. Nevertheless it remains true that the SAPS, now more than ever, is simply too large for a single centralised body to develop meaningful policy that will enable it to deal with the various challenges that it faces in a responsive way. It is therefore important that a greater level of flexibility be introduced into the policy-making system than currently exists.

Empowering provincial government might also support greater local level accountability. A greater level of flexibility in the system might enable experiments with different models of more localised accountability aligned with the features of specific provinces. This is probably more realistic than the current 'one size fits all' approach to policy-making in which the national policy-making process has to make policy that is appropriate to all nine provinces, 54 or more areas of local level government jurisdiction,<sup>68</sup> and upwards of 1 200 police station 'precincts'.

## Notes

- 1 African National Congress, 1992.
- 2 Act 200 of 1993.
- 3 Act 68 of 1995.
- 4 Constitution of the Republic of South Africa, Act 108 of 1996. The Act came into effect on 4 February 1997.
- 5 Section 221(2)(a).
- 6 Shaw, 1994: 213.
- 7 Shaw, 1994: 214.
- 8 Shaw, 2002: 28.
- 9 Shaw, 1994: 216.
- 10 Shaw, 2002: 28.
- 11 The SAPS is for instance bigger than the French National Police which numbers less than 150 000 employees, though it may be noted that France also has another parallel national policing system, the Gendarmerie numbering in the region of 100 000 (see [http://en.wikipedia.org/wiki/National\\_Police\\_\(France\)](http://en.wikipedia.org/wiki/National_Police_(France)) and [http://en.wikipedia.org/wiki/Law\\_enforcement\\_in\\_France](http://en.wikipedia.org/wiki/Law_enforcement_in_France) both accessed 9 September 2011). The Indonesian National Police also numbers about 150 000 members though this is supplemented by various local police numbering more than 300 000 ([http://en.wikipedia.org/wiki/Indonesian\\_National\\_Police](http://en.wikipedia.org/wiki/Indonesian_National_Police)).
- 12 The combined personnel strength of the five metropolitan police agencies may be estimated at roughly 7 500. This means that in combination these five police departments account for roughly 5% of the total personnel strength of the SAPS whose serving police members (excluding civilian staff) number over 150 000 and whose total staff complement (including civilians) is over 190 000 members.
- 13 Jones, 2003, 605 citing Reiner, 1995.
- 14 Jones, 2003, 605 quotes Day and Klein (1987) to the effect that accountability 'has been described as a

“chameleon” term with a range of meanings, including “answerability, responsiveness, openness, efficient estate management, not to mention participation and obedience to external laws” (Jones, 2003, 605). See also Dixon, 2000).

- 15 The distinction made here resembles that referred to by Newburn and Reiner (referencing Marshall 1978) who refer to the juxtaposition between ‘explanatory and cooperative’ and ‘subordinate and obedient’ styles of accountability. With the introduction of centralised performance targets these are anyway both displaced by a ‘calculative and contractual’ system of authority (Newburn and Reiner, 2007: 926).
- 16 As shall be seen in this paper, the key sources of tension was around the meaning of accountability.
- 17 See for instance Bruce, 2002, Rauch, 2000, Shaw, 2002.
- 18 Eck, 1994 quoted in Tilley, 2003: 311.
- 19 Elliott and Nicholls, 1996, 1 state that ‘These groups exist under a variety of names, including police community liaison committees or groups, police community fora, and police community partnership groups. See also [http://en.wikipedia.org/wiki/Scarman\\_report](http://en.wikipedia.org/wiki/Scarman_report) (accessed 11 August).
- 20 Section 214 of the ‘interim’ constitution.
- 21 Section 221(2)(a). The relevant provisions are Sections 221(1) and 221(2) which in full provided that
  1. The Act referred to in section 214 (1) shall provide for the establishment of community- police forums in respect of police stations.
  2. The functions of community-police forums referred to in subsection (1) may include: (a) the promotion of accountability of the Service to local communities and co-operation of communities with the Service; (b) the monitoring of the effectiveness and efficiency of the Service; (c) advising the Service regarding local policing priorities; (d) the evaluation of the provision of visible police services, including (i) the provision, siting and staffing of police stations; (ii) the reception and processing of complaints and charges; (iii) the provision of protective services at gatherings; (iv) the patrolling of residential and business areas; and (v) the prosecution of offenders; and (e) requesting enquiries into policing matters in the locality concerned.
- 22 The Interim Constitution was written through the Codesa multi-party negotiation process. The 1995 SAPS Act was written by a technical team in the Ministry of Safety and Security composed of police lawyers and civilian lawyers, led by Azhar Cachalia (Janine Rauch, email correspondence, 3 September 2011).
- 23 Section 18 of the Act provides in part that: (1) The Service shall, in order to achieve the objects contemplated in section 215 of the Constitution, liaise with the community through community police forums and area and provincial community police boards, in accordance with sections 19, 20 and 21, with a view to (a) establishing and maintaining a partnership between the community and the Service; (b) promoting communication between the Service and the community; (c) promoting co-operation between the Service and the community in fulfilling the needs of the community regarding policing; (d) improving the rendering of police services to the community at national, provincial, area and local levels; (e) improving transparency in the Service and accountability of the Service to the community; and (f) promoting joint problem identification and problem-solving by the Service and the community. (2) This Chapter shall not preclude liaison by the Service with the community by means other than through community police forums and boards. <http://www.info.gov.za/view/DownloadFileAction?id=70987> (accessed 8 August)
- 24 Act 108 of 1996.
- 25 Gordon, 2006: 219.
- 26 This involved a number of participating institutions but was established under the auspices of the Centre for Criminal Justice, University of Natal (Pietermaritzburg) and Harvard University (Marais, 1992: 1).
- 27 Marais, 1992: 22-23.
- 28 Shaw, 2002: 31
- 29 Minnaar, 2010: 32 citing at the beginning of the quotation Mistry, 1997 and at the end Brogden and Nijhar, 2005: 138.
- 30 Hornberger, 2008: 13.
- 31 Ibid, 12. See also Pelser, 1999: 7-8.
- 32 Minnaar, 2010: 33.
- 33 Open Society Foundation for South African and Open Society Justice Initiative, 2005: 16.
- 34 See for instance Bearak, 2011.
- 35 Maroga, 2005: 23-24.
- 36 Minnaar, 2010: 35.
- 37 Ibid.
- 38 Elliott and Nicholls, 1996: 11.
- 39 The quote is from Maroga, 2005: 13 in which it is said to be a point made in ‘Bayley, 1994’ (no page reference provided).
- 40 Jones, 2003: 622.
- 41 Shaw, 2002: 122.
- 42 Section 64, SAPS Act, 68 of 1995 as amended.
- 43 Shaw 2002: 121.
- 44 See for instance Omar, 2007: 25.
- 45 Civilian Secretariat for Police.
- 46 Ibid.: 4.

- 47 Ibid.: 15-16.
- 48 Section 206(1).
- 49 Section 207(1) and (2).
- 50 Section 207(3).
- 51 'Interim' Constitution, Act 200 of 1993, Section 217(3).
- 52 Schedule 4 of the Constitution deals with 'functional areas of concurrent national and provincial legislative competence'. Police are listed as one such area but only 'to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislature legislative competence'. Chapter 11 does not explicitly set out any areas of provincial legislative competence'. Potentially areas of such competence must presumably therefore be inferred from Section 206 and specifically Section 206 (3).
- 53 Other instruments for civilian oversight or control provided for in the 1996 Constitution included: the national Parliament, the provincial MEC (member of the Executive Council (MEC)) and provincial executive more generally (see inter alia Section 206(4), 206(6) and 206(8)). Apart from their oversight of the provincial executives engagement with police (part of the general oversight function), the powers of the provincial legislature were in many ways restricted to the power to require the provincial commissioner to appear before it to answer questions (Section 206 (9)). Potentially strengthening the National Minister's ability to provide policy direction provision was made for the creation of a police civilian secretariat 'to function under the direction of the Cabinet member responsible for policing' (Section 208). The 'independent mechanism under civilian control' to ensure that complaints of alleged criminality and misconduct by police were properly investigated' that had been referred to in Section 222 of the Interim Constitution was now referred to only tangentially (Section 206(6)). Like CPFs though this was now formally provided for in the 1995 SAPS Act though these provisions are now amended by the Independent Police Investigative Directorate, Act 1 of 2011.
- 54 Act 2 of 2011.
- 55 <http://www.info.gov.za/view/DownloadFileAction?id=146470> (accessed 8 September 2011).
- 56 Bruce, Newham and Masuku, 2007: 46.
- 57 In terms of Section 206(3) of the Constitution, 'each province is entitled (i) to monitor police conduct; (ii) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service; (iii) to promote good relations between the police and the community; (iv) to assess the effectiveness of visible policing; and (v) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.'
- 58 In terms of Section 206(5) of the Constitution, provinces 'may investigate, or appoint a Commission of Inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community', though it 'must make recommendations' to the Minister of Safety and Security.
- 59 The authority provided for in Section 206(6) is to lodge complaints with an 'independent police complaints body established by national legislation' (i.e. the ICD or IPID) regarding 'any alleged misconduct, or offence committed by, a member of the police service in the province'.
- 60 Section 207(3) requires that the national commissioner appoint the provincial commissioner 'with the concurrence of the Provincial Executive' and provides for the Minister of Safety and Security to mediate if they cannot reach agreement.
- 61 The Provincial Executive has the authority in terms of Section 207(6) of the Constitution to institute proceedings for the removal etc of the provincial commissioner. In terms of Section 8 of the SAPS Act, 68 of 1995, the Provincial Executive would do this by notifying the Minister of Safety and Security that the provincial commissioner has lost the confidence of the Provincial Executive.
- 62 REF (Newham & Bruce).
- 63 Shaw, 2002: 145-6.
- 64 For other examples see the links contained on the page [http://en.wikipedia.org/wiki/National\\_Police](http://en.wikipedia.org/wiki/National_Police) (accessed 9 September 2011).
- 65 Though see the discussion paper released by the British Home Office in 2010 which is strongly critical of this trend and proposes doing away with centrally imposed performance indicators and targets (Home Office, 2010)
- 66 Shaw, 2002: 144.
- 67 Rauch, 2002: 23.
- 68 Local level government in South Africa includes 'Eight metropolitan municipalities and 46 district municipalities'. However district municipalities are further subdivided into subdivisions known as local municipalities so that altogether there are 279 municipalities in South Africa ([http://en.wikipedia.org/wiki/Municipalities\\_of\\_South\\_Africa](http://en.wikipedia.org/wiki/Municipalities_of_South_Africa) accessed 12 September 2011).

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## **ABOUT APCOF**

The African Policing Civilian Oversight Forum (APCOF) is a network of African practitioners active in policing reform and civilian oversight over policing in Africa.

It believes that the broad values behind the establishment of civilian oversight are to assist in restoring public confidence, develop a culture of human rights, integrity and transparency within the police and promote a good working relationship between the police and the community. It achieves its goal through raising awareness, sharing information on police oversight and providing technical assistance to civil society, police and police oversight bodies in Africa.

APCOF utilises the expertise of its membership to promote learning and networking on the continent. It is actively engaged in country reform projects, regional dialogues, and is working at a continental level to prioritise police reform.

APCOF was created in 2004. Its members are drawn from state and non-state institutions.

### **THE OBJECTIVES OF APCOF ARE TO:**

- Create and sustain public confidence in police
- Develop a culture of human rights, integrity, transparency and accountability within the police
- Promote a good working relationships between the police and the community

### **APCOF WORKS ON A RANGE OF ISSUES SUCH AS:**

- Promoting fair treatment of citizens by police agencies on the continent
- Exchange of information on better practices among oversight bodies
- Promoting the establishment of police oversight bodies where they do not currently exist
- Standard setting for policing and civilian oversight bodies in Africa
- Encouraging and supporting the formation of regional networks to promote police reform
- Supporting local reform initiatives at promoting civilian police oversight

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