

MCH 91-74-1-2

The Relation Between Police and Government:
The Quest for Impartial Policing

by

Clifford D. Shearing

Community Law Centre
University of the Western Cape

&

Centre of Criminology
University of Toronto

An earlier version of this paper was presented at the Conference on Policing in the New South Africa, Centre for Criminal Justice, Law School, University of Natal, Pietermaritzburg, June 4-6th, 1991.

I am grateful to my colleague Philip Stenning for his comments on an earlier draft of this paper.

Introduction

This is the first of a series of essays that will consider critical issues in policing a transformed South Africa both during the transition period and beyond. These essays are being prepared as part of the Democratic Policing Project located at the Community Law Centre at the University of the Western Cape. A major theme of this series will be the quest for impartial policing in South Africa.

This paper examines the merits of establishing a police force that is independent of government as a strategy for guaranteeing impartiality. Canada's experience with this strategy will be used both to examine its features and to propose an alternative. The Canadian experience has been selected for emphasis both because it is directly relevant to the dilemmas facing South African and because Canadians have been particularly sensitive to the strengths and weaknesses of the idea of police independence.

The paper begins with a review of the De Klerk government's vision of an impartial police. It then turns to an examination of the rationale for, and implications of, police independence. It concludes with its rejection and a proposal for a monitoring strategy, based on the ombudsman idea, as a more acceptable democratic alternative.

The South African Context

President De Klerk in his startling February 2nd 1990 speech

set a new strategic direction for the South African government. This initiative seeks to radicalize the Nationalist government's "winning the hearts and minds" strategy, developed during PW Botha's reign, by promising to revoke discriminatory legislation to enfranchise all South Africans so that they can elect a new democratic government. As part of this initiative De Klerk has proposed a more limited role for the South African Police as an essentially crime-fighting force. He spelt out his vision for a new South African Police and the part they were to play in his initiative in a speech to senior police officers in January 1990 just a few days before his famous speech.

The country is presently engaged in a major struggle both inside and outside its borders. This struggle may develop in one of two directions. It can either become a racist struggle where black people engage whites in battle and where the result will, inevitably only be determined after much bloodshed. The alternative is that it is a struggle about fundamental values We can't continue doing things in the old ways. We have to find new solutions to ensure that we move towards goals which will find growing acceptance with the majority of the population. ... We can't continue managing the security situation by merely waiting for someone to stick out his head before we grab him and wait for the next one. ... Where the forces gather for the battle of Armageddon in SA; an Armageddon where -- even if blood flows ankle-deep in our streets and four or five million people have been shot dead -- the problem will be just as great as before we've begun shooting. ... We have the responsibility to determine what is going to happen in the next 50 to 100 years. If we fail we will not be able to avoid destruction and annihilation.

...

The time has come to take the political initiative and mobilise the silent majority in South Africa behind peaceful solutions for the country's problem. ... But the silent majority are being intimidated by radicals which force us to accelerate the process of reform to accommodate them.

...

Let me assure you. The government has not become weak-kneed or changed its views on the dangers of communism. It does not entertain the thought of allowing a system which is incompatible with our belief in certain fundamental values We are not naive. We don't underestimate the enemy. It has all to do with methods. It is not a question of whether we want to secure the future of SA but how we are going to do it (South African Press Association News Bulletin, 27/1/90).

He spelt out these new methods and their consequences for the police in the following terms.

Up to now the police have been required to perform two types of functions. The one is to handle typical crime situations -- murder, rape, theft, etc. This is the task which will always be that of a police force all over the world. But you also had other tasks to fulfil, and that was a control function connected to a specific political policy and the execution of laws. Let us take swimming for example. It is not a crime to swim on a beach, but it is one to commit murder. It is not criminal to swim but it is to steal. You don't harm someone when you swim but you do when you commit fraud. The nature of beach control differs fundamentally from that of crime prevention, and you can draw this parallel to a number of issues of which it has been required of the police in the past to act on political matters. Situations which had nothing to do with crime but everything to do with the ordering of society. In the future you will be required to police the beaches to prevent theft and assault but you will never again be required to say to someone: "Hey, you are not allowed to swim here because of the colour of your skin." When people gather for political purposes you will be required to maintain law and order and to ensure that the laws of the land are not transgressed. But you will no longer be required to prevent people from gathering to canvass support for their views. This is the political arena and we want to take the police out of it. We don't want to use you any more as instruments to reach certain political goals. We as politicians must take the full responsibility for politics. We must stop requiring of the police to lay in the first line of trenches in the political battles. As ordinary citizens policemen have the liberty and freedom to vote for the party of their choice. But in the execution of their duties they must ensure that

normal activities -- whether it is swimming or holding political meetings -- take place in an orderly and lawful fashion. This is the direction we are taking and I want you to make peace with this new line. ... And we ask you to help us maintain law and order in such a way that decent people can search for a solution that will bring lasting peace to SA. We want to take you out of the political cross-fire and free your hands to concentrate on the prevention of crime.

Whatever one might think of De Klerk's broader strategy there is no doubt that a South African Police, genuinely committed to protecting all South Africans from predatory crimes and to promoting the conditions for normal political activity, would be a vast improvement. The question is how is this to be achieved so long as the police are the coercive arm of a government that is a partisan player in the negotiations over the future of South Africa that are now under way? This problem was put into sharp relief, no doubt unintentionally, by the Deputy Minister of Law and Order, J Scheepers in an address to a graduating class of police recruits in Cape Town recently when he said:

The government and the SAP have as their objective the creation of a totally professional police force -- apolitical and impartial, yet loyal to the government of the day (The Cape Times, 19/6/91).

How can the police be apolitical and impartial if they are loyal to a government that was not democratically elected and that is so evidently a partisan player in the transformation of South Africa?

Although the scepticism and the dilemma this question

expresses is particularly acute in South Africa it is not peculiar to this country. It also bedevils representative democracies. It is to this experience that the paper now turns.

Accountability and Democratic Governance

Accountability, understood as the requirement to answer to an authority and to accept its directions, is an essential feature of governance. A government cannot govern effectively unless the agencies of the state are accountable to it. A central feature of democratic governance is the idea that government is answerable to "the people" and subject to their control. Indeed, a political system is said to be democratic to the extent that government is accountable to "the people."

In a "representative democracy" government is answerable to, and ultimately controlled by, elected representatives who in turn are accountable to the electorate. Within this system the institutions of government that make up the state are accountable to "the people" to the extent that they are accountable to government.

Representative governments that operate within a "rights culture" conceive of the political process as a whole as being limited by a framework of fundamental rights that impose limits and requirements on government. These conditions do not abrogate the basic principles of democratic accountability.

The Public Police and Democratic Governance

The public police as purveyors of physical force used to maintain the order promoted by government are a very consequential institution. Given this and the importance of the principle of democratic accountability just outlined we would expect to find in place, in a society like Canada that considers itself to be a representative democracy, clearly established mechanisms for ensuring that the public police are accountable to government. This is not so. The Canadian police are not accountable to governments in Canada in any clear, direct or simple way. Indeed they are, for the most part, so independent of governmental and legislative control that they could almost be described as constituting a fourth branch of governance along with the executive, the judiciary and the legislature. Canadian governments simply do not have clear or unambiguous control over their police.

Not only are the Canadian police unaccountable but Canadians generally are not apologetic about the independence of their police. Rather the independence of the police is something many Canadians are proud of and point to as one of the great strengths of their public police. Indeed the concept of "police independence" from government has for many years been a sacrosanct idea in Canada, in much the same way as it has been in Britain.

This feature of the Canadian situation raises doubts about the notions of a democratically accountable police. If Canadians have developed institutions that deliberately insulate the police

from government should the police in a new democratic South Africa be answerable to, and controlled by, government?

The answer developed below is an emphatic "Yes." The police in South Africa should be directly and unambiguously accountable to a democratically elected government. To develop this answer it is necessary to outline the arguments that have been mounted to justify and promote the idea of an independent police.

Police Independence and Impartial Policing

Support for an independent police arises out of a concern over the partisan nature of representative governments and a corresponding desire to create a police service that cannot be used by governments to promote their partisan interests at the expense of the "common good." The fear that a police service that is directly controlled by government will not police impartially arises out of a deep seated suspicion of the motives of all governments including ones within representative democracies.

A government, within a representative democracy, is formed by a political party that promotes policies that reflect the interests of its constituents. It is very rare for this constituency to include a majority of citizens. This is so for at least two reasons. First, the citizens who elect a government in a representative democracy seldom constitute a majority and, indeed, often comprise no more than a small minority. Second, the policy of the government is often influenced by lobby groups

who work behind the scenes to persuade governments to promote their sectarian interests.

To place the public police directly under the control of a representative government is, thus, to put in the hands of a partisan set of politicians a powerful resource that can, and very likely will be, used to promote partisan interests incompatible with the "common good." Such partisan control will, it is argued, not only undermine the legitimacy of the police but will ultimately undermine the process of democratic governance itself (precisely De Klerk's concern in the passages cited above). To prevent this from happening, so the argument goes, it is necessary to distance the police from government by making them independent.

Accountability to the Law and Original Authority

Police independence involves the claim that the police should take their direction directly from the law of the land rather than from a political authority. This claim rests on the assumption that the law comes closer to representing the will of the people than the directions of particular governments because it is the product of successive governments as well as the reflections over time of the judiciary. The law, it is argued, may not perfectly reflect a "common good" but it comes closer to doing so than the inevitably partisan directions of particular governments. In this conception law is given an autonomous character that separates it from government and is accorded a

"voice" that speaks to the police directly on behalf of "the people."

Within this conception public policing will be impartial to the extent that the police are independent of government and take their direction from the law. Police officers are viewed as having an "original authority" that comes to them directly from the law. Perhaps the most famous expression of this doctrine is the statement by Lord Denning, in Britain, who argued that a chief constable,

is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can the police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. (1968, 1 All England Reports 763, at 769.)

Police Discretion

The central problem with the idea of the police taking their direction from the law directly is that the "voice" of the law is seldom clear or unambiguous. The law requires interpretation. This requirement compels police officers to exercise discretion in deciding how precisely they will exercise their duty to enforce the law. This discretion creates a space that can be used to undermine the very impartiality the notion of police independence seeks to guarantee.

The response that has been developed in response to this problem of discretion is "police professionalism." The idea here is that partisan influence, either directly from government

officials or more indirectly through the police sub-culture, can be forestalled if the police are oriented to an impartial professional ethic, or code of conduct, that governs law enforcement. Professionalism, it is argued, contributes to the development of impartial policing because it establishes standards and directions for police action that are independent of partisan interests; standards that will ensure that the police will act in the "public interest." In a nutshell the argument is that even if you can't trust politicians you can trust the police because they are professionals.

A professional police force, it is argued, can be created through training that informs police officers of the standard of conduct expected of them. This training is seen in much the same way as any other form of professional training. Just as a lawyer or a doctor has to learn the ethos and the skills of their profession so does a police officer. Police training that binds police officers to a code of conduct is the source of an impartial, independent police who take their direction from the law and interpret it from the independent perspective of a law enforcement professional.

Police Independence as a Mask for Partisan Policing

This set of ideas about police independence and police professionalism has been vigorously challenged on the grounds that it creates a body of police officers answerable to no one but themselves. Questions have been raised about the ability of

the police (or anyone else for that matter) to police themselves. In Canada these concerns have been raised most vocally by disadvantaged groups (women, indigenous people, blacks, homosexuals, poor people) who have pointed out that as a matter of fact an independent, professional police does not police impartially. Instead they use their power of coercion, under the protection of the doctrine of police independence, to promote and maintain an order of inequality.

The Institutionalised Hypocrisy of Policing

These criticisms have given rise to a host of academic investigations of the way in which police discretion is exercised. A central finding of these studies is a pervasive hypocrisy in which the liberal vision of equality before the law is routinely violated by the police as they systematically privilege high status groups and disadvantage those at the bottom of the socio-economic ladder. Police deviance from liberal legal and professional standards, it has been argued, constitutes a subterranean mechanism for maintaining socio-economic inequality that works against the rhetoric of equality before the law. This deviance is promoted by tacit support from supervisors, and the law itself, within a "blind eye" culture. An important institutional feature of this deviance-promoting mechanism are internal systems for handling public complaints against the police -- justified in terms of independence and professionalism -- that cover-up rather than root out police

deviance.

Making an Independent Police More Accountable

These criticisms have given rise to demands for external systems to oversee the police response to complaints against them. Two models of police oversight have developed in Canada: an interventionist model and a review-and-recommend model that draws its inspiration from the ombudsman idea. They differ in terms of whether or not the oversight entity has the authority to overturn decisions made by a police chief. That is, they differ in terms of whether they leave the command structure intact or whether they allow the decisions of senior police officers to be overruled by a review body. In both these systems the police have retained an initial right to investigate complaints and respond to them.

Both these models question the notion of police independence though they do so in different ways. Interventionist mechanisms that permit the oversight authority to overrule a chief of police challenge the notion of police independence by questioning the police assertion that they should govern themselves. However, in doing so they compound rather than solve the problem of police accountability by establishing an authority that can override the judgements of a chief of police that is itself not subject to political review. What results is a bifurcated command structure with both a police chief and an oversight body having the final say in police discipline depending on whether the disciplinary

action arises from a complaint or not. Thus, while interventionist systems challenge the autonomy of the police chief they do not challenge the notion of police independence in any fundamental sense. Instead they create another authority responsible for the management of the police that is itself not politically accountable.

In the review-and-recommend model of police oversight the review authority can recommend a course of action to the head of the police but the final decision as to what will be done rests with the police. The essence of this model is that it seeks to make the decisions of the police visible and compels them to justify their decisions (in particular decisions not to accept the review authorities recommendation) publicly to a multi-party political authority in the form of a legislature. This system directly confronts police independence by making the actions of senior police officers visible to the legislature who can, and do use, the review body's report to make police operations a subject of political debate.

Within this model, however, the doctrine of independence continues, in the final analysis, to insulate the police from political control for while the review body can compel them to answer to a legislature for their actions the legislature is limited in what it can require a government to do. The advantage of the review-and-recommend model is that it compels officials to answer for their actions. Its limitation is that it is only as effective as the control structure it seeks to enhance by

compelling officials to answer for their actions.

The Challenge of the Canadian Experience

In summary the situation in Canada is one of a growing dissatisfaction with the notion of police independence coupled with a cautious reluctance to abandon it in the absence of an alternative mechanism that will guard against the very real dangers associated with direct government control of the police. The challenge the Canadian experience identifies is the need to locate an alternative system for limiting the extent to which the police can be used as a partisan tool that does not leave them ultimately unaccountable.

While the Canadians have not solved this problem, they have developed an oversight initiative, based on the ombuds idea, that begins to challenge the doctrine of police independence and suggests the rudiments of an alternative solution. What the above reading of the Canadian situation anticipates is a continued retreat from the doctrine of police independence towards a system that insists on governmental control and responsibility.

The precondition for the ultimate abandonment of the doctrine is likely to be an oversight mechanism that provides legislators with the information they require to hold governments accountable for all aspects of police activity and, equally importantly, for the directions they give the police. What seems likely to emerge is a system that requires governments to remain

aloof from police handling of particular cases but that permits, and indeed requires, intervention in exceptional cases. The most recent step towards realising the above precondition is the growing acceptance of the idea of proactive monitoring that is not merely complaint-based. A proactive approach permits a review authority to act on its own initiative to review police action and the structures and processes that support it. If this idea takes root Canadian review authorities will develop an audit-like function that will require them, on a routine basis, to comment on such things as training, recruitment, resource allocation, and the like.

Lessons for South Africa

What the above analysis suggests is that the hope that impartial policing can be achieved through the doctrine of police independence is a chimera that should be rejected by South Africans. If an independent police has not achieved its intended aim of impartial policing in a country like Canada with a long democratic history it is unlikely do so in South Africa where the police traditionally have been employed to deny the majority of South Africans the most basic human freedoms. All that this strategy would do in South Africa would be to embed the practices and values of the old regime within the new state.

While this might be an outcome favoured by those who are resisting the transformation of South African into a democratic state it is not one that the democratic movement can countenance.

Police independence is simply not an option anyone seriously interested in transforming the South African state should contemplate as a device for establishing an impartial police that respects human rights.

Given this conclusion, how can the vision of an impartial police that promotes fundamental human rights be realized in a new South Africa?

Re-thinking Impartiality

The first step to be taken in considering an alternative to police independence is a rejection of the utopian vision of the police as non-political that is often implied in calls for an impartial police. To police is by definition to promote an order and order is always political in the sense that it seeks to institutionalize a way of doing things that realizes particular interests and values. All state police seek to guarantee a politically endorsed order. What differs is the legitimacy of the order they promote.

While an impartial police in the sense of a police outside of politics is illusory a more realistic meaning can be given to the notion of impartiality. This is a conception of a police who enforce the order endorsed by the state without bias, that is, without allowing their own or others values and preferences (including those of the government of the day) to persuade them to deviate from this order in their enforcement practices.

Impartiality in this sense is independent of legitimacy.

Thus, for example, a police operating under the old apartheid order would be considered impartial to the extent that they acted to maintain the inequalities it sought to realise without fear or favour. Within this conception an impartial police are only as legitimate as the order they seeks to guarantee.

Towards an Accountable South African Police

The critical question facing South African policing, and one that embraces both these concerns of legitimacy and impartiality, is:

how is the role set out for the police by De Klerk to be realised given the undemocratic character of his government?

The conclusion suggested by the above analysis is that this goal can only be achieved if two fundamental conditions are met.

* First, the existence of a legitimate authority committed to these goals that is required to, and is capable, of directing and controlling the police.

* Second, the establishment of a mechanism both for assessing the extent to which police actions are in accord with the legal and professional standards and for making this assessment visible to the people as a whole through their representatives.

The first of these conditions will be met in the long term by the establishment of a democratic polity in which the government of the day has the authority to direct police action but is required to make public any directions with respect to the handling of individual cases. During the transitional period it

requires the establishment of a body responsible for policing that can legitimately claim to represent the people. For instance, an interim government accountable to a democratically elected constituent assembly,

The second condition, can be accomplished by the establishment of a review body with the authority to review every aspect of police activity it wishes either in response to complaints or on its own initiative. In the long term this body would report to a new South African legislature, or legislatures if responsibility for policing is delegated to regional or local governments. During the transition period it should be responsible to whatever body is established as the ultimate political authority.

Conclusion: The Road Forward

The second paper in this series will develop detailed proposals for the review body that the second condition requires. It will also address questions to do with the transformation of the South African Police from a force whose focus has been political policing to one committed to ordinary crime-focused policing and free and fair elections.