

**THE CENTRE CANNOT HOLD:
THE ROLE OF SUBNATIONAL GOVERNMENTS IN POLICING IN SOUTH
AFRICA**

by

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DECLARATION

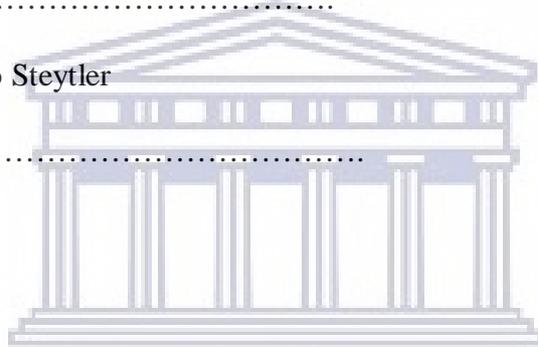
I, JEAN REDPATH, do hereby declare that *The centre cannot hold: The role of subnational governments in policing in South Africa* is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this thesis, all the materials and sources used have been duly and properly acknowledged.

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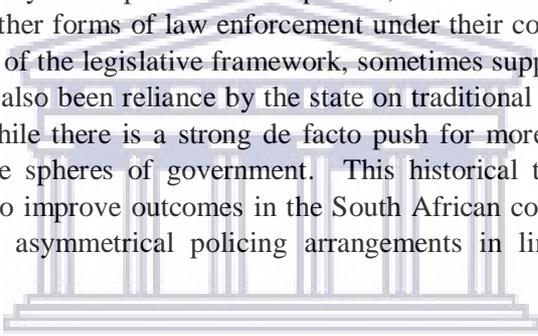
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ABSTRACT

South Africa continues to experience one of the highest crime rates in the world. Crime is unevenly distributed, and the police are not trusted by the majority of citizens. The power and responsibility for policing lies with the national government, through South Africa's negotiated constitutional framework. Only a limited form of policing under local government, severely constrained by onerous requirements, is permitted in the legislative framework. Such centralisation of policing in federal states is theorised to be necessary to avoid partisan policing and armed separatism; to prevent local capture of police by local politicians; to ensure uniformity, equity and democratic change, and to ensure equitable outcomes; and to bring efficiencies of scale to policing. Comparative evidence – and the record in South Africa – suggests theory does not always hold. The reasons for the policing arrangements in South Africa lie with the troubled history of regional policing in the apartheid era, the African National Congress's aversion to federalism, and the desire of the South African Police Service itself to retain its hegemony over policing. Yet like countries with similar arrangements on the African continent, in South Africa subnational provincial governments have engaged in a variety of interventions to support, supplement or direct the national government in policing interventions which have been accepted, tolerated or resisted to various degrees, despite their constitutional "infidelity". Local governments, particularly metropolitan municipalities, have also increasingly stretched the ambit of local policing and other forms of law enforcement under their control to engage in policing activities which stray outside of the legislative framework, sometimes supplanting the national police through necessity. There has also been reliance by the state on traditional leaders to control crime in former 'Bantustan' areas. While there is a strong *de facto* push for more decentralisation, policing remains contested among the spheres of government. This historical trajectory suggests that an appropriate evolution likely to improve outcomes in the South African context is one which permits broadening of the ambit of asymmetrical policing arrangements in line with development and capacity.



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Key words:

Policing, federalism, subnational government, decentralisation, constitutional framework, crime, provinces, metropolitan municipalities, local municipalities, contestation

LIST OF ABBREVIATIONS

AFU	Asset Forfeiture Unit
ANC	African National Congress
CSP	Civilian Secretariat for Policing
DA	Democratic Alliance
DOCS	Department of Community Safety
DSO	Directorate of Special Operations
EFF	Economic Freedom Fighters
FBI	Federal Bureau of Investigation
HDI	Human Development Index
ICD	Independent Complaints Directorate
IFP	Inkatha Freedom Party
IPID	Independent Policing Investigative Directorate
KZN	KwaZulu-Natal
NPA	National Prosecuting Authority
RCMP	Royal Canadian Mounted Police
SAP	South African Police
SAPS	South African Police Service
SIU	Special Investigating Unit
UN	United Nations
UNDP	United Nations Development Programme
US	United States of America



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Chapter 1: Introduction

1.1 Problem statement

1.1.1 Public insecurity impedes South Africa

South Africa's democratic transition sought to create democratic institutions, including the police, which would enable the conditions necessary for sustainable development. Among the necessary conditions for sustainable development is a sufficient degree of public safety and freedom from violence and crime: as the preamble to the 2030 Global Sustainable Development Agenda puts it, '[T]here can be no sustainable development without peace and no peace without sustainable development.'¹

Given the range of factors which may affect crime rates, the criminological literature, particularly that located in the global North, has frequently been pessimistic or sceptical of the ability of traditional policing to exert a measurable ameliorating effect on crime, compared to the operation of other factors.² The converse – that bad policing may worsen public insecurity – is perhaps more obvious and evident: in countries in which the police are abusive, corrupt or ineffective in carrying out policing functions, trust in the police worsens, and public insecurity, including the general level of violence, worsens.³ Trust is key to the effectiveness of policing and is associated with greater public security.⁴

Indeed quantitative evidence is emerging that good policing improves public security; cross-nationally, countries with better police – on traditional measures of police performance – have been found to have lower homicide rates.⁵ Further, the empirical evidence is emerging that certain kinds of policing have measurable ameliorating impacts on crime.⁶ Consequently, a police service operating in

¹ UN General Assembly *Transforming our world : the 2030 Agenda for Sustainable Development* 21 October 2015, A/RES/70/1.

² See *inter alia* Sutherland E & Cressey D *Principles of Criminology* 7ed (1966); Wertheimer R 'Are Police Necessary?' in Viano EC and Reiman JH (eds) *The Police in Society* (1975); Grasmick HG and Bursik RJ (1990) 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' 24(3) *Law and Society Review* 837-861; Moore MH 'Problem-solving and Community Policing' in Tonry M & Morris N (eds) *Crime and Justice: A Review of Research* (1992) 15 *Modern Policing*) 99-158 .

³ See *inter alia* Perez OJ 'Democratic Legitimacy and Public Insecurity: Crime and Democracy in El Salvador and Guatemala' (2003/4) 118(4) *Political Science Quarterly* 627-644; Andvig JC & Fjeldstad OH *Crime Poverty and Police Corruption in Developing Countries* Chr. Michelsen Institute (CMI) Working Paper (2008); UNODC *Crime and Development in Africa* (2005).

⁴ Goldsmith A 'Police reform and the problem of trust' (2005) 9(4) *Theoretical Criminology* 443-470. Sunshine J and Tyler T) 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 17 *Law and Society Review* 513-47.

⁵ Pare P 'Indicators of Police Performance and Their Relationships With Homicide Rates Across 77 Nations' (2014) 24 *International Criminal Justice Review* 254-270.

⁶ See Sherman L and Weisburd D 'General Deterrent Effects of Police Patrol in Crime Hotspots: A Randomized Controlled Trial (1995) 12 *Justice Quarterly* 625-648; Weisburd D, Farrington D & Gill, C 'What works in crime prevention and rehabilitation: An assessment of systematic reviews' (2017) 16(2) *Criminology and Public Policy* 415-449; White MD, Fyfe JJ, Campbell SP & Goldkamp JS 'The police role in preventing homicide: considering the impact of problem-oriented policing on the prevalence of murder' 40(2) *Journal of Research in Crime and Delinquency* (2003) 194-225.

a manner able to create trust and which is effective in carrying out its policing functions would be expected over time to be able to improve public security in South Africa.

Yet South Africa in the third decade of democracy continues to experience levels of violence, indicated by the homicide rate, which places it amongst the most violent countries in the world, while trust in the police remains low and amongst the lowest of all South African institutions in the democratic era.⁷

1.1.2 National government has the mandate to police

The arena of policing and criminal justice is centralised under national government, despite South Africa's multi-governmental structure. A single national police is mandated even though government is structured into national, provincial and local spheres;⁸ traditional leadership is recognised, albeit not as a sphere of government.⁹ National government is responsible for policing, prosecution, administration of the courts, and corrections. The centrality of national government is clear. The governing principles of the security services chapter of the Constitution¹⁰ provide that national security is subject to the authority of Parliament and the national executive,¹¹ and that the security services of the Republic consist of 'a single defence force, a single police service, and any intelligence services established in terms of the Constitution'.¹² The objects of the national¹³ police service are 'to prevent, combat, and investigate crime, to maintain public order, to protect and secure the inhabitants of the republic and their property, and to uphold and enforce the law'.¹⁴

Provincial competence in policing is limited. Schedule 4 of the Constitution contains the functional areas of concurrent national and provincial legislative competence.¹⁵ Although Schedule 4 lists 'police' as a concurrent competence, it limits provincial competence to 'the extent that the provisions of Chapter 11 of the Constitution confer on provincial legislatures legislative competence'.¹⁶ Through this limitation, provincial competence is limited to monitoring police conduct, overseeing the effectiveness and efficiency of the police, promoting good relations between the police and the community, assessing the effectiveness of visible policy, and liaising with the responsible minister.¹⁷

Local government may field limited municipal police services but have no control over the national police. The national police service must be 'structured to function' in the national, provincial and, 'where appropriate', local spheres of government,¹⁸ but there is no direct control by provincial or local government of the national police. Moreover, national legislation must establish the powers and

⁷ Afrobarometer *Survey in South Africa* (2000), (2002), (2004), (2006), (2008), (2011), and (2015) available at <https://www.afrobarometer.org/countries/south-africa-0> accessed 11 November 2019. Trust in police was measured at 35 percent in 2000, rising to 49 percent in 2011 and dropping to 45 per cent in 2015, when it measured slightly higher than traditional leadership but lower than all other institutions measured.

⁸ Section 40(1) Constitution of the Republic of South Africa, 1996 (Constitution).

⁹ Chapter 12, Constitution.

¹⁰ Chapter 11, Constitution.

¹¹ Section 198(d) Constitution.

¹² Section 199(1) Constitution.

¹³ Section 205(1) Constitution.

¹⁴ Section 205(3) Constitution.

¹⁵ Section 44(1)(ii) Constitution. Matters not listed in this Schedule 4 or Schedule 5, which lists exclusive provincial competencies, are national competencies.

¹⁶ Schedule 4, Constitution.

¹⁷ Section 206(3) Constitution.

¹⁸ Section 205(1) Constitution.

functions of the police service¹⁹ as well as the framework for the powers, functions and control of municipal police services.²⁰ National legislation has restricted municipal policing to crime prevention, traffic policing and the policing of by-laws, thus specifically excluding the investigation of crime from their ambit.

1.1.3 National government is failing to meet the crime crisis

Across a range of measures, national government can be said to be failing in its policing mandate. Trends in violent crime have worsened, the number and cost of violent protests are escalating, policing resources are distributed unequally and irrationally, elements of the national police have been corrupted, and ever-fewer crimes result in conviction in a court of law.

1.1.4 Subnational policing is emerging

The explicit provisions of the Constitution place policing in the hands of national government and enjoin each sphere of government to 'respect the Constitutional status, institutions, powers and functions of government in the other sphere'. Significantly, however, the Constitution also provides that the spheres of government are 'distinctive, interdependent and interrelated'²¹ and obligates all spheres of government to 'preserve the peace'²² and 'secure the well-being of the people of the Republic'. Furthermore, the Constitution provides that the objects of local government include promoting 'a safe and healthy environment'.²³

There is evidence that subnational governments have attempted to supplement policing through this complementary role. This is not an unprecedented development on the African continent. While the majority of African countries, including those which are federal, embrace centralised policing, subnational governments are increasingly attempting to close perceived gaps in policing. Nigeria and Kenya provide examples of this trend.

In South Africa, subnational policing interventions have emerged primarily in the wealthier metropolitan municipalities. These municipalities have established metropolitan police services, law enforcement divisions, and traffic policing services, all of which carry out crime-prevention activities. Cities now routinely deploy and monitor CCTV cameras and other forms of technology, as do some wealthier local municipalities. A limited degree of investigation also takes place. Municipalities routinely include safety strategies in their integrated development plans (IDP) or draft specific safety plans for specific locations.

Since 1997 most provincial governments have departments of safety and security, despite the latter having the most limited of mandates. The interventions undertaken by provincial governments have stretched the boundaries of their constitutionally constrained police oversight role. They range from deploying 'force multipliers', such as volunteer 'patrollers', to leadership in intergovernmental strategies. In much of rural traditional South Africa, however, there is effectively no national policing, and justice is accessed primarily through traditional mechanisms. Furthermore, national government seems intent on abdicating its responsibilities in rural areas through measures such as the Traditional Courts Bill and through its failure to allocate sufficient police in traditional areas.

¹⁹ Section 205(2) Constitution.

²⁰ Section 206(7) Constitution.

²¹ Section 40(1) Constitution.

²² Section 41(1)(a) Constitution.

²³ Section 152(1)(d) Constitution.

In summary, policing and public security are primarily a national competence. Crime remains high, and increasingly unequal trends in policing are emerging. Subnational government has attempted to fill the gaps. There appears to be further scope within the constitutional framework for subnational governments to expand the notional bounds of their policing mandate.

1.2 Research question

Within the current constitutional framework and safety and security crisis, what is, and should be, the role of subnational governments? Sub-questions to be examined include:

- What are the theorised advantages of centralised policing, and do these outcomes manifest in practice in federal countries?
- What are the underlying reasons for the centralised policing framework in South Africa?
- What is the nature of national government's failure in policing, and to what extent is the failure intrinsic to the constitutional framework?
- What forms, mechanisms and drivers of subnational policing have come to light?
- What is the potential and desired nature of subnational policing in South Africa?

1.3 Argument

Notwithstanding that it provides for a federal-type system and establishes some precedent for municipal policing, South Africa's negotiated Constitution creates a highly centralised national police system, with municipal policing provided for as an afterthought. The reasons for this lie in apartheid history, police conservatism, and the general political preference of the ruling African National Congress (ANC) for centralisation. In the democratic era, national policing failures related to the centralised framework are evident. Subnational governments, within their available resources, are stepping into the policing gap by seeking to direct policing or by carrying out quasi-policing of their own in response to under-policing or high crime rates. Traditional leaders replace police in traditional areas. Meanwhile, comparative and local evidence suggests that centralisation is not a necessary condition for some of its theorised advantages and has some negative outcomes; as the country develops asymmetrically, a more asymmetrical approach may be required, contingent on capacity and development. The legislative framework should follow the principle of subsidiarity and encourage, rather than impede, incremental asymmetrical devolution of policing powers to subnational governments.

1.4 Chapter outline

The thesis will commence by examining international arrangements in federal states and proceed to consider the legislation and practice at national, provincial and municipal level and in respect of traditional areas. The final chapter will draw conclusions and suggest a model for subnational policing in South Africa.

Chapter 2: Policing in federal states: four case studies

Chapter 2 considers the international literature on decentralised policing and policing in federal states, and applies it to four case studies. The chapter seeks to understand the theorised benefits of centralised policing and how they play out in practice. The case studies are selected as examples of

extremes of policing arrangements and their associated outcomes, to illustrate outcomes in practice of these arrangements against theory. The arrangements for policing in two classic federations, the United States of America (US) and Canada, and two emerging African federations, Nigeria and Kenya, are compared and their respective evolutions traced. The case studies selected share with South Africa historical roots with the former British empire. Among the limited number of federations in existence, the majority of classic federations demonstrate devolution in policing, while emerging quasi-federal nations tend to be centralist in policing. The reasons for centralisation include a desire to prevent the emergence of partisan or corrupt armed forces, and the theory that transformation and equity are better served by central control.

The literature, by contrast, suggests that both decentralisation and asymmetry may be necessary for equitable public security outcomes in diverse federations, and that public safety *requires* decentralisation because federal priorities are seldom aligned to local ones. The case studies suggest that corruption of policing may occur equally in centralised or devolved policing arrangements, and that multilevel arrangements may be necessary for preventing police abuses and holding police accountable in both centralised and decentralised models.

Chapter 3: South Africa's federal arrangements fall short in policing

Policing is highly centralised under the national government, with a limited oversight role for provinces. The chapter traces how this came about, given the overall quasi-federal nature of the Constitution. The degree of centralisation evolved from the apartheid era, with the Constitution of 1996 representing a retreat from the moderate level of devolution formerly provided for in the Interim Constitution, with transformation of police underpinning centralisation.

Chapter 4: Centralised policing fails to deliver, creating a vacuum

The centralised constitutional and legislative framework for policing has created a large centralised national police service. While some transformation has occurred, centralisation has not prevented corruption of the police nor inequity in the distribution of resources. It has not delivered public security either: violent crime and violent protest have worsened, and the investigation and prosecution of crime has faltered, while police abuses and lack of public trust persist. These trends are themselves partly a result of centralisation, as the national police fail to respond adequately to the highly localised crime concerns of provinces and municipalities.

Chapter 5: The provinces want to police

An extremely limited mandate and the competing priorities of provincial competencies have not stopped the provinces from demonstrating a desire to police. More control over the national police and quasi-policing formations has been sought, and the oversight mandate has been stretched. National legislation has burdened provinces with an obligatory role in monitoring. The stronger provinces present a record of intervention nuanced by political control of the province concerned; where such intervention is politically tolerated, the record points to improved performance by the South African Police Service (SAPS).

Chapter 6: The short leash for municipal policing

National legislation provides for municipal policing, which is not nationally funded and is subject to strict gate-keeping requirements and a relatively limited mandate. Law enforcement and traffic policing powers are used in the absence of municipal police. National rhetoric continues to suggest that these should be subsumed under national control.

Chapter 7: Mind the gap: Municipalities step in

The evidence shows that municipalities deploy more public safety officials where national deployment is low and violence is high – if they have sufficient revenue. The number employed in municipal policing is significant, and evidence suggests that it may be more effective to deploy these officials than the national police. The national government, through regulation, has incrementally increased the role and powers of municipal police, particularly in relation to intractable politically difficult policing problems such as public protest, land invasions, and even domestic violence – yet without providing any associated funding.

Chapter 9: The state legislates ‘traditional’ law and order

This chapter explores how in legislation both national and provincial government have sought to retain old-era laws or legislate in favour of making traditional leadership – the so-called ‘fourth sphere’ – responsible for ‘law and order’ in communal areas, notwithstanding a constitutional framework that places this obligation on the national police and in spite of the fact that traditional leadership is not an organ of state. The impetus for empowering traditional leadership in this way appears to be closely related to electoral politics.

Chapter 9: Shadowland policing

A shadowland is an indeterminate borderland between places or states. Areas of the ‘fourth sphere’ are such places. This chapter explores the policing practice in these areas. Here, policing by the national police is negligible and accompanied by an explicit reliance on traditional leadership. Trends in such ‘traditional policing’ range from abusive rural despots meting out ‘punishment’ to their ‘subjects’, to the existence of modern, self-funded quasi-police forces replete with vehicles and helicopters.

Chapter 10: Conclusion

South Africa exemplifies trends common to emerging federal states – policing is centralised but is contested by subnational governments, largely due to failures in national policing that in turn are partly a result of those centralised arrangements. Subnational governments vary considerably in their capabilities and in the revenue at their disposal for policing interventions. In rural areas of deep national policing neglect, traditional leaders hold sway.

The evidence suggests an incremental approach to increasing local policing in an asymmetrical fashion would be appropriate for South Africa. In a strengthened intergovernmental framework, national policing would be improved through being subject to external standards and accountability structures, provinces would have stronger oversight powers and deploy more “force-multipliers”, and local government would build on the record of local policing, with the support of provinces.

1.6 Literature survey

1.6.1 International literature

International literature on the role of subnational governments in policing is not extensive; indeed, much of it refers explicitly to the absence of academic attention to the subject. This review seeks to focus on literature which considers the issue of policing in a multi-tier government context. The

intention is to highlight literature which informs the analysis and to demonstrate that the current thesis makes a novel contribution.

Policing arrangement in federal states

Ajay Mehra brings together in a book²⁴ a collection of papers presented at a 2010 conference in India entitled 'Public Security in Federal Systems' and supported by the international non-governmental organisation (NGO), Forum of Federations. The papers in this book are not systematic treatments of the issue, however, and deal with discrete issues that challenge the local delivery of public security, such as organised crime and terrorism, in particular countries, or the delivery of public security in particular contexts, such as urban metropolitan North America and India. The papers focus mostly on India and none of them considers the situation in African federations.

The North American paper in Mehra's book was written by possibly the most prolific scholar in the field, Christian Leuprecht, who has also co-edited what at the time of this writing is the most recent book on the subject. Leuprecht's preferred mode of analysis is the country-comparative approach, which is also adopted in the book edited by Todd Hataley, Mario Kölling and himself, a work that claims to be 'the first book to offer an overview of the federal structures and processes that reconcile domestic security with fundamental democratic norms'.²⁵

The book, which provides a chapter on each of nine federal nations including South Africa, 'proposes a broad comparative review of constitutional, institutional and legislative frameworks that underpin security across nine federations, and the implications that follow for institutional design, public administration, and public policy'. The editors note that 'domestic security policy and the state's monopoly of force have been neglected as fields of rigorous comparative research', resulting in a 'relative dearth of policy, administrative, and institutional innovation' in safety and security. The book seeks to understand how 'state structure affects the performance of security policy'.

In a previous work in 2012, Leuprecht²⁶ provides an international perspective on the relationship between public safety and security and the multilevel governance of security in federal states. He does not deal here with quasi-federal countries like South Africa in which responsibility for public safety is constitutionally located almost entirely at the centre.

Foreshadowing their editing of their comparative assessment of public security, Leuprecht, Kölling and Hataley,²⁷ in their chapter in another collection on federalism, point out that the relationship between federalism and security 'has yet to be examined systematically through a comparison across several federal countries'. They conduct what they term a 'cursory survey' of public security across selected countries to gauge the extent to which successes or problems are a function of federalism; whether they may be improved upon by making changes to the federal structure; and the extent to which successes and problems are caused by factors other than federalism.

They discuss the theoretical rationales for centralisation of policing in federal states, including that emergent federal state may not wish to allocate to territorial groups power over armed forces, as new states may be concerned about the potential for local police to be corrupted by local politicians in the absence of central control; in countries where there has formerly been police neglect or abuse of

²⁴ Mehra AK (ed) *Public Security in Federal Systems* (2014).

²⁵ Leuprecht, C Kölling M & Hataley T (eds) *Public Security in Federal Polities* (2019).

²⁶ Leuprecht C 'Public Safety in Federal Systems: A Primer' (2012) 1(363) *L'Europe en formation* 417-434.

²⁷ Leuprecht, C Kölling M & Hataley T 'Federalism as Decision-Making: Security Structures, Procedures and Policies' in Palermo F & Alber E (eds) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015) 339-357.

power, strong central control may be seen as necessary to bring the necessary capacity, uniformity, equity and democratic change.²⁸ They also refer to the perceived risk that own-source financing could lead to less equitable outcomes,²⁹ with larger, central organisations bringing efficiencies of scale to matters of training in democratic policing, creating opportunities for specialisation, and increasing the proportion of civilian personnel, thus encouraging a more ‘civilian’ police force.³⁰ These rationales inform the comparative analysis carried out in this thesis.

Possibly relevant to these rationales is the early political economy work of Elinor Ostrom and others, in the field of policing in the United States, one of the federal case studies in this thesis. At the time, advocates of metropolitan reform made proposals to eliminate “fragmentation” of urban services, as multiple units of local government providing services were considered chaotic and ineffective.³¹ Ostrom found, in contrast, that for policing, increasing the size of the constituent unit consistently had a negative impact on output and efficiency, with smaller police units consistently outperforming larger and better trained services.³² To explain this it was theorised that in smaller communities, citizens were more active in self-policing, while police services knew their communities better.³³ This work suggests efficiencies of scale may not necessarily transpire via centralisation if it results in larger constituent units; it suggests also that arrangements which bring citizens closer to the policing unit may work better. In later work, it was also found that where many police units serve a metropolitan area, duplication of services to the same set of citizens is rare; further, the presumed negative impact of a multiplicity of departments serving the same metropolitan area was not found.³⁴ The most efficient arrangement was a multiplicity of services providing patrol and similar services, but a single service providing technical assistance such as laboratory services. The conclusion is that complexity is not the same as chaos in regard to metropolitan policing governance.³⁵ These insights are relevant to interrogating multi-tier government policing arrangements.

The prevalence and outcomes of centralised and decentralised policing

It is not only federal states which may have multi-tier arrangements in policing, with some unitary states decentralising police to the local level or other sub-national level, even in otherwise central states. Literature that considers issues of centralised policing may also be relevant to the current study, given the quasi-federal nature of South Africa’s arrangements. George Berkeley, writing in 1970, notes that while centralised police forces are often associated with authoritarian regimes, they are increasingly common and associated with democratic government,³⁶ while David Bayley, writing in 1985, concludes that centralised policing systems are far more common than decentralised ones.³⁷ This suggests that the choice of centralised policing was not controversial for a new democracy such as South Africa in 1996.

²⁸ Leuprecht et al. (2015) 355.

²⁹ Leuprecht et al. (2015) 349.

³⁰ Berkley GE ‘Centralization, Democracy, and the Police’ (1970) 61(2) *Journal of Criminal Law and Criminology* 311.

³¹ Ostrom E ‘A Long Polycentric Journey’ (2010) 13(1) *Annual Review of Political Science* 7.

³² Ostrom E ‘Size and performance in a federal system’ (1976) 6(2) *Publius J. Federalism* (33-73; Ostrom & Whitaker ‘Community control and governmental responsiveness: the case of police in black neighborhoods’ in Hawley W & Rogers D (eds) *Improving the Quality of Urban Management* 303–34.

³³ Ostrom E & Whitaker GP ‘Does local community control of police make a difference? Some preliminary Findings’ (1973) 17 *Am. J. Polit. Sci.* 48–76.

³⁴ Ostrom E Parks RB Whitaker GP *Patterns of Metropolitan Policing* (1978).

³⁵ Ostrom E Parks RB Whitaker GP *Patterns of Metropolitan Policing* (1978).

³⁶ Berkley GE ‘Centralization, Democracy, and the Police’ (1970) 61(2) *Journal of Criminal Law and Criminology* 309-312.

³⁷ Bayley DH *Patterns of Policing: A Comparative International Analysis* (1985) 72.

The question arises of the extent to which centralisation is found to be associated with outcomes such as trust in policing. Recently (2017), the question of the extent to which policing systems in general are centralised or decentralised – specifically in relation to ‘tiers of government’ – has been canvassed more thoroughly by Grichawat Lowatcharin who finds that most fall on the ‘more centralised’ end of the spectrum.³⁸ Along with Judith Stallman, they goes on to test the degree of police decentralisation (using his index termed the police decentralisation index (PDI)) against measures of trust in policing, distinguishing between more and less developed countries, and finding decentralized police systems tend to be positively related to citizen trust in the more developed countries but inversely in the less developed countries.³⁹ Notably, in an earlier paper, the same authors find that the degree of decentralisation is associated with more ‘police intensity’ (i.e. number of police per capita) in developed countries and with less such intensity in less developed ones.⁴⁰ Although these three papers consider centralisation generally and have important findings informing some of the investigations in this thesis, none of them enquire into it in relation to federal arrangements; in addition, South Africa is not included in their analysis.

The role of local governments and non-state actors

Sebastian Roché⁴¹ argues that whereas in the traditional organisational model for public security and crime prevention the central government and its agents at the local level played a dominant role, the state’s role is diminishing while approaches and stakeholders are becoming more numerous and diverse (thereby including, for example, citizens, municipalities, central government, Europe, business, and insurance companies). This observation leads to the conclusion that the state is losing its monopoly in the field, that it can no longer impose its ‘top-down’ approach, and that a new form of security governance using a contract-based territorial model has become the norm. Roché’s analysis is drawn from his study of developments in France. It suggest more complicated forms of security governance which acknowledging territorial heterogeneity within countries are needed in modern states.

This approach is echoed in the work of Julie Berg, Sophie Nakueira and Clifford Shearing (2014) who argue for a polycentric model of security governance (discussed below), building on Ostrom’s work.

In summary, despite an emerging literature which considers more complex models of policing in federal states, the questions posed in this thesis have not been comprehensively answered in international literature.

³⁸ Lowatcharin G *Centralised and Decentralised Policing Systems: A cross-national mixed-methods study of the effects of policing structures with lessons for Thailand* (Doctoral thesis, University of Missouri-Columbia, 2016). Thus a country with three tiers of government in which the police are controlled only by national government has an index score of 0.33. By contrast, a highly decentralised system where every tier of governments controls police will score 1.00 on the DPI.

³⁹ Lowatcharin G and Stallman J ‘Decentralization and citizen trust: An empirical study of policing in more and less developed countries’ (2019) 1974 *Journal of Public Affairs* 1-13.

⁴⁰ Lowatcharin G and Stallman J ‘The differential effects of decentralization on police intensity: A cross-national comparison’ (2018) 56(2) *The Social Science Journal* 196-207.

⁴¹ Roché, S ‘Prevention and Security: A New Governance Model for France through a Contract-Based Territorial Approach’ (2005) 47(2) *Canadian Journal of Criminology & Criminal Justice* 407-426.

1.6.2 South African literature

Nico Steytler and Lukas Muntingh, in the South African chapter in Leuprecht above, explicitly address the role of subnational governments in enhancing public security in South Africa.⁴² However, their chapter does not explore the issue quantitatively, nor does it address the role of traditional leaders. Furthermore, while the authors argue broadly for more municipal policing in crime combating and a co-ordinated approach in crime prevention, they do not provide detail on what this means in the South African constitutional framework. The chapter is not intended as a comprehensive assessment of the role that subnational government has played or could play in combating and preventing crime, albeit that these issues are raised.

Steytler and Muntingh's chapter provides an introduction to subnational policing in South Africa. At present, there is no comprehensive assessment of the current and potential scope of subnational government in policing in this country. Over the decades, however, South African literature has alluded to the ways in which subnational governments could play a role in crime prevention. This literature has evolved through a number of distinct approaches in the post-apartheid era: enthusiasm, disillusionment, pragmatism and acknowledging complexity. Throughout the era, the emphasis has been on national policing approaches, with some reference to local government; only in recent years has the role of provincial government come into focus, albeit that rural and traditional areas remain neglected in the discourse.

In the first phase – that is, in the immediate post-apartheid period – there is almost breathless enthusiasm for the possibilities for crime prevention in general and social crime prevention in particular, which is reflective of the range of hastily developed interventions that were occurring at the time. This phase reflects the mood at the time which saw policing as peripheral and social approaches as key. In this phase, local government is seen as supporting national interventions and there is little explicit reference to provincial government, which at the time is seen politically as an extension of national government, largely so because the national ruling party was also the provincial ruling party in all nine provinces over most of this period.

This phase is followed by a phase of disillusionment in which commentators appear to disagree on the reason for the failure of crime prevention and the continuing high crime rate. Some diagnose a failure to implement social crime prevention approaches, while others diagnose an over-emphasis on social crime prevention and a failure of policing and law enforcement. In this phase, local government emerges as a location for programmatic social interventions and local government law enforcement as a 'middle way' between law enforcement ('crime combating') and (social) crime prevention approaches. 'Safer Cities' ideas⁴³ from the developed world were imported into the South African context, which implicitly endorse the notion of cities as the primary implementers of crime prevention, albeit primarily in the form of social approaches. In the third phase, there is a move to realism: from generalised and vague prescriptions for crime prevention to ones that are more specific, such as particular programmatic interventions in regard to particular issues. The emphasis is on complexity, interrelationships with non-governmental actors, and a return to a consideration of local government and municipal policing. In this phase, the role of provincial governments in crime prevention emerges, too, for the first time.

⁴² Steytler N & Muntingh L 'South Africa' in Leuprecht, C Kölling M & Hataley T (eds) *Public Security in Federal Polities* (2019).

⁴³ Harris E 'Local governments ride the crime prevention wave' (1999) *Nation's Cities Weekly* 7.

The South African literature offers little in the way of empirical evidence supporting proposed approaches – the majority of papers focus more on the process of development of strategies by and for government than on their implementation or evaluation. Approaches are strongly shaped by whether the author is in favour of traditional law enforcement through policing ('crime combating') or 'social' crime-prevention approaches. Little evidence for success or failure is offered, probably due to the paucity of suitable measurement methods and the short time periods applicable. The question arises whether the emphasis on social approaches – which in terms of South Africa's federal arrangements would primarily be located at the level of province and municipality – emerged precisely because of the already apparent failings in national policing.

There is also little to no consideration of the varying constitutional mandates of the spheres of government and the complexity of these intergovernmental relations. Furthermore, there is an over-emphasis on urban areas. The literature in each of the phases will be considered in turn.

Enthusiasm for city-based crime prevention

In the first phase, enthusiasm for the possibilities of social crime prevention in particular is apparent. Mark Shaw's 1998 paper⁴⁴ provides an overview of the (then) emerging policy framework for local government crime prevention. The paper refers to the National Crime Prevention Strategy, the (then draft) White Paper on Safety and Security (1998-2003), and the White Paper on Local Government, as well as 'Safer Cities' initiatives being implemented in metropolitan centres such as Johannesburg, Cape Town and Pretoria. Shaw notes that the focus on cities and towns as the key to crime prevention was then directly in line with international developments in the area of crime prevention.

His paper does not attempt a comprehensive constitutional analysis of the policing roles of the spheres of government. Given its publication date, it is also necessarily a prospective paper pointing to possibilities and emerging policies. In addition, the paper does not anticipate the extent of the failure of national government, nor the implications for intergovernmental co-operation of political heterogeneity amongst the spheres of government.

Ingrid Palmary's paper⁴⁵ is located in the social crime-prevention paradigm and focuses on 'Safer Cities', the name for a set of approaches to urban crime prevention developed in some European cities. Her paper examines how those approaches were playing out in four cities at the time in implementing the White Paper on Safety and Security (1998). Like Shaw's paper, hers considers neither the role of provinces, nor the constitutional role of local government, and provides only a snapshot of interventions that were then current with the emphasis on non-policing approaches.

Janine Rauch, Mark Shaw and Antoinette Louw's paper⁴⁶ on municipal policing traces the origins and development of municipal policing in South Africa from the infamous 'municipal police' in apartheid's townships to the Durban City Police and its successor, the Durban Metropolitan Police Service, established in terms of amendments in 1998 to the South African Police Service Act. The paper clarifies the then functions of a municipal police service and the challenges they would be likely to face, and provides a picture, extending until 2001, of developments in municipal policing in four cities. Their paper offers a comprehensive outline of the political and policy processes leading to

⁴⁴ Shaw M *The role of local government in crime prevention in South Africa* Institute for Security Studies Occasional Paper 33 (1998).

⁴⁵ Palmary I *Social Crime Prevention in South Africa's Major Cities* Centre for the Study of Violence and Reconciliation Report (2001).

⁴⁶ Rauch J, Shaw M & Louw A *Municipal Policing in South Africa: Development and Challenges* Institute for Security Studies Monograph 67 (2001).

municipal policing. However, given its publication date, it does not incorporate subsequent legislative and other developments.

Janine Rauch's subsequent paper⁴⁷ discusses the government's flagship National Urban Renewal Programme (NURP), which contains elements of the crime prevention approaches envisaged in the 1996 National Crime Prevention Strategy, which again places emphasis on social approaches. The paper examines the NURP from the perspective of its *potential* contribution to urban safety. It focuses on the implementation of the NURP in the metropolitan municipalities, and is a preliminary investigation into the relationship between urban renewal and crime prevention. Both the plans and the paper are concerned with national interventions within metropolitan areas rather than interventions by subnational government. The paper, as suggested, is prospective in nature.

Disillusionment with implementation of social approaches

In the second phase, some disillusionment is apparent. In a later paper, Pelser and Louw⁴⁸ lament the wide gap between crime-prevention policy and practice evident by 2002, which they attribute to (1) a failure to take into account the actual requirements for policy implementation, and (2) the adoption of policy models from developed countries. Their paper echoes the international literature in identifying direct local accountability as necessary for the delivery of public security, but does not deal in detail with multilevel government policing arrangements.

Ted Leggett⁴⁹ in his paper attempts to bridge the gap between crime combating (policing and law enforcement) and social crime prevention approaches. His approach sees local government at the forefront of such interventions, which he describes as a 'middle way' between law enforcement and social approaches. His paper is not a comprehensive assessment of subnational government's policing role, but begins the discussion toward locally-controlled policing .

Gareth Newham's paper⁵⁰ continues the theme of disillusionment, with his focus on the failure to implement developmental or social crime prevention: his aim is to 'refocus attention on the original vision and meaning of the term 'crime prevention' as set out in the National Crime Prevention Strategy'. Newham argues that South African local governments have begun to take on responsibilities in public safety and that there is a growing realisation that police can play only a limited role. He argues for a broader recognition throughout society of the potential benefits of 'developmental' crime prevention. His paper is not a comprehensive assessment of subnational government's policing role, but is illustrative of the broader emphasis on social approaches.

By contrast, Bill Dixon's⁵¹ disillusionment is with the entire notion of social crime prevention 'trumping' all other goods. He argues that the complex relationships between crime prevention, social policy and development that emerge from policy documents published in South Africa since 1994 suggest that while, under certain circumstances, crime prevention may indeed be a legitimate goal of social policy, 'a principled approach to deciding its relative priority in the development process is

⁴⁷ Rauch J *Thinking Big: The National Urban Renewal Programme and Crime Prevention in South Africa's Metropolitan Cities* Centre for the Study of Violence and Reconciliation Report (2002).

⁴⁸ Pelser E & Louw A 'Where did we go wrong? A critical assessment of crime prevention' (2002) 2 *South African Crime Quarterly* 1-4.

⁴⁹ Leggett T 'Why wait? By-laws and regulations for high impact crime prevention' (2004) 8 *South African Crime Quarterly* 11-16.

⁵⁰ Newham G *A Decade of Crime Prevention in South Africa: From a national strategy to a local challenge* Centre for the Study of Violence and Reconciliation Report (2005).

⁵¹ Dixon B 'Development, crime prevention and social policy in post-apartheid South Africa' (2006) 26(1) *Critical Social Policy* 169-191.

needed if crime is not to be allowed to trump all other social problems'. He does not explicitly deal with subnational government but his important point that considerations of crime should not trump all other goods foreshadows the debate on investment in policing.

In a later paper, Newham⁵² examines the challenges facing metropolitan police departments (MPDs) in the first five years of their existence, key among which is that metropolitan councils have placed pressure on MPDs to engage in traditional crime combating activities. Newham offers a critique of what he perceives as the over-emphasis on law enforcement and highlights shortcomings in oversight of MPDs and the danger this poses for corruption and abuse.

In diametric opposition to Newham, Anthony Albeker⁵³ decries the 'crime prevention' approach seemingly adopted in criminal justice policy and the failure to incarcerate more 'violent criminals' in the period 1994-2007. He argues that the 'failure' to build the (national) criminal justice system has stimulated criminality through a 'contagion' of criminality. His paper was followed by a popular book⁵⁴ on the same theme, one informed by his personal experience as a victim of violent crime. Albeker's focus is on national government and its policing failures and he does not address the multi-government arrangements for policing.

Pragmatic approaches toward improved policing via subnational intervention

In the third phase, a more pragmatic approach is evident.

From 2009 onwards, provincial government begins to emerge in the literature. Louise Ehlers and Sean Tait⁵⁵ argue for policies that balance the immediate need for safety and security with the long-term objective of achieving systemic social change. Their paper describes an intervention undertaken by the Open Society Foundation for South Africa in collaboration with three provincial departments of safety, and explores how such a dual approach can be achieved. Although implemented by provincial departments, the interventions took place locally in three sites identified by the provinces as 'crime hotspots'. The paper was written before any results could be made available, and does not explore the complex intersection of the roles of provincial and local governments in detail but highlights the role of provincial Departments in directly influencing safety.

While Ehlers and Tait described locally-based interventions owned by provincial governments, Newham – writing now in this era of 'pragmatism' – provides a case study in which a provincial government played a role in supporting the national police to reduce crime throughout the Gauteng province, as part of which it (provincial government) also harnessed municipal police.⁵⁶ His important account of this case study is discussed in Chapter 5.

Writing as the great hope of municipal policing became mired in corruption, Andrew Faull⁵⁷ argues that a lack of creativity and political will places the country's MPDs at risk of losing legitimacy. He contends that management and councils 'pay lip service to evidence of dwindling organisational

⁵² Newham G 'Getting into the City Beat: Challenges facing our metro police' (2006) 15 *SA Crime Quarterly* 1-5.

⁵³ Albeker A 'How we got it wrong: what to do about the failure of crime prevention' (2007) 21 *SA Crime Quarterly* 27-32.

⁵⁴ Albeker A *A Country at War with Itself: South Africa's Crisis of Crime* (2009).

⁵⁵ Ehlers L & Tait S 'Finding the right balance: Immediate safety versus long-term social change' (2009) 27 *SA Crime Quarterly* 23-30.

⁵⁶ Newham G 'Cops and robbers: a new approach: The Gauteng Aggravated Robbery Strategy' (2009) 29 *SA Crime Quarterly* 3-8.

⁵⁷ Faull A 'Taking the Test: Policing integrity and professionalism in the MPDs' (2009) 27 *SA Crime Quarterly* 3-6.

integrity' and corruption. Faull argues for targeted and random integrity tests within police departments to turn the tide on abuses of power. His focus is on MPDs and not subnational government in general. His analysis is important in highlighting the risks of local policing and the interventions necessary to address those risks.

Alexius Amtaika⁵⁸ examines the causes of high rates of crime in South Africa and the role of local government and communities in combating them. He argues that while inequalities among South African communities contribute greatly to the rise of crime, its deeper causes can be traced back to the apartheid era, when criminal elements were tolerated in the name of fighting the system. Amtaika maintains that abolishing capital punishment encouraged crime, and that crime prevention would be effective if the law enforcement bodies established partnerships with residents to flush out criminals in their communities. He does not provide an assessment of the role of subnational government in policing, but the approach is one which brings together policing and communities.

Addressing municipal policing in particular, Johnny Steinberg⁵⁹ critically discusses the urban crime-prevention ideas that were imported from abroad and adopted in the early years of South Africa's democracy, arguing that their culturally-specific baggage led to 'hubristic failure'. He concludes that, '[d]ressed in the garb of crime prevention, a modified version of the paramilitary policing practices that flourished under apartheid returned to the streets of a democratic South Africa'. His analysis therefore implicitly supports the notion that policing at the local level is inimical to democratic transformation.

Acknowledging emerging complexity

In the fourth phase, an acknowledgement of complexity is apparent. New, younger voices begin to emerge from 2011. Local government is explicitly the target of Paula Meth's (2011)⁶⁰ paper. Her focus is on the micro-local workings of 'crime management' and the political implications of these interconnections.

Although not dealing directly with subnational government, Gregory Breetzke's (2012)⁶¹ analysis points to policing approaches that could be adopted at subnational level. He recommends high-density saturation policing, alcohol-free zones and high-visibility policing in at-risk areas. He does not discuss the spheres of government which might be involved in implementation.

Gail Super (2013)⁶² considers the transition to democracy in South Africa and its impact upon crime and punishment. She argues that South Africa provides rich material on the role that political authority plays in the construction of crime and criminality. Her work uses the South African case study to examine the politics of punishment and race in neo-liberalising regimes.

⁵⁸ Amtaika A 'Crime prevention programmes at the lower level of government in South Africa' (2010) 14(4) *International Journal of Human Rights* 603-623.

⁵⁹ Steinberg J 'Policy transfer and policing in post-apartheid South Africa' (2011) 15(4) *Theoretical Criminology* 349-364.

⁶⁰ Meth P 'Crime Management and Urban Governance: Everyday interconnections in South Africa' (2011) 43(3) *Environ Plan A* 742-760.

⁶¹ Breetzke GD 'Understanding the magnitude and extent of crime in post-apartheid South Africa' (2012) 18(3) *Social Identities* 299-315.

⁶² Super G *Governing through Crime in South Africa: The Politics of Race and Class in Neoliberalizing Regimes* (2013).

Julie Berg, Sophie Nakueira and Clifford Shearing (2014) address developments in security governance, with their focus placed on the concept of polycentricism.⁶³ This concept is also invoked in Berg and Shearing's (2015)⁶⁴ research into 'an experiment in polycentric governance' – namely, Improvement Districts in South Africa. The paper questions whether analytically separating state from non-state actors, and then giving the former conceptual priority over the latter, enhances democracy and security.

Ernst Van Biljon (2018) assesses the mandate of metropolitan police within the South African constitutional framework, using the various Gauteng metropolitan police agencies as case studies.⁶⁵ The study investigates the perceptions of senior metropolitan police officials in Gauteng regarding the mandate of metropolitan police agencies. Van Biljon concludes that they have a 'narrow understanding' of democracy and democratic policing, and that the perceived mandate is 'neither appropriate nor constructive to a democratic South Africa'.⁶⁶

1.6.3 Conclusion

As with the international literature, the South African literature does not comprehensively evaluate the legal framework, the legal role, nor how the role is carried out in practice of subnational government in policing. This thesis seeks to provide a comprehensive legal, qualitative and quantitative assessment of the role of subnational government in policing in South Africa. The analysis is located within the broader context of policing in federal states through contrast with four international case studies and international literature on decentralised policing and policing in federal states. It considers the nature of the failure of policing in South Africa and the extant crime crisis, as well as the extent to which policing centralisation is implicated in this. The reasons for, and nature of, the constitutional and legislative framework, as well as the practice in relation to the spheres of government are considered – including traditional authorities. The thesis draws on the findings to develop a model for the future role of subnational government in policing in South Africa.

1.7 Methodology

In answering these questions, this thesis adopts a sociological approach to gain an empirical understanding of why and how the law in relation to multilevel government and policing has played out in the South African context; this empirical understanding then informs theoretical policy proposals for the evolution of the law.

1.7.1 Legal and legal historical analysis

In approaching the topic, it was necessary to employ the methods of doctrinal research to determine the relevant legal provisions and the key interpretations by the courts on the subject. A study of the historical development of the relevant legal provisions followed, making use of textual comparison of the Interim and Final Constitution. Available primary documents, including notes of parliamentary

⁶³ Berg J, Nakueira S & Shearing C (2014) 'Global Non-state Auspices of Security Governance' in Arrigo B & Bersot H (eds) *The Routledge Handbook of International Crime and Justice Studies* 77-97.

⁶⁴ Berg J & Shearing C 'New Authorities: Relating State and Non-state Security Auspices in South African Improvement Districts' in Albrecht, P & Kyed H (eds) *Policing and the Politics of Order-making* (2015) 91-107.

⁶⁵ Van Biljon E *A critical assessment of the Metropolitan Police Mandate within a Constitutional Democratic Framework: The Case of Gauteng Metropolitan Police Departments* (Doctoral thesis, University of South Africa, 2018).

⁶⁶ Van Biljon (2018) 234.

committee meetings obtainable on the Parliamentary Monitoring Group website, and ANC policy documents, obtainable on the ANC website archive, were also analysed. Available literature on the period of transition and subsequent years comprised the secondary sources that were used to supplement the legal historical analysis.

1.7.2 Comparative case study analysis

A case-study approach was the primary methodology adopted for the comparative analysis, which focused only on federal or quasi-federal states. The selection of countries was purposive. Three of the four case studies illustrate three distinct models among 26 identified federal or quasi-federal states. The table below lists the candidate countries for selection, illustrating the diversity of policing arrangements in federal states. The United States of America represents the extreme of multi-tier policing decentralised primarily to the local level, while Nigeria represents the extreme of policing centralised at federal level. Canada by contrast represents an asymmetrical approach, with differing forms of policing available at sub-national level. The fourth case study is selected for its similarity to the South African model: Kenya has a quasi-federal constitution which retains a highly centralised policing arrangement. The four countries selected all share a common history as part of the former British Empire and thus share similar criminal justice system operation.

Table 1: Federal states and policing arrangements⁶⁷

Federal states	Policing arrangement
Argentina (23 provinces and 1 autonomous city)	national, provincial and some local police
Australia (6 states and 2 territories)	state, federal and council
Austria (9 states)	federal and municipal
Belgium (Flanders and Wallonia)	federal and local
Bosnia and Herzegovina (Federation of Bosnia and Herzegovina and Republika Srpska)	canton, entity and state
Brazil (26 states and 1 federal district)	federal, state and municipal
Canada (10 provinces and 3 territories)	federal, provincial and local (asymmetrical)
Comoros (Anjouan, Grande Comore, Mohéli and Mayotte)	national and island local
Ethiopia (9 regions and 2 cities)	federal
Federated States of Micronesia (4 island states)	federal, state and municipal
Germany (16 states)	state, municipal and limited federal
India (28 states and 7 union territories)	state and federal
Kenya (47 counties)	national and limited local
Malaysia (13 states and 3 federal territories)	federal
Mexico (31 states and 1 federal district)	federal, state and municipal
Nigeria (36 states)	federal and some local
Pakistan (4 provinces and 1 territory)	federal, provincial & territorial
Palau (16 states)	national
Papua New Guinea (20 provinces)	national and local

⁶⁷ The table was compiled based on a list of federal countries compiled by McGill University at https://www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/l/List_of_countries_by_system_of_government.htm accessed 9 November 2019 and supplemented by a range of sources for each country.

Russia (49 oblasts, 21 republics, 10 autonomous okrugs, 6 krais, 2 federal cities, 1 autonomous oblast)	federal
Saint Kitts and Nevis (2 islands and 14 parishes)	national
South Africa (9 provinces)*	national, some municipal
Switzerland (26 cantons)	canton, municipal and specialised federal
United Arab Emirates (7 emirates)	emirati and specialised federal
United States (50 states, one district, two commonwealths, and 12 territories)	local, state and federal
Venezuela (23 states and 1 capital district)	national, state and some municipal

The literature on policing in federal states informed the case-study comparative analysis. The case studies explored the policing model in each country *vis-à-vis* the federal structure, along with the resultant outcomes in practice. Within the comparative analysis a range of quantitative investigations were carried out, and are detailed in 1.7.4 below.

1.7.3 Qualitative empirical analysis

Qualitative empirical analysis was carried out to understand national and subnational policing developments in South Africa in the democratic era.

1.7.3.1 National policing

Chapter 3 considers the reasons for policing arrangements, and relies extensively on the literature, as well as on primary documents, including policy documents of the African National Congress (ANC).⁶⁸

The analysis of national policing appears in Chapter 4. The primary methodology was document review. Primary sources include South African Police Service (SAPS) annual reports⁶⁹ and SAPS presentations made to the portfolio committee in Parliament⁷⁰, as well as the National Expenditure Surveys of the National Treasury.⁷¹ A literature review of secondary sources in relation to SAPS internal structuring, the detective service, and public order policing, supplemented the document review.

1.7.3.2 Subnational policing

The provincial analysis appears in Chapter 5 and the municipal analysis in Chapter 7. The primary methodology adopted for the provinces was document review. A review of primary sources in the form of official documents – particularly annual reports and budgets – formed the basis for the development of a qualitative understanding of the approach taken by provinces and municipalities to policing. These were not stored in a single location. Speeches by Members of Executive Councils (MECs) were a further, rich primary source in relation to the provinces. Key limitations were the availability of older primary documents and inconsistencies in official reporting. The primary

⁶⁸ These were located in the archive of the original ANC website. A new ANC website was subsequently launched, which, at the time of writing, had not transferred the archived documents to the new ANC website.

⁶⁹ Available at https://www.saps.gov.za/about/stratframework/annualreports_arch.php last accessed 11 December 2019.

⁷⁰ Available at <https://pmg.org.za/committee/86/> last accessed 11 December 2019.

⁷¹ Available at <http://www.treasury.gov.za/documents/national%20budget/default.aspx> last accessed 11 December 2019.

document review was supplemented by content analysis of news reports selected by using online keyword searches suggested by the primary document review.

A literature review of secondary sources was also carried out. The analysis was undertaken in relation to all nine provinces, all metropolitan municipalities, and a purposive limited selection of local municipalities which quantitative investigation (see below) suggested had a relatively high level of municipal policing. In other words, the qualitative investigation was limited to these municipalities. The latter are not representative of all municipalities, but demonstrate the nature of policing in local municipalities with the highest levels of sub-national policing, as identified through the quantitative empirical analysis. Sources included annual reports of the municipalities concerned.

1.7.4 Quantitative empirical analysis

Both cross-sectional and longitudinal quantitative methodologies were employed. A number of quantitative investigations were carried out to explore specific issues within the constraints of available data.

1.7.4.1 Cross-country analysis of centralisation and development

This analysis appears in Chapter 2 and sought to understand the relationship between development and centralisation of policing among 72 countries (unitary and federal) using data from Lowatcharin's thesis.⁷² Lowatcharin developed a variable called the Police Decentralisation Index (PDI), which divides the number of levels of policing by the number of levels of (administrative) government. The countries' policing arrangements were categorised as centralised or decentralised based on this PDI. The range in PDI was compared to the variable for development, namely the Human Development Index (HDI), as calculated and published by the United Nations Development Programme, as identified for each country.⁷³ The variation in HDI was compared among those countries classified as decentralised, as compared to those classified as centralised.

1.7.4.2 Analysis of rationality of distribution of police resources in country case studies

Analyses appear in Chapter 2 in relation to the United States and Canada. Similar data was not available for the other two cases studies. This analysis sought to understand the relationship in each country between recorded homicide rates in earlier years and later allocations of police resources in subnational states or provinces. It was theorised that a rational allocation would see areas with previously recorded high murder rates later allocated proportionally more resources. Because the homicide rate from earlier years is tested against resources later allocated, the extent to which the homicide rate (X-axis) influences the resultant allocation (Y-axis) is therefore tested, rather than the extent to which the allocation affects homicide trends (see the discussion below regarding the problems with separating out these effects). In the US, the homicide rate and police personnel by state as recorded by the Federal Bureau of Investigation (FBI) are the variables used⁷⁴, and in Canada the homicide rate and police personnel as recorded by Statistics Canada⁷⁵ are the variables used. Such data is not available for Nigeria nor Kenya.

⁷² Lowatcharin (2019).

⁷³ UNDP *Human Development Reports* 'Table 2. Human Development Index Trends 1990-2017' available at <http://hdr.undp.org/en/composite/trends> accessed 4 July 2017.

⁷⁴ The FBI no longer publishes this data in the format in which it was originally extracted for this study. The references are therefore to the original version of the FBI data, as extracted.

⁷⁵ Available at <https://www.statcan.gc.ca/eng/start> last accessed 11 December 2019 at various sub-locations as referenced in the text.

1.7.4.3 Analysis of national policing in South Africa

This analysis appears in Chapter 4. This analysis sought to investigate national trends in relation to revenue, policing and crime in South Africa. A longitudinal analysis for South Africa was conducted. The following variables from 1995 to 2018 were used:

- the total budget allocated to policing per year, as recorded in National Expenditure Surveys available on the website of the National Treasury, adjusted for inflation to September 2017 prices;
- the total number of employees of the SAPS, as published in the introductory pages of its annual reports;
- the total population of South Africa, as published by Statistics South Africa in its mid-year population estimates ('P304'); and
- the total number of murders annually, as reported by SAPS.

The analysis simply uses scatter plots to observe whether there is a linear association between two variables of interest. The variables are adjusted using the population variable where appropriate, usually to create variables per 100 000 of the population.

1.7.4.4 Analysis of the relationship between national and municipal policing in South Africa

This analysis appears in Chapter 7 in conjunction with the qualitative investigations referred to above. The analysis was conducted to understand the relationship, if any, between the extent of subnational policing by municipalities, and the allocations by the SAPS and violent crime trends, taking revenue into account. A further analysis, confined to the subset of metropolitan municipalities, sought to understand any relationship between a metro's public safety deployment and its relative murder rates. The cross-sectional analyses covered the whole of South Africa, in the year 2016, at the spatial level of (1) police stations, and (2) local and metropolitan municipalities.

The following variables at the spatial level of the police station, covering all police stations in South Africa, were used:

- the total number of serious crimes, and the number of murders averaged over four years, as reported by the SAPS and published on its website;
- the total estimated population in 2016, as estimated and published by Code4SA and
- the fixed establishment of SAPS employees in 2016, as made available in *SJC v Min of Police* in an annexure to an affidavit by a member of SAPS management labelled 'PLV2', as digitised and cleaned by this author.

The following variables at the spatial level of local or metropolitan municipality, covering all local and metropolitan municipalities in 2016, were used:

- the total population in 2016 per municipality, as reported in the *Local Government Handbook* and published online⁷⁶
- the number of public security positions allocated in the municipality in 2016, from the same source as above;

⁷⁶ Available at www.municipalities.co.za last accessed 11 December 2019.

- the total municipal revenue of the municipality in 2016, from the same source as above;
- the total number of valid votes cast in 2014, as published by the Independent Electoral Commission (IEC) on its website⁷⁷; and
- the total number of votes for the ANC in 2014, from the same source as above.

Spatial data for police stations were obtained from the SAPS website, and spatial data for municipalities, from open sources. The data at the spatial level of the police station were combined with data at the spatial level of the municipality by allocating all police stations whose GIS point location fell within the polygon boundaries to the relevant municipality. No attempt was made to apportion percentages of the relevant variables to account for misalignment of boundaries. In other words, crimes recorded at a police station were allocated to the municipality in which that police station is physically located, notwithstanding that some parts of the station's jurisdiction fall outside of the jurisdiction of that municipality. QGIS software was employed in this process.

Univariate and multivariate regression analysis was carried out with the resulting dataset, using Stata software. Such analysis determines whether or not there is a statistically significant association between two or more variables of interest (unless otherwise stated, at the $p < 0.05$ i.e. a less than 5 percent probability that the observed association is random). The extent to which the independent variable (X) predicts the dependent variable (Y) is indicated by R-squared. The co-efficient output indicates the average change in Y associated with a change in X, via the regression line to which the data is fitted.

These analyses of various associations of interest appear in Chapter 7.

1.7.4.5 Analysis of policing in traditional areas

The analysis above permitted municipalities to be identified as being within the geographical borders of former 'Bantustan' areas, which are now called traditional council areas. The percentage of municipalities with low or high rates of policing was calculated per province. Election results, available on the IEC website⁷⁸, were also considered to gain further insight.

This analysis appears in chapters 8 and 9.

1.7.4.6 Method of analysis

In both the cross-sectional and longitudinal analyses, the first step was to take account of any underlying collinearity caused by population size (where the variables of interest are also related to population, such as the number of crimes) by creating variables that take population into account (in the case of revenue, per person/per capita, or in the case of crime or allocations of police officials, per 100 000 persons). The second step was a simple xy plot of the resultant variables of interest, in order to identify any possible linear relationship between the variables by means of visual inspection. The plot was generated using Microsoft Excel. Where a linear relationship was observed, the relevant outputs of a linear regression were generated with Stata software.

The following Stata outputs were considered relevant to report on in the narrative:

⁷⁷ Available at www.elections.org.za last accessed 11 December 2019.

⁷⁸ Available at www.elections.org.za last accessed 11 December 2019.

- Prob>F, where a level above 0.05 was considered as indicating a high probability of a statistically significant linear relationship between the variables in the dataset; this was converted to a percentage probability in the narrative (e.g. Prob>F = 0.05 was reported as a 95 per cent probability of a relationship between the variables);
- R-squared, with the fraction being converted to a percentage in the narrative to indicate the extent to which the independent variable (X) predicts the dependent variable (Y) in the dataset (e.g. R-squared = 0.05 was reported as 5 per cent of the variation in y predicted by x); and
- the co-efficient, which was reported in the narrative to indicate the increments in variable x associated with an increment of 1 in variable y (e.g. Co-eff = 5 means every 1 additional x is associated with 5 additional y).

Where the plots did not suggest a linear relationship in the whole dataset but indications were present of a possible linear relationship in a subset of the data, analyses confining the enquiry to the relevant subset were carried out – for example, confining the analysis to metros only, or only municipalities with revenue of above R2000 per capita.

In terms of the limitations of this data, the variables on public safety positions, or ‘posts’, and on SAPS ‘fixed establishment’ (total posts) do not equal the number actually deployed in municipalities and police stations, respectively. They are therefore approximations. The problems associated with recorded crime, and with using murder as an indicator, are discussed below.

1.7.4.7 Discussion

Benefits of centralisation

The quantitative analyses in the comparative chapter (Chapter 2) seek to explore whether there is evidence that the theorised benefits or risks of particular models of policing in multilevel government countries transpire in practice. Evidence on partisan policing and armed separatism; local capture of police by local politicians; uniformity, equity and democratic change, and to ensure equitable outcomes; efficiencies of scale to policing, is presented where available. Equity and efficiency is measured through an analysis of rationality in the distribution of resources, which is determined by comparing policing rates with homicide rates. In order to measure democracy and transformation, evidence on the tendency for police to use lethal force, and trends in that use of force, are explored. The measure here is the number of instances of lethal force per 100 000 of the population, where that is available.

Policing and prevention

Chapter 4 explores the extent to which the record of the national centralised SAPS to date on the same measures as explored in Chapter 2. The chapter also considers whether the constitutional mandate of the SAPS to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law, is being met.

In relation to prevention, the thesis proceeds from the contention that police are indeed able to have an impact on crime – both positive and negative. Ross Homel argues that studies which have been sceptical of police impact fail to consider absolute and marginal effects; a certain size police service and a certain level of police activity may achieve a measure of crime control such that if there were no police, there would be a sudden and substantial increase in crime, even if increases in police numbers

or intensification of police activities might not have measurable crime reduction effects – or indeed negative effects.⁷⁹

Further, the criminological literature has posited theories of how policing might prevent crime via rational choice theory and deterrence, which seem to overemphasise the role of potential offenders and the direct role of the police. Trust-based theories are more compelling; in essence, when the public views police as legitimate (or trustworthy), public co-operation with police in ways that assist their effectiveness is more likely.⁸⁰ This echoes the findings in Ostrom's work alluded to above. Trust is lost when police are neglectful, indifferent or incompetent, or operate with impunity or bias.⁸¹ This in turn reduces their ability to prevent crime, as the public fail to magnify their impact through co-operation, as posited by Ostrom.

Thus it can be argued that the way in which the police prevent crime through traditional policing activities – competent, non-neglectful patrolling, responding to crime, investigating crime – is primarily via improvements in trust and the role of trust in enabling policing by consent. This primary layer of crime prevention is supplemented by the burgeoning findings of the field of evidence based policing,⁸² which finds that certain kinds of policing have a clear and measurable marginal impact on crime. Thus evidence exists that policing via targeted patrols, hot-spot policing, and targeting of prolific offenders, inter alia, all measurably reduce crime.⁸³ It is consequently accepted for the purpose of this thesis that police may indeed prevent and combat crime, as tasked by the Constitution, notwithstanding the complexity of factors which may influence crime trends; and that this is measurable.

Use of the murder rate as the primary indicator crime trends

In investigating whether or not crime has been prevented or combated in South Africa, and why, use is primarily had to the murder rate – the term used in South Africa rather than homicide rate – as a proxy for violent crime. This use of the murder/homicide rate as a proxy for violent crime is in line with practice of the UNODC and is commonly employed in quantitative analysis.⁸⁴ The murder rate is preferred because the rate of reported crime is not a robust measure of true crime trends. Reporting rates vary both over time and over geographical space, particularly in South Africa where trust in the police varies similarly over time and place, with initial gains having been reversed after 2012.⁸⁵ Furthermore, even neighbouring areas may have very different reporting rates as a result. Evidence from surveys finds widely differing rates of reporting by geographical area in South Africa.

Moreover, there is considerable evidence to suggest that the use by the government of crime rates as an explicit performance measure of the SAPS has resulted in the tendency for the SAPS itself not to record crimes.⁸⁶ This has affected the consistency of recording of crime over time.

⁷⁹ Homel R 'Can Police Prevent Crime?' in Bryett K & Lewis C (eds) *Unpeeling tradition :Contemporary policing* (1994) 7-35.

⁸⁰ Goldsmith A 'Police reform and the problem of trust' 9(4) *Theoretical Criminology* (2005) 443–470.

⁸¹ Goldsmith (2005) 444- 445.

⁸² Sherman LW 'The rise of evidence-based policing: targeting, testing and tracking' (2013) 42(1) *Crime and Justice in America 1975–2025* 377-451.

⁸³ Sherman (2013) 377-451.

⁸⁴ UNODC *Global Study on Homicide (2019)* available at <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf> accessed 1 June 2020. See also Fajnzylber P , Lederman D and Loayza N 45(1) 'Inequality and Violent Crime' *The Journal of Law & Economics*(2002) . 1-39.

⁸⁵ Afrobarometer *Survey in South Africa* in 2000, 2002, 2004, 2006, 2008, 2011, and 2015. Trust in police was measured at 35 percent in 2000, 49 percent in 2011 dropping to 45 per cent in 2015.

⁸⁶ See Bruce D 'Measuring outputs, neglecting outcomes' (2011) 38 *SA Crime Quarterly* 3-13.

Accordingly, in South Africa reported crime rates are an unreliable measure of true crime trends, and must be interpreted in the light of evidence on which crimes are better reported and more robust indicators such as the murder rate. Indeed, in terms of SAPS-reported crime, the number of total “community reported crimes” has decreased since 2008⁸⁷ – but the fact that most categories of more serious crime (which have better reporting rates) have increased suggests that reporting rates are at work in the trends rather than that there has been a real decrease in crime.

It is for these reasons that resort is had to murder rates to provide insights into crime trends, particularly in relation to violent crime. In South Africa, murder is sufficiently common for this to be a useful metric in determine the impact of policing, even at municipal level. There is a general obligation in law on all persons to report any death that may be unnatural,⁸⁸ while the police have a duty to investigate any death presumed to be of unnatural causes,⁸⁹ which gives rise to the assumption that most homicides – termed ‘murder’ in South Africa – will be recorded. Victims of Crime Surveys also suggest that aggravated robbery (robbery involving violence or a weapon) is reasonably well-reported in South Africa, and resort can sometimes be had to this metric, particularly in longitudinal analyses covering large areas.

Measurement problems

Demonstrating in data any impact of policing is affected by the problem of endogeneity – the variables under analysis affect each other. This has the result that cross-sectional analyses using crime rates and policy interventions are often positive. In other words, the level of police forces, prison population, or the severity of sanctions tends to *increase* with crime over geographical space. This is because what is being measured is the response to crime by policy-makers, rather than the impact of the policy response. It does not mean that higher numbers of police officers or increased prison populations lead to an increase in crime, but rather that these different measures are endogenous (that is, also depend on crime, through policy responses in allocating such resources) as opposed to exogenous. That is to say, the intervention is both caused by crime and has an impact on crime.

It is for this reason that, in order to understand the rationality of resource allocation (i.e. policy responses) in cross-sectional analyses, it is necessary to look at crime rates in earlier periods to understand the impact of decisions to allocate resources in later years. By contrast, in order to demonstrate impact on crime through an increase in police resources, one considers the later impact on crime of a prior change of resources in longitudinal analysis. Thus it can be shown that in South Africa, an increase of approximately 14 extra police officers per 100 000 population is associated with a reduction in the murder rate of 1 per 100 000 in a later year.⁹⁰

1.7.5 Conclusion

The empirical understanding of why and how the law in relation to multilevel government and policing has developed in practice and what the outcomes of those developments have been, emerges from the above methods.

⁸⁷ SAPS *National Crime Statistics Financial Years 2008/9 to 2017/18* (2018).

⁸⁸ Section 2(1) Inquests Act 58 of 1959.

⁸⁹ Section 3 Inquests Act.

⁹⁰ Redpath J ‘Does policing prevent crime?’ *SA Crime Quarterly* (forthcoming). Similarly, an association is found between the rate of metropolitan policing and the murder rate (see below).

Chapter 2:

Policing in federal states: Four case studies

2.1 Introduction

Under federal arrangements, powers and functions are distributed by constitutions or treaties amongst a central authority and smaller territorial authorities which have distinct governments with defined legislative and executive powers (and are not merely administrative units).¹ Although Africa was dominated by unitary one-party states during the Cold War, the second wave of liberation post-1989 has seen federal-type systems emerging in South Africa (1994), Ethiopia (1995), Nigeria (1999, re-establishing earlier federal constitutions), the Comoros (1996, 2001), the Democratic Republic of Congo (DRC) (2005), the Sudan (2005), Kenya (2010), South Sudan (2011) and Somalia (2012).² The emergence of multilevel government in Africa has occurred despite what Rotimi Suberu terms the 'centrist biases and proclivities' of African political regimes.³

The rationale for federal arrangements may be distilled as follows. They serve to address group differences that play out territorially; to limit central government excesses by distributing power;⁴ to enhance democracy, by bringing government closer to the people; and to enhance efficient service provision, by matching local needs more closely.⁵ The principle of subsidiarity, which posits that functions should be carried out at the lowest feasible level of organisation, guides the allocation of functions among spheres of government in federal systems.⁶ Consequently, public security functions, such as securing national borders or combating terrorism, are often allocated to the central authority, even in highly decentralised public security systems, as they cannot be carried out feasibly at local level. Everyday policing of crime, by contrast, is a highly local phenomenon: subsidiarity would suggest that it should be decentralised, which is often the case in established or populous federations.⁷ In emerging federal states, however, policing tends to be highly centralised.⁸ Indeed, the emergence of decentralised policing arrangements in the developing world generally is rare. Taking the data collated by Grichawat Lowatcharin⁹ in relation to 72 (unitary and federal) countries and comparing their policing arrangements with the human development index (HDI), shows that countries with fully centralised policing (whether unitary or federal states) demonstrate a wide range in HDI from 0.49 to 0.94 in 2012,¹⁰ while countries with fully decentralised policing are confined to

¹ King L 'Cities, Subsidiarity and Federalism' in Fleming JE and Levy JT *Federalism and Subsidiarity* (2014) 292.

² Steytler N & Muntingh L 'South Africa' in Leuprecht, C Kölling M & Hataley T (eds) *Public Security in Federal Polities* (2019) 146.

³ Suberu, R. 'Nigeria: A Centralising Federation' in Loughlin J, Kincaid J and Swenden W (eds) *Routledge Handbook of Regionalism and Federalism* (2013) 415.

⁴ Leuprecht, C, Kölling, M & Hataley, T 'Federalism as Decision-Making: Security Structures, Procedures and Policies' in Palermo, F & Marko, J (eds) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015) 339.

⁵ King (2014) 292.

⁶ King (2014) 291.

⁷ Leuprecht et al. (2015) 348.

⁸ All of the federal-type states in Africa, save Ethiopia, have centralised policing.

⁹ Lowatcharin G *Centralised and Decentralised Policing Systems: A cross-national mixed-methods study of the effects of policing structures with lessons for Thailand* (Doctoral thesis, University of Missouri-Columbia, 2016).

¹⁰ Norway, Denmark, Finland, Ireland, New Zealand, Israel, Korea (Republic of), Luxembourg, Italy, Slovakia, Portugal, Chile, Croatia, Russian Federation, Bulgaria, Kazakhstan, Mauritius, Panama, Turkey, Azerbaijan,

those with a minimum HDI of 0.6 or more in 2012.¹¹ This suggests that a degree of human development is associated with fully decentralised policing arrangements. While neither Kenya nor Nigeria have yet reached an HDI of 0.6, South Africa has exceeded that level since 1990, although there is variation at the sub-national level, by 2018 all provinces exceeded 0.60.¹²

The theoretical rationales for centralisation of policing are in a sense the shadows of those for federal arrangements. While an emergent federal state may allocate powers and functions to territorial groups, allocating power to them over armed forces is avoided due to fears of partisan policing or future armed separatism. New states may be concerned about the potential for local police to be corrupted by local politicians in the absence of central control; in countries where there has formerly been police neglect or abuse of power, strong central control may be seen as necessary to bring the necessary capacity, uniformity, equity and democratic change.¹³ There is also the perceived risk that own-source financing could lead to less equitable outcomes.¹⁴ Larger central organisations may bring efficiencies of scale to matters of training in democratic policing, create opportunities for specialisation, and increase the proportion of civilian personnel, thus encouraging a more ‘civilian’ police force.¹⁵ The four case studies below explore how these rationales play out in practice in four distinctly different models of policing in federal states

Although federal states are far less numerous than unitary states, an estimated 40 per cent of the world’s population lives in a federal state.¹⁶ The US and Canada are among the most established, dating from 1789 and 1867, respectively, and are classic federations which emerged from the amalgamation of constituent units. Although they both present case studies of decentralised policing, their models are different in key respects, illustrating the risks of highly decentralised arrangements (US) and suggesting that asymmetry and multilevel accountability are a means to ameliorate these risks (Canada). Nigeria is amongst the oldest of the emerging African federations and represents a highly centralised solution for policing, while Kenya’s federal-type arrangement is less than a decade old and is in its policing arrangements comparable to South Africa.

The constitutions of Kenya, Nigeria and South Africa exhibit highly centralised forms of federalism. Only Nigeria calls itself a federation, while South Africa eschews the label and Kenya has opted for the term ‘devolution’. All three exhibit the federal characteristics of constitutional recognition of subnational authorities, intergovernmental distribution of revenues, mechanisms for the representation of subnational units in the national government, institutions for intergovernmental relations, and provisions for judicial review.¹⁷ All three countries, however, despite their multilevel government structure, opted for a centralised national police service.

Georgia, Colombia, Ecuador, Jordan, Peru, Thailand, Dominican Republic, Indonesia, Paraguay, Morocco, Kenya, Uganda.

¹¹ Switzerland, United States, Sweden, Estonia, Latvia, Trinidad and Tobago, Mexico, Jamaica, Philippines, El Salvador, Guatemala, Honduras.

¹² Global Data Lab *Subnational Human Development Index* available at <https://globaldatalab.org/shdi/> accessed 11 December 2019.

¹³ Leuprecht et al. (2015) 355.

¹⁴ Leuprecht et al. (2015) 349.

¹⁵ Berkley GE ‘Centralization, Democracy, and the Police’ (1970) 61(2) *Journal of Criminal Law and Criminology* 311.

¹⁶ Forum of Federations ‘Countries’ available at <http://www.forumfed.org/countries/> accessed 16 October 2019.

¹⁷ Suberu R ‘Part II Federal and Hybrid Federal Systems in Africa, 4 Constitutional Infidelity and Federalism in Nigeria’ in Fombad CM & Steytler N *Decentralisation and Constitutionalism in Africa* (2019) 101.

The classic federations of the US and Canada exhibit highly decentralised policing systems, albeit with differing arrangements. In the US, local policing has primacy, while in Canada, highly asymmetrical multilevel government arrangements are evident.

2.2 The United States: The primacy of local policing

The US Constitution's reservation clause famously provides that powers not assigned to the federal government by the Constitution itself, and not prohibited to the states,¹⁸ are for the states and the people, respectively.¹⁹ Policing is not assigned federally, nor prohibited to the states, and is thus for the states and the people. Federal government does, however, police those crimes which fall under its jurisdiction; very few crimes are under exclusive federal jurisdiction.²⁰ Federal intrusion is usually viewed in the US as something strongly to be resisted.²¹ The US Secret Service was created in 1865²² and the FBI in 1908,²³ with their statutes originally limited to specific authorities within the constitutional framework, while the Secret Service was part of the US Treasury, with the mandate to investigate and prosecute crimes against the nation's financial security.²⁴ Although the number of federal agencies has proliferated since then,²⁵ the vast majority of policing is conducted through local or state police.

State constitutions and laws define the criminal justice system in each state and delegate authority and responsibility for criminal justice.²⁶ Although the Constitution does not explicitly mention local governments,²⁷ these are legislated by states, while local criminal justice systems are defined through local ordinances; local police agencies are established and are responsible for criminal justice processing where these are not established by state government.²⁸

As a result of these arrangements, the US has an extreme number of state and local law enforcement agencies – currently estimated at more than 17,000 – with police forces ranging in size from one

¹⁸ The US is comprised of 50 states, the District of Columbia, and 14 dependent territories.

¹⁹ Tenth Amendment, Constitution of the United States of America.

²⁰ Bureau of Justice Statistics (BJS) 'The Justice System' available at <https://www.bjs.gov/content/justsys.cfm> accessed 7 June 2017.

²¹ See Kilroy R 'Public Security in the United States of America: Challenges to Federalism from an All-Hazards Perspective' in Leuprecht C. Kölling M & Hataley T *Public Security in Federal Politics* (2019).

²² US Secret Service 'History' available at <https://www.secretservice.gov/about/history/events/> accessed 12 September 2017.

²³ Federal Bureau of Investigation (FBI) 'A Brief History' available at <https://www.fbi.gov/history/brief-history> accessed 12 September 2017.

²⁴ Kilroy (2019) 237.

²⁵ Reaves BA 'Federal Law Enforcement Officers, 2008' Bureau of Justice Statistics (2012) available at <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> (accessed 28 November 2019). Federal enforcement agencies with 250 or more employees in 2008 include the US Customs and Border Protection, Federal Bureau of Prisons, Federal Bureau of Investigation, US Immigration and Customs Enforcement, US Secret Service, Administrative Office of the US Courts, Drug Enforcement Administration, US Marshals Service, Veterans Health Administration, Internal Revenue Service Criminal Investigation, Bureau of Alcohol, Tobacco, Firearms and Explosives, US Postal Inspection Service, US Capitol Police, National Park Service – Rangers, Bureau of Diplomatic Security, Pentagon Force Protection Agency, US Forest Service, US Fish and Wildlife Service, National Park Service – US Park Police, National Nuclear Security Administration, US Mint Police, Amtrak Police, Bureau of Indian Affairs, and Bureau of Land Management.

²⁶ Reaves (2012).

²⁷ New York Department of State *Local Government Handbook* (2011), available at https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf accessed 12 September 2017. These include a diverse set of entities, including counties, municipalities (towns and cities) and townships with varying degrees of governmental power, according to state law; some consolidated city-counties also exist.

²⁸ Bureau of Justice Statistics (BJS) 'The Justice System' available at <https://www.bjs.gov/content/justsys.cfm> accessed 7 June 2017 BJS.

deputy sheriff to municipalities with organisations comprising 30,000 officers.²⁹ According to FBI data, less than one-tenth (approximately 90,000) of law enforcement personnel at subnational level are employed at the state level,³⁰ with local police being far more numerous - in excess of 900,000. In addition, there are a large number of federal enforcement agencies, among them the FBI and Department of Homeland Security, with law enforcement numbering personnel more than 120,000.³¹

Centralisation is frequently proposed as a means of democratising the police through better training and central accountability mechanisms. The problem in the US of frequent use of fatal force by police is arguably a result of the country's highly decentralised model, one in which local authorities appear unable to provide the requisite training and hold their police to account. The number of people killed by police in the US is equivalent to almost 10 per cent of all murders recorded:³² there were 16,651 reported murder and non-negligent manslaughter cases in 2016,³³ and in 2015 an estimated 1,617 arrest-related deaths occurred.³⁴ *The Washington Post* estimates that 991 people were fatally shot by police in 2015;³⁵ of them, 26 per cent were African-American, in a country in which only 12 per cent of the population is black.

Control and accountability of policing in the US is achieved through mayor-councils, council-managers, civilian commissioners or boards, or town meetings.³⁶ The relatively high and skewed rate of use of fatal force suggests that the current devolved and highly variable system does not ensure sufficient accountability. State Police Commissions do set standards for training and recruitment of police, but do not enforce direct accountability or carry out the training. Partly as a result of this, in 2014, less than 50 per cent of Americans favourably rated the honesty and ethics of police.³⁷

Indeed, in line with the rationale that centralisation favours capacity and training, David Bayley argues that 'the USA is the worst prepared (for the future of policing)'.³⁸ He bases his view largely on shortcomings in training, consultation, and funding in the US's decentralised arrangements. He notes that most police departments, apart from those in larger cities, are underfunded with respect to the

²⁹ Kilroy 238.

³⁰ In 2015, some 13,160 law enforcement agencies provided data to the Uniform Crime Reporting (UCR) Program of the FBI. These police agencies reported a total of 913,161 law enforcement employees to the UCR in 2015, of which only 89,726 were state law enforcement employees. See FBI 'Table 77 Full-time Law Enforcement Employees by State' *UCR* (2015) available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/police-employee-data/police-employee-data> accessed 30 November 2019.

³¹ The last Census of federal law enforcement was carried out by the Department of Justice in 2008. BJS 'Data Collection: Census of Federal Law Enforcement Officers' 2017 *BJS website* available at <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=250> accessed 28 August 2017.

³² It is not easy to make such estimates because the Uniform Crime Reports (UCR) do not report on the use of fatal force by law enforcement officers in the US. However, the BJS in response to concerns, redesigned its collection of fatal force data in June 2015 and recorded 1,348 potential arrest-related deaths over 10 months.

³³ FBI 'Crime in the US 2017' available at <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-12> accessed 30 November 2019.

³⁴ BJS 'Arrest-Related Deaths Program Redesign Study, 2015–16: Preliminary Findings, NCJ 250112' available at https://www.bjs.gov/content/pub/pdf/ardprs1516pf_sum.pdf accessed 26 October 2019.

³⁵ The Washington Post 'Police Shootings' (2015) available at <https://www.washingtonpost.com/graphics/national/police-shootings/> accessed 1 July 2019.

³⁶ Kilroy 238, Harmon 172.

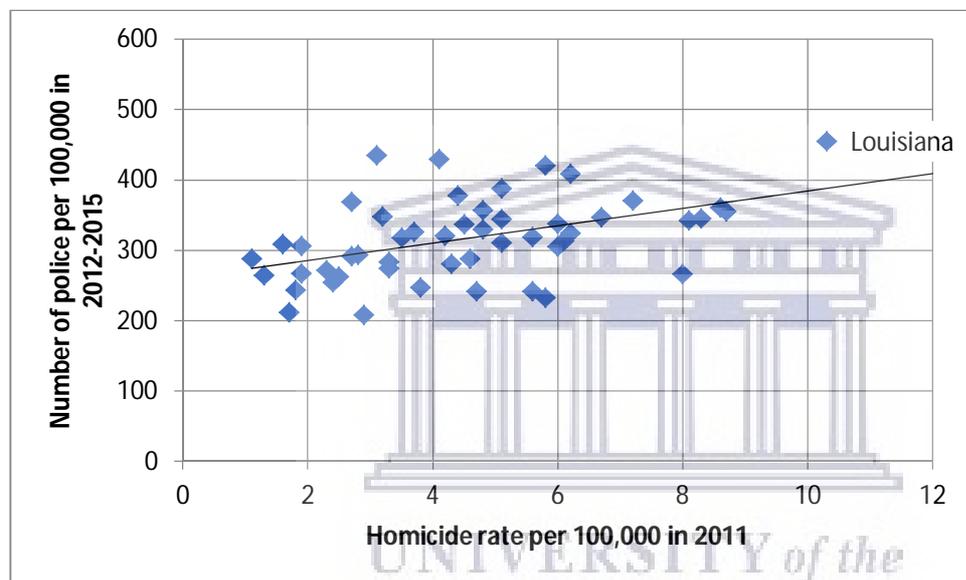
³⁷ James N et al. Congressional Research Service (CRS) 'Public Trust and Law Enforcement – A Brief Discussion for Policymakers R43904 (2016)' available at <https://fas.org/sgp/crs/misc/R43904.pdf> accessed 9 October 2017.

³⁸ Bayley D 'The Complexities of 21st Century Policing' (2016) 10(3) *Policing: A Journal of Policy and Practice* 168

selection and training of senior managers; attempts were made in the 1970s to amalgamate police departments in order to improve operational effectiveness, but the movement did not catch on.³⁹

Central control is argued to be necessary to ensure equity and rationality in the allocation of police resources. The example of the US suggests, however, that decentralisation is not inimical to rationality in the allocation of police resources. In US cities, population predicts 90 per cent of the variation in the number of police employees (officers plus civilians).⁴⁰ Furthermore, there is broad rationality in the distribution of police resources among states despite the lack of central control, in that there is correlation with the prior homicide rate (see Figure 2 below). This suggests that decentralised police systems may exhibit equitable outcomes in the allocation of resources without central control, as local and state authorities make rational choices to meet local needs.

Figure 1: Relationship between prior homicide rate⁴¹ and subsequent police human resources,⁴² states of the US (excluding DC)



Date Source: Federal Bureau of Investigation

These state-level results have been partially influenced, however, by federal funding programmes; federal Community Oriented Policing Services (COPS) funding accounts for the remuneration of more than 100,000 police officers in the US.⁴³ There were fears that the conditions attached to federal funding of additional personnel through COPS would be likely to give preference to additional funding for already well-funded departments, which would tend to result in *less*, rather than more,

³⁹ Bayley (2016) 168.

⁴⁰ FBI 'Table 78 Full-time law enforcement employees by state by cities, 2015' available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/police-employee-data/police-employee-data> accessed 30 November 2019. Testing population against total employees, P=0.0000, R-squared =0.9026.

⁴¹ FBI 'Table 8 Offenses Known to Law Enforcement, by State by City, 2011' available at https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_8_offenses_known_to_law_enforcement_by_state_by_city_2011.xls/view accessed 30 November 2019.

⁴² FBI 'Table 78 Full-time law enforcement employees by state by cities, 2015' available at https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-78/table_78_full_time_law_enforcement_employees_by_state_by_cities_2015.xls/view accessed 30 November 2019.

⁴³ Sullivan B 'Federal funds help police pay for new officers, when they can find them' *USA Today* 24 September 2016.

equity; analysis of the data in a 2003 study found, on the contrary, that COPS grants promoted equity in areas of high diversity and high crime.⁴⁴ This suggests that the outcomes in relation to allocations have not been negatively affected by federal funding, possibly because such funding is accessed voluntarily.

Decentralisation advocates argue that local policing is more effective; the US case study partly supports this contention, as 4 out of 5 US towns reported no homicide in 2014-2015,⁴⁵ as did 4 out of 5 counties.⁴⁶ However, the US has some extreme outliers: the homicide rate in 2017 in Baltimore was 55 per 100,000 and in St Louis, 59 per 100,000,⁴⁷ while five large cities have 2018 murder rates higher than South Africa's.⁴⁸ St Louis was, however, under state-controlled police until 2018 due to concerns dating from the Civil War regarding the city's having control of its own arsenal; of the large cities, only Kansas City remains under state police.⁴⁹

The evidence therefore suggests that for most towns and counties, decentralised policing is highly effective, but in a few cities, highly ineffective. It could be theorised that highly decentralised policing contributes to the unevenness of outcomes, as policing may be susceptible to competing local needs, the constraints of local budgets, and the vagaries of weak or corrupt political control. Deep decentralisation such as that of the US may be more effective in small jurisdictions: the average population size served by city-town agencies without any murders is eight times smaller than the average size of those which reported murders.⁵⁰ This suggests that in highly decentralised arrangements, provision or intervention at state or federal level may be necessary in places where municipal policing is ineffective.

Centralisation advocates may well point to a major theme of 19th century American policing: the large-scale corruption across police departments, linked to the broader problem of political machinery running municipal government.⁵¹ Municipal agencies were under the aegis of political parties and captured by local elites; employment in exchange for votes or money was common.⁵² Police

⁴⁴ Gutierrez RS *Social Equity and the Funding of Community Policing* (2003).

⁴⁵ Of the 9,348 city-towns providing data to the UCR in 2014, some 81 per cent reported no murders at all. In 2015, of the 9,395 agencies reporting, 80 per cent reported no murders. See FBI 'Table 8 Offenses Known to Law Enforcement, by State by City, 2014' available at

⁴⁶ Of the 2,587 county agencies reporting in 2015, some 77 per cent reported no murders. Of the 2,579 county agencies reporting in 2014, some 78 per cent reported no murders. See FBI 'Table 8 Offenses Known to Law Enforcement, by State by City, 2014' available at https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-8/Table_8_Offenses_Known_to_Law_Enforcement_by_State_by_City_2014.xls/view and 2015 data at https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-8/table_8_offenses_known_to_law_enforcement_by_state_by_city_2015.xls/view both accessed 30 November 2019.

⁴⁷ Gramlich J 'Facts about crime in the US' *Pew Research Centre Fact Tank* 21 February 2017 available at <http://www.pewresearch.org/fact-tank/2017/02/21/5-facts-about-crime-in-the-u-s/> accessed 11 August 2017.

⁴⁸ St Louis, Baltimore, Detroit, New Orleans, Baton Rouge – see CBS News 'Murder Map: Deadliest US cities' available at <https://www.cbsnews.com/pictures/murder-map-deadliest-u-s-cities/66/> accessed 26 October 2019.

⁴⁹ KUNC 'After 152 Years, St. Louis Gains Control of Its Police Force' KUNC live radio available at <https://www.kunc.org/post/after-152-years-st-louis-gains-control-its-police-force#stream/0> accessed 26 October 2019.

⁵⁰ FBI 'Table 10 Offenses Known to Law Enforcement by State by Metropolitan and Nonmetropolitan Counties, 2014' available at https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-10/Table_10_Offenses_Known_to_Law_Enforcement_by_State_by_Metropolitan_and_Nonmetropolitan_Counties_2014.xls/view accessed 30 November 2019.

⁵¹ Uchida CD 'The Development of the American Police' in Dunham RG and Albert GP *Critical Issues in Policing: Contemporary Readings* (2015) 11; Beausoleil, M 'Community Policing and Relations' in Miller WR (ed) *The Social History of Crime and Punishment in America: An Encyclopaedia* (2012).

⁵² Uchida (2015) 19.

departments were filled with political appointees, who frequently protected the illicit activities of political favourites, with corrupt practices extending from the chief down to the patrol officer.⁵³ Some US cities such as Atlantic City still exhibit these characteristics of 19th century policing.⁵⁴ This suggests that in the absence of external accountability measures, local policing under local control may well be susceptible to corruption.

At the end of the 19th century, a group known as the Progressives attempted to introduce three reforms to address these problems: centralising the police departments under an independent chief; upgrading and professionalising the personnel; and narrowing the police function to policing only,⁵⁵ given that at the time police carried out a variety of other functions, such as land surveying and verifying the accuracy of weights and measures.⁵⁶ A second reform effort in the early 20th century emanated from within police circles and was aimed at professionalising the police.⁵⁷ The focus was on improving the quality of police officers and making better use of technology.⁵⁸ Although police chiefs obtained more power and authority, they continued to receive input only from local political leaders and remained political appointees. As such, the goal of professionalisation was, arguably, not uniformly achieved;⁵⁹ instead, as some contend, it led to a detached relationship with the public which ‘contradicted “we-the-people” aspects of democracy’.⁶⁰ Without the economies of scale offered by centralisation, neither effort appeared to have the desired effect.

From the 1960s, however, federal intervention, via Commissions of Inquiry, was prompted by rising crime and protests stemming from the civil rights movements; riots engulfed every major city, sparked by the shooting of a black teenager by a white policeman.⁶¹ The federal Kerner Commission⁶² found many problems in police departments. In its wake, the Katzenbach Commission⁶³ was established to investigate, at the national, state and local levels, the causes of crime, measures for crime prevention, the adequacy of law enforcement and administration of justice, and factors encouraging respect or disrespect of law,⁶⁴ as well as to develop standards and make recommendations for action that could be taken by the federal, state and local government.⁶⁵

The Katzenbach Commission can be seen as having mounted a critique of the perils of decentralisation by way of its findings and recommendations relating to federal involvement in state and local police. It found that federal support to local and state actors was insufficient, and recommended increasing federal funding to state and local police.⁶⁶ It recommended that Congress create a new office in the Justice Department devoted to *assisting* state and local law enforcement

⁵³ Uchida (2015) 19.

⁵⁴ *The Economist* ‘Atlantic City deals itself another bad hand’ 12 October 2019.

⁵⁵ Uchida (2015) 20.

⁵⁶ Potter G ‘The History of Policing in the United States’ EKUonline (undated) available at <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> accessed 14 November 2019.

⁵⁷ Uchida (2015) 21, Forst & Manning *The Privatisation of Policing: Two Views* (1999) 12.

⁵⁸ Uchida (2015) 23.

⁵⁹ Uchida (2015) 23.

⁶⁰ Forst & Manning (1999) 12.

⁶¹ Uchida (2015) 23-24.

⁶² The National Advisory Commission on Civil Disorders, Executive Order 11365, July 29, 1967 (Kerner Commission).

⁶³ The President's Commission on Law Enforcement and Administration of Justice, Executive Order 11236, July 23, 1965 (Katzenbach Commission).

⁶⁴ Section 2(1) Executive Order 11236 (1965).

⁶⁵ Section 2(2) Executive Order 11236 (1965).

⁶⁶ Katzenbach N *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and the Administration of Justice* (1967) 284.

departments within the Department of Justice; this office was to be headed by a political appointee on behalf of the Attorney-General. The Law Enforcement Assistance Administration, and within it the National Institute of Law Enforcement and Criminal Justice, were created.

Now called the Office of Justice Programs and the National Institute of Justice, respectively, these departments continue to give federal support to the locally determined and managed justice system. Thus, while state and local governments still enjoy a large amount of autonomy in relation to public safety, police agencies may voluntarily call on federal government for financial support. Dozens of federal statutes now authorise federal agencies to give money and power to local police departments and municipalities, amongst the most well-known being the COPS Hiring Program grants.⁶⁷ COPS provides financial support for the implementation of community policing, distributed through the national Office of Community Oriented Policing Services, which also supports and develops new programmes and provides training and technical development resources.⁶⁸ COPS continues to provide federal funding in this way.⁶⁹ Federal agencies have used these and other programmes to expand local policing, encourage the enforcement of specific laws, and promote coordination among law enforcement agencies.⁷⁰

Rachel Harmon argues that federal public safety programmes such as COPS encourage harmful policing – through the provision of additional arms and equipment, and through measurement which emphasises arrests – that communities might wish to limit; and that they undermine local political control over police departments that otherwise might function to curb that harm.⁷¹ She further argues that federal programmes that give money, equipment, and power directly to departments, rather than municipalities, weaken the ability of political actors to use municipal budgets to influence police action.⁷² While she acknowledges the federal role in reigning in police abuses, Harmon argues that federal support for increased local law enforcement is far more extensive than its civil rights enforcement and has had a much greater impact.⁷³

It has indeed been argued that in times of insecurity, Americans are willing to concede greater authority over the use of law and force to the federal government in order to enhance public safety and security.⁷⁴ Terrorism has encouraged ever greater federal involvement, with the 3,300 deaths due to terrorism on US territory over the period 1995 to December 2014 looming disproportionately large in the public imagination.⁷⁵ The federal role in policing has been expanding accordingly, with an increase in the number of law enforcement personnel employed by federal agencies, an increase in federal funding of local police, and the federal legislature seeking to expand its role. The number of federal law enforcement employees now exceeds the number of state police: the last Census of federal

⁶⁷ Harmon, RA 'Federal Programs and the Real Costs of Policing' 2015 (90) *New York University Law Review* 872.

⁶⁸ *Title I: Public Safety Partnership and Community Policing Act of 1994*, The Violent Crime Control and Law Enforcement Act of 1994.

⁶⁹ See 'Office of Community Oriented Policing Services' <https://cops.usdoj.gov/> accessed 10 August 2017.

⁷⁰ Harmon 72.

⁷¹ Harmon 873.

⁷² Harmon 873.

⁷³ Harmon 872.

⁷⁴ Kilroy 260.

⁷⁵ National Consortium for the Study of Terrorism and Responses to Terrorism 'American Deaths in Terror Attacks: Fact Sheet' available at https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Oct2015.pdf accessed 31 July 2017.

law enforcement, carried out by the Department of Justice in 2008,⁷⁶ found that federal agencies employed approximately 120,000 full-time law enforcement officers.⁷⁷ The four largest agencies, two in the Department of Homeland Security (DHS) and two in the Department of Justice (DOJ), employed about two-thirds of all officers.⁷⁸

The federal role in controlling delinquent subnational police remains relatively constrained, however. Federal legislation addressing police misconduct suffers from limitations that reduce its effectiveness.⁷⁹ The federal crime of ‘acting under ‘color of law’ to ‘wilfully deprive or conspire to deprive a person of a right protected by the Constitution or US law’ is investigated by the FBI.⁸⁰ The federal violation requires proof that police officers acted wilfully — that is, that they intentionally sought to deprive someone of his or her constitutional rights. Incompetence, bad training or mistakes in judgment do not meet that standard.⁸¹ Consequently, federal prosecutions of individual police misconduct are exceedingly rare.

A law for federal investigations of a pattern or practice of human rights violation by the federal Justice Department was passed in 1994 after the 1991 roadside beating of Rodney King by white officers of the Los Angeles Police Department.⁸² Such an investigation was carried out after the shooting in Missouri of Darren Wilson by police in 2014.⁸³ The report uncovered a municipal government intent on criminalising its own residents as a source of revenue, with city officials directing police to produce increases in court fees for infractions such as ‘manner of walking in roadway’ and ‘failure to comply’, with the report describing the police as an ‘armed collection agency’.⁸⁴ Such federal investigations may result in court-enforced agreements known as ‘consent decrees’ to compel changes if necessary; such decrees are in place in Chicago and Baltimore after federal investigation.⁸⁵

Ongoing protests around the US regarding inappropriate police use of force and a perceived lack of accountability by law enforcement officers have sparked discussion about local law enforcement and judicial practices, which has resulted in several members of the Federal Congress formulating federal proposals designed to promote accountability and deter discrimination at the state and local levels.⁸⁶ However, because the enforcement of criminal law is primarily the responsibility of state and local governments, the imposition of federal restrictions on such entities raises the question of the extent to which the Constitution permits the federal government to regulate the actions of state and local officers.⁸⁷

⁷⁶ BJS ‘Data Collection: Census Of Federal Law Enforcement Officers’ available at <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=250> accessed 28 August 2017.

⁷⁷ Reaves, BA ‘Federal Law Enforcement Officers, 2008’ 2012 *National Criminal Justice (NCJ)* 238250 1

⁷⁸ Reaves (2012) 1.

⁷⁹ US Department of Justice ‘Addressing Police Misconduct Enforced by the Department of Justice’ available at <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> accessed 12 September 2017.

⁸⁰ FBI ‘What we investigate: Civil Rights’ available at <https://www.fbi.gov/investigate/civil-rights> accessed 12 September 2017.

⁸¹ Mills S ‘702 shootings by city’s cops, not one federal prosecution’ *Chicago Tribune* 8 August 2016.

⁸² Weichselbaum S ‘The Problems with Policing the Police’ *Time* 26 May 2015.

⁸³ Serwer A ‘Jeff Sessions’s Blind Eye’ *The Atlantic* 5 April 2017.

⁸⁴ Serwer (2017).

⁸⁵ Serwer. (2017).

⁸⁶ Congressional Research Service (CRS) *Federal Power over Local Law Enforcement Reform: Legal Issues* R44014 (2016) available at <https://www.everycrsreport.com/reports/R44104.html#Content> accessed 10 August 2017.

⁸⁷ CRS 1.

Proposals include imposing restrictions on the receipt of federal funds as well as banning certain practices independently of a tether to federal money.⁸⁸ This may be possible through the 14th Amendment of the Constitution, which bars states and local governments from ‘depriv[ing] any person of life, liberty, or property, without due process of law [or] deny[ing] to any person ... the equal protection of the laws’ and grants Congress the ‘power to enforce, by appropriate legislation’ those provisions. The Congressional Research Service is of the view that to support such federal legislation, Congress would need to show a widespread history of violations of constitutional rights.⁸⁹ However in March 2017, the Attorney-General of the Trump administration ordered a review of the Justice Department’s approach to policing, asserting that ‘it is not the responsibility of the federal government to manage non-federal law enforcement agencies’.⁹⁰

Conclusion

The US case study refutes the idea that central control is necessary for rationality and equity in the distribution of resources. Nonetheless, it suggests that local accountability measures may be insufficient to control the abuses of delinquent subnational police. It further suggests that central intervention may be necessary to realise economies of scale in appropriate and uniform training of professional police officers, and to supplement underfunding in some municipalities. While the case study seems to confirm the risk of corrupt local capture of policing, such risk of capture is equally present when policing is centralised, as the case study of Nigeria below shows, and indeed may have a more widespread deleterious impact.

In terms of safety outcomes, the US case study demonstrates that high levels of safety may be achieved in most subnational entities with a highly decentralised arrangement – but that some cities may not achieve adequate safety outcomes, often as a result of corruption. This suggests that some asymmetry in policing arrangements may be necessary to achieve more evenly distributed safety outcomes – Canada is an excellent example of such asymmetrical arrangements.

2.3 Canada: Asymmetrical policing arrangements

The fundamentals of Canadian federalism were first provided at the time of Confederation via the 1867 British North America Act, which in 1982 was renamed the Constitution Act of 1867. This Act sets out the powers of the federal and provincial levels of government, as well as providing for matters of sole provincial jurisdiction⁹¹ and matters of concurrent federal jurisdiction.⁹² The federal government has powers over ‘Peace, Order and good Government (POGG),’⁹³ as well as jurisdiction over criminal law, emergency management, national security, policy on violent crime and the political executive’s prerogative over foreign and defence policy.⁹⁴ At the same time, matters that are ‘local’ in nature are assigned to the jurisdiction of the provincial government: detention facilities, civil matters and natural disasters, and the enforcement of laws made by the province.⁹⁵ This arrangement is intended to preserve local solutions to local security issues.⁹⁶

⁸⁸ CRS 1.

⁸⁹ CRS 1.

⁹⁰ Serwer (2017).

⁹¹ Section 92 Constitution Act.

⁹² Section 95 Constitution Act.

⁹³ Preamble, Article 91, British North America Act (BNAA 1867).

⁹⁴ Leuprecht et al. (2015) 4.

⁹⁵ Article 92 BNAA 1867.

⁹⁶ Leuprecht et al. (2015) 4.

While this federal-provincial arrangement seems straightforward, there is ambiguity in practice, with no clear and shared understanding of the roles and responsibilities of the levels of government in matters of public security.⁹⁷ This results in a reliance on intergovernmental mechanisms to determine which level of government is responsible for funding and delivering public security.⁹⁸ Three levels of government are consequently involved in policing in Canada, with several types of police services serving Canadians, depending on the province and local government.⁹⁹

The federal police service, the Royal Canadian Mounted Police (RCMP), in addition to its federal role, polices eight provinces, three territories, and more than 150 municipalities under contract.¹⁰⁰ The RCMP also provides specialised national police services to all law enforcement, such as forensic analyses of criminal evidence, criminal records information, identification services, technological support, learning opportunities, and the collection and analysis of criminal information and intelligence.¹⁰¹

Provincial police legislation¹⁰² sets out the terms by which police are governed. Local governments derive their powers from provincial law (usually in the form of a Municipal Act created by the provincial legislature). The legislation can require that cities and towns of a certain population size maintain their own police force. Municipalities have three options when providing municipal policing services: they may form their own police force, join an existing municipal police force, or enter into an agreement with a provincial police force or the RCMP.¹⁰³

Where there are municipal and provincial services, the municipal and provincial government, respectively, are responsible for funding their police forces. In the provinces and territories where the RCMP is contracted to provide provincial-level policing, the provinces are billed 70 per cent of the total contract costs in most cases.¹⁰⁴ Where the RCMP is granted a policing contract to police a municipality, in terms of the billing agreement municipalities with a population under 15,000 are billed 70 per cent of total expenditures, while municipalities of 15,000 and over are billed 90 per cent of total costs.¹⁰⁵

In Ontario and Quebec, provincial police serve areas not served by municipal police, whereas residents of western and maritime Canada are policed either by self-run municipal police services or by the RCMP through its contracted municipal, provincial or territorial policing.¹⁰⁶ Newfoundland and Labrador contract with the provincial police, the Royal Newfoundland Constabulary, to serve the

⁹⁷ Leuprecht et al. (2015) 5.

⁹⁸ Leuprecht et al. (2015) 5.

⁹⁹ Council of Canadian Academies (COCA) *Policing Canada in the 21st Century: New Policing for New Challenges/The Expert Panel on the Future of Canadian Policing Models* (2014) 6 available at https://ccla.org/cclanewsites/wp-content/uploads/2015/05/policing_fullreporten.pdf accessed 30 November 2019.

¹⁰⁰ RCMP 'About the RCMP' available at www.rcmp-grc.gc.ca/about-ausujet/index-eng accessed 12 June 2018.

¹⁰¹ Officer of the Auditor-General of Canada '2011 June Status Report of the Auditor General of Canada, Chapter 5 – National Police Services: Royal Canadian Mounted Police' available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_05_e_35373.html accessed 29 October 2019.

¹⁰² See, for example, British Columbia (BC) Police Act [RSBC 1996] Chapter 367.

¹⁰³ McKim E 'Policing in Canada Today' (1999) Public Affairs and Information Directorate Royal Canadian Mounted Police 1 available at http://ssrsbstaff.ednet.ns.ca/aripley/Law12/PolicingandArrest/Policing_in_Canada_Today_1.doc accessed 26 October 2019.

¹⁰⁴ McKim (1999) 2; see e.g. BC Police Act Schedule A, Article 11; BC Police Act Schedule B article 11.

¹⁰⁵ McKim (1999) 2 BC Police Act Schedule B article 11.

¹⁰⁶ COCA (2014) 6.

major municipalities, while the RCMP is responsible for rural policing.¹⁰⁷ Some two-thirds of Canadians live in regions served by stand-alone municipal police services, with another 11 per cent living in municipalities policed by the RCMP under contract.¹⁰⁸

First Nations policing agreements exist for aboriginal communities across Canada.¹⁰⁹ Aboriginal communities have varying degrees of self-administration or self-government.¹¹⁰ Policing services are negotiated through tripartite agreements between the federal government, provincial or territorial governments, and the First Nations; under these arrangements, First Nation communities are policed either by a self-administered police service, or under agreement by the provincial, territorial or other existing police service.¹¹¹ Policing costs are paid jointly by the federal and provincial government, and provincial policing standards apply.¹¹²

Canada's model of decentralisation is characterised by a considerably lower incidence¹¹³ of use of fatal force than in the US, with about 25 incidents per year.¹¹⁴ This better record may be an effect of the multilevel government contracting arrangements: the RCMP appears to record a lower rate of fatal shootings per officer over a 17 year period than the Toronto, Montreal or Vancouver Municipal Police.¹¹⁵ Although the rate is better than that in the US, it is nevertheless higher than some European counties such as Germany, which reports 20 or fewer such killings per year despite a population almost twice as large.¹¹⁶

Consequently, it remains an issue of concern in Canada. Since 1990, six provinces¹¹⁷ have created a civilian oversight agency that investigates cases of serious injury and death involving police and the public. Ontario's Special Investigations Unit (SIU) was the first, having been established in 1990. More recent developments include the creation via provincial legislation of police boards and commissions.¹¹⁸ The RCMP does not have its own agency for investigating cases of serious injury or death. The Civilian Review and Complaints Commission is an independent agency founded in 1988 to review public complaints concerning the conduct of RCMP members, but it has no authority to

¹⁰⁷ COCA (2014) 6.

¹⁰⁸ COCA (2014) 6.

¹⁰⁹ Mckim (1999) 1.

¹¹⁰ Government of Canada 'Self-government' available at <https://www.rcaanc-cimac.gc.ca/eng/1100100032275/1529354547314> accessed 26 October 2019.

¹¹¹ Lithopolous S 'Lifecycle of First Nation Administered Police Services in Canada – Canada's First Nation Policing Programme' (2016) available at <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctms/2016-r030/index-en.aspx#s2> accessed 12 July 2019.

¹¹² Lithopolous (2016).

¹¹³ Expressed per 100,000 population and as a percentage of homicides.

¹¹⁴ Baird T 'Stop the killing: Fatal police shootings in Canada' *The Independent Newfoundland and Labrador* 14 April 2015 available at <http://theindependent.ca/2015/04/14/stop-the-killing-fatal-police-shootings-in-canada/> accessed 26 October 2019.

¹¹⁵ Estimates of 5.8 per 1,000 officers, 15.8 per 1,000 officers, 9.3 per 1,000 officers, 32 per 1,000 officers, respectively, based on approximate size of the RCMP of 30,000, Toronto Police Service of 5,600, Montreal of 4,600, and Vancouver of 1,300. For size of services see Statistics Canada 'Police officers and crime rates — Police officers in the 30 largest municipal police services, 2012' available at <https://www150.statcan.gc.ca/n1/pub/85-225-x/2012000/t004-eng.htm> accessed 30 November 2019. Number of RCMP fatalities: 176; Toronto Police Service: 89; Service de Police de la Ville de Montreal: 43; Vancouver Police Department: 42, as per CBC data reproduced by Kim P '17 years of police killings' PIVOT 28 March 2019 available at http://www.pivotlegal.org/17_years_of_police_violence_in_canada accessed 17 October 2019.

¹¹⁶ Gagnon M 'Police in Germany kill more than you think' *Deutsche Welle* 14 May 2017 available at <https://www.dw.com/en/police-in-germany-kill-more-than-you-think/a-38822484-0> accessed 17 October 2019.

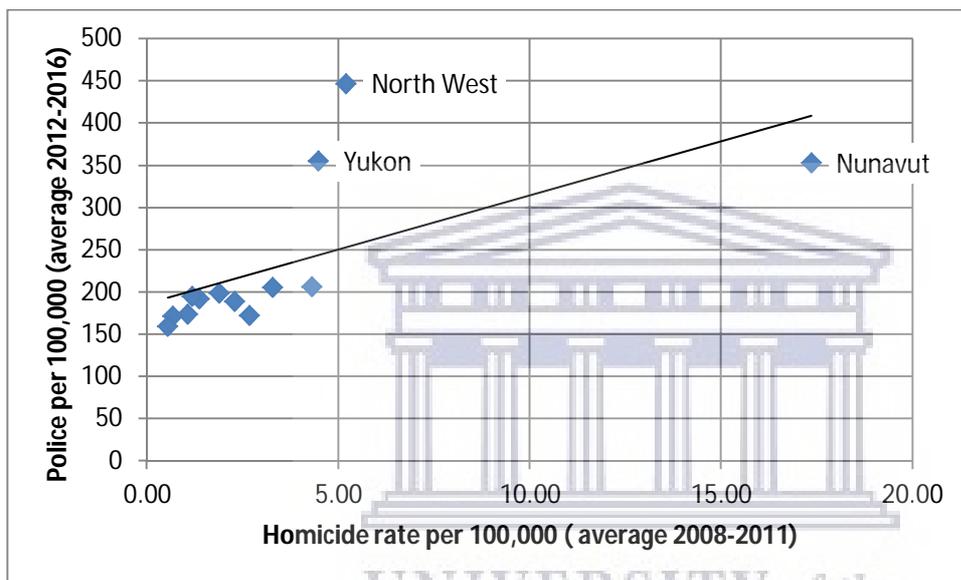
¹¹⁷ British Columbia, Alberta, Manitoba, Ontario, Quebec, and Nova Scotia.

¹¹⁸ See, inter alia, the Police Services Act of 2009 (Manitoba).

investigate incidents of death or injury involving the RCMP.¹¹⁹ Thus, in Canada intervention to control police misconduct has been located at the level of the province.

The Canadian decentralisation model is associated with relatively equitable and rational distribution of police resources by province and territory – except for three outliers, namely Yukon, Northwest and Nunavut Territories, which are policed solely by the RCMP and have the highest policing rates per 100,000.¹²⁰ Yukon and Northwest, but not Nunavut, also have significantly more resources than suggested by the prior homicide rate (see Figure 2 below); their very small populations (less than 50,000 each) and vast geographical area may account partly for this: in 2017 the three territories had a total of 445 RCMP officers.¹²¹

Figure 2: Relationship between prior homicide rate and police resources in provinces and territories of Canada



Data Source: Statistics Canada

Unlike the US model, the Canadian one is associated with an overall lower level of homicide (see Table 1) and an absence of extremely high outlier homicide rates – no Canadian metropolitan area has close to the very high homicide rates evident in the US outlier cities.¹²² The fact that an asymmetrical decentralised policing arrangement is associated with relatively even outcomes suggests that asymmetry may be required in decentralised arrangements to lead to broadly even outcomes. Nunavut represents the provincial and territorial maximum homicide rate, and Thunder Bay, Ontario, the metropolitan maximum homicide rate.

¹¹⁹ Laming E ‘Here's how Canada could properly police the police’ *Ottawa Citizen* 28 June 2017 available at <https://ottawacitizen.com/opinion/columnists/laming-heres-how-canada-could-properly-police-the-police> accessed 30 November 2019.

¹²⁰ Statistics Canada ‘Police officers by level of policing, by province and territory, 2017’ available at <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54912/tbl/tbl02-eng.htm> accessed 26 October 2019.

¹²¹ Statistics Canada ‘Police officers by level of policing, by province and territory, 2017’ available at <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54912/tbl/tbl02-eng.htm> accessed 26 October 2019.

¹²² Statistics Canada ‘Table 35-10-0071-01 Homicide victims and rate per 100,000 population’ available at <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510007101&pickMembers%5B0%5D=2.2> accessed 12 July 2019.

Table 2: Average homicide rate in Canada (2013-2017)

Homicide rate per 100 000	Minimum	Median	Maximum
Provinces and Territories	0.69	1.97	9.26
Metropolitan Areas	0.36	1.21	5.28

Data source: Statistics Canada

The Canadian model – in which the RCMP may be contracted, typically for 20-year periods, provincial ministers exert strategic control, and provincial accountability mechanisms are in place – appears to be associated with a greater degree of police professionalism and adherence to the rule of law than is evident in the US.

Conclusion

The Canadian case study suggests that centralisation is not required for equitable resource distribution and may be associated with safety outcomes. The asymmetrical arrangements ensure that economies of scale operate in favour of small subnational units contracting with the RCMP. The twin themes of the need for public security and curbing police abuse have also emerged in this model, but the former has arisen more prominently at the federal level and the latter at provincial level, which may be the appropriate given the preponderance of policing by the RCMP and the higher rate of fatal force at municipal police level.

Leuprecht concludes that the Canadian system works because it empowers provinces and localities to be responsive to local needs, with ‘surge support’ available from the federal level; in addition, the confidence, capacity and autonomy of local levels of government are combined with a political culture that balances shared rule with self-rule through strong commitment to the rule of law.¹²³

2.4 Nigeria: Contested centralisation

Nigeria’s first constitution after independence in 1960 gave each region the right to have regional police forces while the federal government retained oversight along with federal police.¹²⁴ However, in view of the role of the northern police forces in the pogroms of 1966,¹²⁵ the Gowon regime¹²⁶ disbanded the regional police forces. The secession of the eastern Nigerian region and, ultimately, the Nigeria-Biafra civil war were in response to the 1966 pogroms. The disbandment of the police forces began in late 1966 and was completed by the end of 1972, with the 1979 Constitution enabling a return to civilian rule and, under the auspices of the federal government, giving the Nigeria Police Force (NPF) sole jurisdiction over the country¹²⁷ during the brief Second Republic.¹²⁸ Thus, for Nigeria, fears of partisan armed forces at state level were not academic – the country’s history lent powerful impetus to the centralised policing provisions of the 1999 Constitution.

The early post-independence era in Nigeria was thus dominated by intermittent military rule followed by the stabilisation of civilian rule after 1999. The Constitution of 1999 provides for federal and state

¹²³ Leuprecht C et al. ‘Introduction’ in Leuprecht C, Kölling, M. & Hataley, T. *Public Security in Federal Politics* (University of Toronto) (2019) 29.

¹²⁴ Nwanza C ‘A History of Nigeria’s Police Service’ *Africa Is a Country* 21 April 2014 available at <https://africasacountry.com/2014/04/historyclass-nigerias-police> accessed 27 October 2014.

¹²⁵ The 1966 anti-Igbo pogrom was a series of massacres targeting Igbo people and others of southern Nigerian origin living in northern Nigeria. It led to the secession of the eastern Nigerian region and the declaration of the Republic of Biafra, events that culminated in the Nigeria-Biafra war.

¹²⁶ General Yakubu Gowon assumed power in August 1966 in a coup and was deposed in a coup in July 1975.

¹²⁷ Section 194 Constitution of the Federal Republic of Nigeria 1979.

¹²⁸ This Second Republic was overthrown in 1983 and was followed by military rule.

legislative and executive powers.¹²⁹ It declares that ‘the security and welfare of the people’ is the primary purpose of government,¹³⁰ with this purpose extending to all organs and levels of government.¹³¹ The Constitution entrenches a highly centralised policing arrangement: ‘Police and other government security services established by law’ are exclusive competences of the federal state.¹³² The Inspector-General of Police¹³³ and the Nigeria Police Council¹³⁴ are responsible for the ‘general supervision’ of the NPF.¹³⁵ The President appoints the Inspector-General of Police from among serving members of the NPF, on the advice of the Nigeria Police Council.¹³⁶ The President has the power to give lawful directions to the Inspector-General regarding maintaining public safety and order, directions with which the latter must comply.¹³⁷

The Police Service Commission is appointed by the President, confirmed by the senate (representing the states)¹³⁸ and is charged with the appointment and disciplinary control of members of the police force other than the Inspector-General,¹³⁹ including state commissioners of police.¹⁴⁰ There is limited control by governors over policing in their states. Contingents of the NPF stationed in a state are subject to the authority of the Inspector-General of Police, under the command of the Commissioner of Police of that state.¹⁴¹ Any lawful directions from the Governor of a state to state commissioners of police are subject to presidential veto.¹⁴²

The rationales for centralised policing – that it prevents local corruption of policing, ensures economies of scale, encourages equitable distribution of resources, and enables transformation – have not been evident in the Nigerian case study. According to Etannibe Alimiki and Innocent Chikwuma, the NPF fails in effectiveness and efficiency in the prevention and control of crime, in observance of the rule of law, in protection of the dignity and rights of citizens, in accountability to the citizens, in civility and incorruptibility, and in concern for the general welfare of citizens.¹⁴³

While centralisation is theorised to permit equity and rationality in the distribution of resources, large proportions¹⁴⁴ of NPF officers are deployed to protect elected officials and the politically connected; the Inspector General of Police in 2015 said only 150,000 of 305,000 police were available for core duties, as the rest were carrying out guard duties.¹⁴⁵ The NPF has been described as ‘undermanned, underequipped, underfunded, undertrained, unaccountable, over-centralized, over-politicized, corrupt’

¹²⁹ Sections 4 and 5 Constitution of Nigeria 1999.

¹³⁰ Section 14(2)(b) Constitution of Nigeria 1999.

¹³¹ Section 13 Constitution of Nigeria 1999.

¹³² Schedule 2 Part 1 item 45 Constitution of Nigeria 1999.

¹³³ Section 215(1)(a) Constitution of Nigeria 1999.

¹³⁴ Section 153(1)(l) Constitution of Nigeria 1999.

¹³⁵ Schedule 3 Part L item 28(b) Constitution of Nigeria 1999.

¹³⁶ Section 215(1)(a) Constitution of Nigeria 1999.

¹³⁷ Section 215(3) Constitution of Nigeria 1999.

¹³⁸ The senate is comprised of 109 senators; the 36 states are each divided into three senatorial districts, with each electing one senator; the Federal Capital Territory elects only one senator.

¹³⁹ Schedule 3 Part M Constitution of Nigeria 1999.

¹⁴⁰ Section 215(1)(a) Constitution of Nigeria 1999.

¹⁴¹ Section 215(4) Constitution of Nigeria 1999.

¹⁴² Section 215(2) Constitution of Nigeria 1999.

¹⁴³ See Alimiki E & Chikwuma I ‘Analysis of Police and Policing in Nigeria’ CLEEN Foundation available at <http://new.cleen.org/policing.%20driver%20of%20change.pdf> accessed 28 October 2019.

¹⁴⁴ Nwanza (2014) estimates 150,000 of 400,000.

¹⁴⁵ Eribake A ‘IGP reduces orderlies attached to governors from 150 to 62’ *Vanguard* 31 August 2015 available at <https://www.vanguardngr.com/2015/08/igp-reduce-orderlies-attached-to-govs-from-150-to-62/> accessed 28 October 2019.

and, 'ultimately, complicit in the country's ongoing epidemic of criminal, communal, and political violence'.¹⁴⁶

While endogenous factors are also at play, commentators such as Suberu ascribe some of these problems to Nigeria's overly centralised arrangements. The trend since 1999 within states has been towards attempts to wring more devolution from a highly centralised policing arrangement. Funding by state governments of the NPF is one of the key manifestations of this trend.

Funding of the National Police Force by state governments

It is claimed that the various military governments after 1979 saw the NPF as a threat to their power and deliberately underfunded it;¹⁴⁷ such historical underfunding is difficult to reverse, and it is widely acknowledged that the NPF remains underfunded.¹⁴⁸ This has resulted in a reversal of the usual flow of funds from the centre to the state; it is instead state funds that are used to support the NPF.

Suberu refers to research which shows that state governments have come consistently to the financial aid of the NPF by providing patrol vehicles, fuel, financial subsidies, communication equipment, armoured personnel carriers, bullet-proof vests and other crime-fighting equipment to its contingents in their jurisdictions. Indeed, the 2008 Presidential Committee on Police Reform 'found that in some cases state government funding covered at least 50-70 per cent of police operating costs within the state'.¹⁴⁹ In Lagos State, a multi-million-dollar Security Trust Fund established by the state government is the primary source of funding for the police, providing 700 vehicles to the NPF in the state over an eight-year period, as against only 20 vehicles provided to the contingent from the federal budget.¹⁵⁰ Given such levels of subnational funding of the NPF, Femi Falana has argued that the 'NPF has become a state police' and that 'state commissioners of police are more loyal to state governors than the president'.¹⁵¹

To diminish this influence, Parliament adopted a Police Bill in 2019 that provides for maintenance of the police force through a fund into which 'shall' be paid not only the budgetary allocations appropriated by Parliament but so too any contributions by the state governments and the Federal Capital Territory.¹⁵² It remains to be seen whether states will continue to fund the NPF directly in spite of this new law.

State governments, in addition to funding the NPF, have pursued alternative strategies for controlling the apparatus of public security in their domains, including state-funded quasi-police formations and state-supported 'vigilante' groups.

¹⁴⁶ Suberu (2019) 118.

¹⁴⁷ Nwanza (2014).

¹⁴⁸ See Suberu, Nwanza, and Alimiki and Chikwuma above.

¹⁴⁹ Human Rights Watch "‘Everyone’s in on the Game’ Corruption and Human Rights Abuses by the Nigeria Police Force' available at <https://www.hrw.org/report/2010/08/17/everyones-game/corruption-and-human-rights-abuses-nigeria-police-force> accessed 30 November 2019.

¹⁵⁰ Falana F 'The Fajuyi Legacy and Demand for Restructuring of Nigeria' *Premium Times* (Lagos) 28 July 2016.

¹⁵¹ Falana (2016).

¹⁵² Clause 27(1) Nigeria Police Bill of 2019.

Emergence of state quasi-police formations

According to *The Economist*, several Nigerian states have ‘set up their own quasi-police forces of uniformed men’ in response to the crisis of policing and the failure of the army to hold back terrorism in Nigeria.¹⁵³ As mentioned, these include quasi-legal and extra-legal ‘policing’ formations.

Examples of quasi-police formations include the Lagos State Traffic Management Authority (LASTMA), the Hisbah (or Islamic morality police) in Kano and other Sharia-implementing states, and the Cross River State Homeland Security Service.¹⁵⁴ LASTMA, established in 2000, has a range of functions, chief of which are controlling traffic and enforcing state and national laws that govern the safe use of vehicles on roads in the state, and deterring and apprehending road-traffic offenders.¹⁵⁵ Members of LASTMA have powers of arrest and impoundment.¹⁵⁶

Cross River State Homeland Security came into existence in November 2016 when Governor Ayade signed into law a bill passed by the State House of Assembly for its establishment.¹⁵⁷ Its members do not bear arms and its function is gathering information to ensure effective policing of the state by the NPF.¹⁵⁸ The Kano State Hisbah Corps was established by the state government in 2003 with the institutionalisation of formerly local and privately maintained Hisbah security units.¹⁵⁹ The establishment follows the reintroduction of Sharia law in the 12 states of northern Nigeria between 1999 and 2000.¹⁶⁰ The Hisbah Corps operates under a Hisbah Board composed of government officials, secular police officers and religious leaders. It is decentralised, with local units supervised by committees composed of officials and citizens in the communities in which they operate.¹⁶¹ It may indeed fit more comfortably into the category of ‘state-supported vigilante groups’, considered in the light of the discussion below.

Emergence of state-supported vigilante groups

State-supported ‘alternative community-based security providers’, ‘voluntary community policing groups’, or vigilante groups have also become increasingly common, in the process stepping into the vacuum created by weak or absent federal police.

According to a 2003 Human Rights Watch (HRW) report, an increase in the activities of ethnic and regional militia, vigilantes, and other armed groups, such as the O’odua People’s Congress (OPC), an organisation active in the southwest of Nigeria campaigning for the Yoruba ethnic group, was already evident in the early 2000. The activities of the OPC ranged from political agitation for Yoruba autonomy and promotion of Yoruba culture, to violent confrontation with members of other ethnic

¹⁵³ The Economist ‘Special Report: Opportunity knocks – Security Keep it calm’ 18 June 2015 available at <https://www.economist.com/special-report/2015/06/18/keep-it-calm> accessed 14 November 2019.

¹⁵⁴ Suberu (2019) 118.

¹⁵⁵ Section 14(a)-(b) Lagos State Traffic Management Authority Law (2008).

¹⁵⁶ Section 15(2)(a)-(b) Lagos State Traffic Management Authority Law.

¹⁵⁷ Dania O ‘C-River begins massive recruitment into Homeland Security Service’ *Vanguard* 29 November 2016 available at <https://www.vanguardngr.com/2016/11/c-river-begins-massive-recruitment-homeland-security-service/> accessed 12 July 2019.

¹⁵⁸ Dania O (2016).

¹⁵⁹ Walker JA ‘Between Global Standards and Local Realities’ in Bunting A et al. (eds) *Marriage by Force?: Contestation over Consent and Coercion in Africa* (2016).

¹⁶⁰ Olaniyi RO ‘Hisbah and Sharia Law Enforcement in Metropolitan Kano’ (2011) 57(4) *Africa Today* 86.

¹⁶¹ Olaniyi RO (2011) 86.

groups, and, more recently, vigilantism and crime-fighting.¹⁶² As HRW puts it, ‘Underlying all these vigilante groups’ ability to operate freely and without accountability is the fundamental inability of the national police force to perform its law enforcement functions effectively, and the consequent lack of public confidence in the police.’¹⁶³

The OPC may have embarked on its crime-fighting activities precisely because of the success of an earlier vigilante group, the Bakassi Boys, which according to a 2002 HRW report were then active in several states in the south-east of Nigeria. HRW describes their growth:

[I]nitially created by traders to fight rampant crime in the large market towns of Aba, in Abia State, then in Onitsha, in Anambra State, the Bakassi Boys have since extended their operations across other parts of Abia, Anambra, and Imo states, with the active support of state governments.¹⁶⁴

The Anambra government gave special legal recognition to the Bakassi Boys by enacting the Anambra State Vigilante Services Law of 2000. Through this law, the Anambra State Vigilante Group (AVG), the successor to the Bakassi Boys, garnered official status. The law outlines the functions and powers of the vigilante group: they do not have powers to detain, but must hand over suspects to the police. The formalisation of AVG was not a fleeting phenomenon. In 2015, a Code of Conduct was instituted for its members, who were by then operating in 177 communities in the state.¹⁶⁵

Ongoing proposals for the establishment of police at state level

Nigerian academics and state governors increasingly suggest that a return to policing at state level, such as was provided for in the 1979 Constitution, is necessary to enhance security. The weakness of the centralised NPF led to the call in June 2012 by the Nigeria Governor’s Forum for the 36 state governments to heed ‘the increasing need for state police as a strategy for combating the increasing insecurity in the country’.¹⁶⁶

Proposed legislation to remove the presidential veto over state governors directives to police was widely seen as a further move towards state policing, as it would shift control of the NPF from the centre to the states. In September 2016, ‘[a] bill for an act to alter the Constitution of the Federal Republic of Nigeria, 1999 to provide for the establishment of state police and to ensure effective community policing in Nigeria; and for other related matters’ passed through a second reading. The bill sought the establishment of state police council and state police commission in the 36 states and the Federal Capital Territory. It was referred to the Special Ad-hoc Committee on the Review of the 1999 Constitution for legislative consideration.¹⁶⁷

¹⁶² Human Rights Watch *The O’dua People’s Congress (OPC): Fighting Violence with Violence* (2003) available at <https://www.hrw.org/report/2003/02/28/oodua-peoples-congress-opc/fighting-violence-violence> accessed 12 July 2019.

¹⁶³ Human Rights Watch (2003).

¹⁶⁴ Human Rights Watch *The Bakassi Boys: The Legitimization of Murder and Torture* (2002) available at <https://www.hrw.org/reports/2002/nigeria2/> accessed 12 July 2019.

¹⁶⁵ Ujumadu V ‘At last, Code of Conduct for Anambra vigilante operators’ *Vanguard* 18 November 2015 available at <https://www.vanguardngr.com/2015/11/at-last-code-of-conduct-for-anambra-vigilante-operators/> accessed 12 July 2019.

¹⁶⁶ Henry Umoru ‘Insecurity: Governors Call for State Police’ *Vanguard* (Lagos) 25 June 2012.

¹⁶⁷ Yesufu K ‘Bill for state police passes Second Reading’ *The Sun* 28 September 2016 available at <http://sunnewsonline.com/bill-for-state-police-passes-second-reading/> accessed 30 November 2019.

However, this push for subnational policing has been strongly resisted and indeed reversed. In May 2019, Parliament voted against adoption of the bill.¹⁶⁸ Parliament instead adopted the Police Bill, which as indicated above, provides for maintenance of the NPF through a fund into which 'shall' be paid not only the budgetary allocations appropriated by Parliament, but also any contributions by the state governments and the Federal Capital Territory.¹⁶⁹ The issue of state policing is likely to continue to be debated in Nigeria.¹⁷⁰

Conclusion

The Nigerian case study illustrates how a history of a compromised regional police strongly informs a constitutional design in favour of centralised policing. It further suggests that an insufficiently resourced central police is likely to be ineffective and unable to reap the benefits of economies of scale, leading to official or unofficial subnational entities stepping into the security vacuum. The case study also suggests that corruption may afflict local and centralised policing structures equally, with the latter possibly exhibiting more widespread deleterious consequences. Finally, as security is essential to development, subnational governments, in the absence of their having meaningful control of the federal police, will use whatever means are at their disposal to enhance policing over which they might have some control.

2.5 Kenya: Deep centralisation

The formation of the Kenya Colony under a governor in 1920 saw Kenya administered by direct rule through powerful provincial administrations. Policing was carried out by the Kenya Police Force (KPF), which served settlers and maintained civil order, and the Administration Police.¹⁷¹ Called the 'Native' or 'Tribal' Police during the colonial era, their function initially was to give effect to the colonial power's control of the indigenous people through taxes, livestock control and labour.¹⁷² The Administration Police Act of 1958 provided that they assist chiefs,¹⁷³ maintain law and order¹⁷⁴ in specified districts, and enforce licences and permits.¹⁷⁵ The Kenya Police Reserve (KPR),¹⁷⁶ an armed volunteer force, supplemented the KPF in providing security where the KPF's presence was limited.

At independence in 1963, a devolved form of regionalism was provided for in the independence constitution,¹⁷⁷ with a politically neutral police service established as a single entity divided into

¹⁶⁸ (No author) 'House Negatives the Nigerian Police Act (Repeal and Re-Enactment) Bill, 2019' Policy and Legal Advocacy Centre 23 May 2019 available at <https://placng.org/wp/2019/05/house-negatives-the-nigerian-police-act-repeal-and-re-enactment-bill-2019/> (accessed 28 November 2019).

¹⁶⁹ Clause 27(1) Nigeria Police Bill of 2019.

¹⁷⁰ Owen O (ed) 'Police Reform in Nigeria: The Devolution Debate' (2018) available <https://cleen.org/wp-content/uploads/2019/04/Police-Reform-in-Nigeria-The-Devolution-Debate.pdf> accessed 30 November 2019.

¹⁷¹ The World Bank 'Public Sector Reform and Capacity Building Kenya Economic Development, Police Oversight, and Accountability Linkages and Reform Issues' 16 September 2009 available at <https://openknowledge.worldbank.org/handle/10986/3174> accessed 30 November 2019.

¹⁷² Van der Spuy, E & Röntsch R *Police and crime prevention in Africa: a brief appraisal of structures, policies and practice* International Centre for the Prevention of Crime Report (2008) 12.

¹⁷³ Section 8(a) Administration Police Act of 1958.

¹⁷⁴ Section 8(c) Administration Police Act of 1958.

¹⁷⁵ Section 11 Administration Police Act of 1958.

¹⁷⁶ Kenya Police Reserve Ordinance of 1948.

¹⁷⁷ Mkutu, K, Marani, M & Ruteere M 'Securing the Counties: Options for Security after Devolution in Kenya' (2014) Centre for Human Rights and Policy Studies (CHRIPS) 15 available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/85852/Marani_Securing%20the%20counties%20options%20for%20security%20after%20devolution%20in%20Kenya.pdf?sequence=1&isAllowed=y accessed 25 June 2019.

regional contingents and specialised branches. Within three years, however, the provisions for regional governments and regional police contingents were deleted from the Constitution. President Jomo Kenyatta justified the centralisation of powers by invoking the ideal of 'nation-building' and claiming that the regional arrangements would inflame ethnic tensions.¹⁷⁸ Political control was again exerted through provincial administrations under central command,¹⁷⁹ while the police were centrally managed in the Office of the President. The revival of the provincial administrations in lieu of regional governments restored the justification for administration police, and the police service was divided once more into the KPF and Administration Police. Anne Makega observes that, since independence, the KPS has been associated with the protection of the political and economic elite and 'widely regarded as hostile, abusive, corrupt and ineffective'.¹⁸⁰

Kenya was governed as a single-party state until the first multiparty elections in 1992.¹⁸¹ A 2003 Task Force on Police Reforms proposed the development of a public relations campaign and the implementation of institutional restructuring. After the 2007 elections, ethnic violence broke out amidst allegations of irregularities, during which police shot hundreds of demonstrators. UN Secretary General Kofi Annan successfully brokered a peace involving shared government. A Commission of Inquiry into the 2007 Post-Election Violence (the Waki Commission) was instituted, which implicated the police (both the Kenya Police and Administration Police) in failures that included partisan acts of violence against civilians.¹⁸² The Commission recommended that 'a comprehensive reform of the Kenya Police Service and Administration Police be undertaken'.¹⁸³ The recommendations of the National Taskforce on Police Reforms in 2009, headed by Retired Judge Philip Ransley, were fed into the contemporaneously drafted new constitution.

After a long, tortuous process, this Constitution was adopted in 2010 and provided for a federal-type devolved government of 47 county governments.¹⁸⁴ Despite this, policing remains highly centralised. The Ransley recommendations are reflected, inter alia, in (1) the centralisation of control over both the KPS and AP as the National Police Service (NPS) under the Inspector-General of Police (IG);¹⁸⁵ (2) the independent partially civilian National Police Service Commission (NPSC) responsible for appointments, promotions, transfers and discipline;¹⁸⁶ and (3) the formation of the Independent Police Oversight Authority (IPOA) to investigate serious offences by police.¹⁸⁷ The KPR, formerly an auxiliary volunteer force detached from the KPS, is also under the IG.¹⁸⁸ The IG is appointed by the President with the approval of Parliament,¹⁸⁹ serving one non-renewable term of four years.¹⁹⁰ There are no restrictions on the terms of the two deputy inspector-generals, who head up the branches

¹⁷⁸ Nyabira BC & Ayele Z 'The state of political inclusion of ethnic communities under Kenya's devolved system' (2016) 20 *Law Democracy and Development* 1.

¹⁷⁹ Mkutu K et al. (2014) 15.

¹⁸⁰ Magega A 'Police reform in Kenya: Challenges and opportunities' Centre for Security Governance 9 October 2015 available at <http://secgovcentre.org/2015/10/police-reform-in-kenya-challenges-and-opportunities/> accessed 27 July 2017.

¹⁸¹ Githuku A 'Kenya: Prospects for Democracy following multiparty elections' (1993) 7 *International Update* available at <https://www.africaportal.org/documents/2069/Kenya-Prospects-For-Democracy.pdf> accessed 30 November 2019.

¹⁸² 'Waki Report: Summarised Version Kriegler and Waki Reports' (2009) Konrad Adenauer Foundation 54-55 available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf accessed 12 July 2019.

¹⁸³ Waki (2009).

¹⁸⁴ Article 6 Constitution of Kenya 2010.

¹⁸⁵ Article 245(2) Constitution of Kenya 2010.

¹⁸⁶ Article 245(3) Constitution of Kenya 2010.

¹⁸⁷ Mkutu K et al. (2014) 17.

¹⁸⁸ Mkutu K et al. (2014) 25.

¹⁸⁹ Article 245(2)(a) Constitution of Kenya 2010.

¹⁹⁰ Article 245(6) Constitution of Kenya 2010.

comprised of the former KPF and Administration Police.¹⁹¹ The national minister may give policy direction to the IG.¹⁹²

Security is centralised under the presidentially-chaired National Security Council (NSC), which is responsible for policy direction and coordination of police, intelligence and defence, and which reports to Parliament about the state of security.¹⁹³ The NSC is mandated to establish committees to discharge its mandate.¹⁹⁴ In practice, all the administrative levels – that is, regions, counties, sub-counties, wards, locations and sub-locations – have security committees that gather information used by the NSC.¹⁹⁵ Within counties, security committees headed by NPF county police commissioners are responsible for day-to-day decisions on policing, amongst other functions.¹⁹⁶ However, there is no control of the county police commissioners by elected county governors. County Police Authorities (CPA) are headed by county governors, but have functions limited mainly to making non-binding recommendations on security and to monitoring progress.¹⁹⁷

The new centralised arrangements incorporating some civilianisation have not led to democratisation or transformation of the police, and neither has the reputation of the NPS improved significantly in the post-2010 era.¹⁹⁸ A study on trauma fatalities in Nairobi (2010) found that gunshots accounted for one-quarter of the mechanisms of fatal injury and that law enforcement officers were responsible for the majority of gunshot deaths.¹⁹⁹ Gabrielle Lynch (2013) is of the view that ‘criminal violence is [a] reality in every social setting in Kenya’ and that Kenya’s security services contribute to that insecurity, including through gross violence inflicted on ordinary citizens.²⁰⁰ A paper reviewing East African Afrobarometer surveys (2015) found that, among East African countries, Kenyans feel the least secure walking in their neighbourhood and most fear political violence and intimidation.²⁰¹ The Brookings Institution has argued that corruption in general and among the police in particular fuels terrorism and violent extremism in Kenya.²⁰² Terrorism in turn had led to further centralisation through the creation of national anti-terror units which have been implicated in counterterrorism abuses.²⁰³ Response to terror-attacks-in-progress has improved,²⁰⁴ however, after foreign support

¹⁹¹ Article 245 (3) Constitution of Kenya 2010.

¹⁹² Article 245(4) Constitution of Kenya 2010.

¹⁹³ Article 240 Constitution of Kenya 2010.

¹⁹⁴ Section 5 National Security Council Act 23 of 2012.

¹⁹⁵ Mkutu K et al. (2014) 27.

¹⁹⁶ Mkutu K et al. (2014) 27.

¹⁹⁷ Part VI National Police Service Act of 2011.

¹⁹⁸ See inter alia Baraka C ‘Forget Al Shabaab, the Police Are the Real Terrorists in Kenya’ *The Elephant* 11 March 2019 available at <https://www.theelephant.info/reflections/2019/03/11/forget-al-shabaab-the-police-are-the-real-terrorists-in-kenya/> accessed 28 October 2019.

¹⁹⁹ Saidi H & Oduor J ‘Trauma deaths outside the hospital: Uncovering the typology in Kenyan capital’ (2013) 20(6) *Journal of Forensic and Legal Medicine* 570.

²⁰⁰ Lynch G ‘Democratisation and criminal violence in Kenya’ in Shwartzmantel J & Kraatzschmar, HJ *Democracy and Violence: Global Debates and Local Challenges* (2013) 165.

²⁰¹ Wambua P ‘Crime and security in East Africa: Burundians feel most secure’ (2015) *Afrobarometer Dispatch No. 10* available at http://afrobarometer.org/sites/default/files/publications/Dispatch/ab_r6_dispatchno10.pdf accessed 28 November 2019.

²⁰² Gilchrist N & Eisen N ‘Corruption and terrorism: The case of Kenya’ *Order From Chaos: Foreign Policy in a Troubled World* 22 August 2019 available at <https://www.brookings.edu/blog/order-from-chaos/2019/08/22/corruption-and-terrorism-the-case-of-kenya/> accessed 28 October 2019.

²⁰³ Langat A and Kushner J ‘Kenya’s anti-terror police are inflicting terror of their own’ *Global Post* 29 July 2015 available at <https://www.pri.org/stories/2015-07-29/kenyas-anti-terror-police-are-inflicting-terror-their-own> accessed 28 October 2019.

²⁰⁴ Bernardo R ‘DSS-trained police help neutralize terrorists, rescue scores of civilians in Nairobi hotel attack’ US Department of State 21 March 2019 available at

following the inept and corrupt response to the Westgate Mall terrorist attack²⁰⁵ and the Garissa University attack.²⁰⁶

Moreover, centralisation has not led to sufficiency or equity in resourcing. As in Nigeria, under-resourcing is part of the problem: in 2015 Kenya had only 40,000 police officers, making the national rate of policing at the time a very low 83 per 100,000 – less than half of what is considered necessary for a minimal service.²⁰⁷ By 2017, it was reported that this figure had more than doubled to 109,000; however, complaints were being made about the disproportionate protection of the elite, with 1 in 7 officers reportedly deployed as bodyguards: every Member of Parliament (MP) is entitled to at least one police bodyguard and two each for his or her homes upcountry or in the city – some policemen are also deployed as MPs' drivers.²⁰⁸

While Kenya's policing devolution debate has had much less time to evolve than in the other case studies and has no real history of regional policing to draw upon, the country exhibits some of the same tendencies as found in Nigeria, in particular the funding of the NPS by the counties and the emergence of policing-like formations that step into the vacuum created by the thinly-spread NPS.

Funding of the National Police Service by county governments

As in Nigeria, the usual flow of resources is reversed in that county governors have supported the NPS in their counties through the provision of vehicles (replete with county branding) and other policing equipment. For example, Machakos County developed a mechanism of collaboration with the police and in 2014 the County Governor presented them with 120 cars, 40 dogs and 500 CCTV cameras, which, they opine, will ensure the Governor's inclusion in security decision-making in the county.²⁰⁹ Machakos is not alone. In 2013, Mombasa County purchased a fleet of 'Mombasa County Metropolitan Police' (sic) vehicles for the use of the KPS, with a view to improving the county's security so that business could be conducted on a 24-hour basis.²¹⁰ This gives county governors a measure of leverage over county police commissioners.

Emergence of police formations at county level

The Constitution leaves the door open to additional forms of policing: Parliament may enact legislation establishing other police services under the supervision of the NPS.²¹¹ In 2018, Parliament introduced the County Law Compliance and Enforcement Bill which seeks to provide for the establishment of law compliance and enforcement units in each county and provides for the powers of

<https://www.state.gov/dss-trained-police-help-neutralize-terrorists-rescue-scores-of-civilians-in-nairobi-hotel-attack/> accessed 28 October 2019.

²⁰⁵ Howden D 'Terror in Nairobi: the full story behind al-Shabaab's mall attack' *The Guardian* 4 October 2013 available at <https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya> accessed 28 October 2019.

²⁰⁶ Parrin A 'Is Kenya's security policy the real enemy within?' IRIN 21 April 2015 available at <https://www.refworld.org/docid/553a3526a.html> accessed 28 October 2019.

²⁰⁷ Muraya, J 'Police numbers a factor in Kenya's insecurity – PKF' *Capital News* 8 June 2015 available <https://www.capitalfm.co.ke/news/2015/06/police-numbers-a-factor-in-kenyas-insecurity-pkf-2/> accessed 20 October 2017.

²⁰⁸ Ombati, C 'Concern over huge number of police officers assigned to VIPs' *Standard Digital* 17 May 2017 available at <https://www.standardmedia.co.ke/article/2001240019/concern-over-huge-number-of-police-officers-assigned-to-vips> accessed 20 October 2017.

²⁰⁹ Mkutu et al. (2014) 31.

²¹⁰ KTN News Kenya 'Mombasa County Police Cars Commissioned' *KTN News* 28 July 2013 available at <https://www.youtube.com/watch?v=uTecaGoCU2U> accessed 12 July 2013.

²¹¹ Article 247 Constitution of Kenya 2010.

their officials including search²¹² and arrest.²¹³ This legislation was introduced only after a number of counties had already legislated in favour of county inspectorates with significant policing powers. County governments had inherited the former ‘council askaris’ (see below) who worked under the former local authorities that existed before 2013.²¹⁴

Since 2013, when the provisions of the Constitution relating to counties came into effect, some counties, such as Mombasa, Nairobi City and Nakuru, have enacted county legislation providing for the establishment of county law enforcement units and their powers.²¹⁵ Other counties, among them Kilifi, Tana River, Uasin Gishu, Kakamega, Wale, Embu, Bomet, Embu and Tharaka Nithi, do not have legislated inspectorates but have security officers or county enforcement officers whose responsibilities include: (1) enforcement of and compliance with county laws and regulations; (2) patrol and guarding of access points; (3) controlling crowds; (4) protection of county government property; and (5) providing market security.²¹⁶ All these types of officers are commonly referred to as ‘county askaris’.²¹⁷

The Nairobi City County Inspectorate Services Bill of 2017 included among the inspectorate’s functions assisting the NPS in the maintenance of law and order and ensuring adherence to national legislation requiring county enforcement,²¹⁸ reflecting the aspirations of the county. In the Act²¹⁹ that was eventually passed, however, those functions were removed and the functions limited to ensuring compliance with county standards, traffic, securing country property, emergency services and disaster management.²²⁰ County officers are ostensibly accorded powers to arrest without a warrant in respect of the enforcement of county laws.²²¹ All former Nairobi city inspectorate employees are absorbed,²²² but must undergo vetting by the Board to ensure their suitability for the position.²²³ This is due to their reputation for corruption and abuse: in April 2016, it was reported that inspectorate officers exposed as harassing Nairobi citizens had been suspended, with past links to human rights abuses and even murder being noted.²²⁴

The Mombasa County Inspectorate Bill 5 of 2016²²⁵ has similar provisions, as does the Taita Taveta County Laws Enforcement and Inspectorate Services Bill of 2018. The county bills provide for powers of arrest and use of force to effect arrest in relation to county law offences, powers of entry, power to search without a warrant, and power to summon and arrest witnesses. These extensive

²¹² Clause 8 County Law Compliance and Enforcement Bill of 2018.

²¹³ Clause 15 County Law Compliance and Enforcement Bill of 2018.

²¹⁴ Mwakuni L 8.

²¹⁵ Mwakuni L ‘Constitutional and Legal Framework for the Enforcement of County Laws in Kenya: Challenges Experienced and Proposals for Addressing Them’ (2018) 10 available at https://www.academia.edu/38268051/Constitutional_and_Legal_Framework_for_the_Enforcement_of_County_Laws_in_Kenya_Challenges_Experienced_and_Proposals_for_Addresssing_Them accessed 28 October 2018.

²¹⁶ Mwakuni (2018) 11.

²¹⁷ Mwakuni (2018) 11.

²¹⁸ Clause 6 Nairobi Inspectorate Bill of 2017.

²¹⁹ Nairobi City Council Inspectorate Services Act of 2017.

²²⁰ Section 6 Nairobi City County Inspectorate Services Act of 2017.

²²¹ Section 21 Nairobi City County Inspectorate Services Act of 2017.

²²² Section 4(6) Nairobi City County Inspectorate Services Act of 2017..

²²³ Section 4(8) Nairobi City County Inspectorate Services Act of 2017.

²²⁴ Thlong’o J ‘Nairobi County govt to hire friendly security team to replace city askaris’ *The Standard* 25 April 2016 available at <https://www.standardmedia.co.ke/article/2000199550/nairobi-county-govt-to-hire-friendly-security-team-to-replace-city-askaris> accessed 12 July 2019.

²²⁵ The Mombasa County Inspectorate Bill 5 of 2016, Mombasa County Gazette Supplement 16, 15 September 2016.

powers were tabled by the counties before the relevant national law was tabled in Parliament, a fact that illustrates the desire of counties to intervene in law enforcement.

County quasi-policing through reservists

The KPR remains armed by the state so as to supplement the role of the police in providing security where police presence is low, often guarding pastoralist cattle kraals and moving with cattle caravans to protect them against raids by other pastoral groups.²²⁶ Although the KPR has been brought ostensibly under the NPS since 2010, in practice its members continue much as they did before but are now increasingly under the influence of politicians.²²⁷ In some counties, county governors have said they would like to transform the KPR into a county police force, a development many fear would create the risk of their being misused as an ethnic militia.²²⁸ Kennedy Mkutu and Gerald Wandera argue that KPR members are vulnerable to politicisation because they tend to be drawn mainly from a single ethnic group and their loyalties may be influenced by offers of financial compensation.²²⁹ Senior officers of the NPS have expressed concern that arming KPRs at the request of politicians is creating armed groups that resemble private armies ready to be deployed at the appropriate time – in other words, elected governors could use KPRs for their own purposes.²³⁰

Debate on devolution of policing to county level

Kennedy Mkutu, Martin Marani and Mutuma Ruteere describe ongoing debate about the role of the county governments in managing security; they record community members expressing the view that local police under county governors could and should be able to respond easily to local problems, while others argue that this could exacerbate ethnic tensions.²³¹

Jospeter Mbuba,²³² for instance, argues that centralisation has particularly perverse outcomes in the highly politicised and hierarchical Kenyan environment. First, he questions benign control by the national government of policing, especially when the interests of the devolved units are at variance with those of the national government.²³³ He argues that, in a centralised arrangement, national government ‘may still use the police against county leaders perceived to be either non-supportive or subversive of the ideals of the national government’, in the same way as ‘unfettered’ centralised police power was used before 2010 to ‘crack down on errant entities’.²³⁴ Such action may occur by unleashing the police against the county leader, or simply by withdrawing or diminishing the security the police provide to subnational entities.²³⁵ Secondly, Mbuba points to the widespread mistrust between national government officials at the subnational level (police commissioners at county level) and the executives of the subnational unit (County Governor): this may impede the implementation of a county government’s development plans.²³⁶ Mbuba recommends legislation in favour of county-

²²⁶ Mkutu K and Wandera G *Policing the Periphery: Opportunities and Challenges for Kenya Police Reserves Small Arms Survey* (2013) 11 available at <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP15-Kenya-Policing-the-Periphery.pdf> accessed 17 October 2019

²²⁷ Mkutu K and Wandera (2013) 39-40 & 55-56.

²²⁸ Mkutu et al. (2014) 26.

²²⁹ Mkutu and Wandera (2013) 65.

²³⁰ Mkutu and Wandera (2013) 65.

²³¹ Mkutu et al. (2014) 31.

²³² Mbuba J ‘Devolution without Devolution: Centralized Police Service Implications in a Decentralized Government in Kenya’ *Africology: The Journal of Pan African Studies* 11(8) 2018.

²³³ Mbuba 177.

²³⁴ Mbuba 177.

²³⁵ Mbuba 178.

²³⁶ Mbuba 178.

level police agencies in parallel with the NPS, with greater powers than the current Inspectorates, and with a clearly defined relationship with the NPS.²³⁷

Conclusion

Centralisation in the Kenyan case study thus continues to be characterised by authoritarian and often corrupt policing in service of the ruling party as the state, rather than by democratic policing in service of the people. With foreign funding and training, the centralised response to terror in progress has improved, albeit that terrorism preventative measures continue to be characterised by human rights abuses and that everyday policing fails to ensure public safety.

The Kenyan case study highlights the impact of the political heterogeneity that may exist between subnational and national government in a centralised arrangement. It also suggests that corrupt or captured policing may equally occur in centralised policing models, and that independent national oversight structures could be inadequate to prevent or address this. Centralised policing may well lend itself to the protection of political elites rather than result in equitable outcomes, in that geographical neglect might not entail direct political consequences for the ruling party in national government (as might be the case instead under a decentralised arrangement).

The case study suggests, furthermore, that subnational entities denied control over policing will seek other means of policing at subnational level. An insufficiently strong and rights-respecting national police may in fact engender more insecurity where devolved government exists and wishes to fill the space so created.

2.6 Conclusion

The reasons for police centralisation in federations include the need to avoid the emergence of armed partisan regional forces, to prevent the local corruption of policing, to advance development through equality and economies of scale, and to promote public security. The case studies from Kenya and Nigeria suggest that centralised policing does not necessarily do any of these well in emerging federations. The question arises whether decentralised policing would have had better outcomes in these contexts.

First, it seems evident that corruption or capture of policing may occur in both centralised and decentralised arrangements; however, the consequences of capture of a centralised police may be more widespread and less susceptible to intervention. The case study of the US, while highlighting the risk of local corruption, suggests that appropriately circumscribed intervention by federal government is a possible means to address delinquent subnational government policing. In centralised policing arrangements, by contrast, there is nowhere to turn for intervention in a delinquent police, except central government itself, which may itself be at fault, unless there exist strong independent non-political civilian oversight entities – these are absent in both the Kenyan and Nigerian case studies.

Secondly, the equitable distribution of resources in the US and Canada case studies suggests that decentralised arrangements can and do result in broadly equitable distribution of resources and widespread (if not uniform) public security, possibly because local governments face the direct political consequences of a failure to police adequately. However, this may be contingent on the greater availability of resources. In centralised arrangements, the risk exists that the central police may neglect subnational units under heterogeneous political (or ethnic) control and give preference to those who are politically or ethnically aligned. While the preferring of political and economic elites

²³⁷ Mbuba 179.

may occur in both centralised and decentralised policing arrangements, voters may more easily punish this directly in decentralised arrangements; in addition, there may be arrangements for federal or state police to step in where local police fail.

Thirdly, while the risk of armed partisan regional forces is a real one under decentralisation, there is a similar risk of unregulated militias emerging in centralised policing arrangements where policing is weak. Indeed, it has been argued that without a strong centralised police with a monopoly of force, decentralisation itself may create instability inasmuch as the resources of subnational units are used to create unofficial armed forces to fill security gaps.²³⁸ The examples of the US and Canada suggest that training and accountability arrangements at federal or state level may be brought to bear to ensure standards and to hold subnational police accountable.

Fourth, public security in centralised arrangements is likely to be insufficiently responsive to local needs given the remove at which decision-makers operate and the disconnect in political consequence. However, subnational entities may be too small or poor to field appropriately trained and professional police service. The asymmetrical arrangements evident in Canada suggest a way in which federal or state policing may, through contract arrangements which retain local political control, provide trained and professional policing at subnational level.

Leuprecht (2012) argues that security is a litmus test of a federal system's maturity. If security is ultimately local (which he argues it is), then one way to measure a central government's commitment to federalism is its respect for local autonomy over security decision-making and enforcement. He concludes that it appears

that those federal systems that respect subnational autonomy and where the central government respects subnational units preserve of their autonomy, funding, and decision-making power in the case of federal intervention in security-related matters, fare better on security than federal countries with central governments that do not.²³⁹

Seen in this regard, the failures of policing in Nigeria and Kenya may be a result partly of the immaturity of their federal-type systems, which fail to devolve policing. Yet the emergence of federal-type policing arrangements in the developing world is rare. The analysis using the data from Grichawat Lowatcharin²⁴⁰ on policing arrangements in relation to the human development index (HDI), found that countries with fully centralised policing demonstrate a wide range in HDI,²⁴¹ while countries with fully decentralised policing are confined to those with a higher minimum HDI of 0.6 or more in 2012.²⁴² This suggests that a degree of human development is associated with fully decentralised policing arrangements.

The direction of the association is debatable. Is a degree of development necessary for decentralised policing to emerge, or does decentralised policing result in a degree of development? If decentralisation improves public security, the argument that security is a *sine qua non* of development

²³⁸ See, inter alia, Eaton K 'The Downside of Decentralization: Armed Clientelism in Colombia' (2006) 15(4) *Security Studies* 533–562.

²³⁹ Leuprecht C 'Public Safety in Federal Systems: A Primer' (2012) 1(363) *L'Europe en formation* 46.

²⁴⁰ Lowatcharin (2016). t

²⁴¹ Norway, Denmark, Finland, Ireland, New Zealand, Israel, Korea (Republic of), Luxembourg, Italy, Slovakia, Portugal, Chile, Croatia, Russian Federation, Bulgaria, Kazakhstan, Mauritius, Panama, Turkey, Azerbaijan, Georgia, Colombia, Ecuador, Jordan, Peru, Thailand, Dominican Republic, Indonesia, Paraguay, Morocco, Kenya, Uganda.

²⁴² Switzerland, United States, Sweden, Estonia, Latvia, Trinidad and Tobago, Mexico, Jamaica, Philippines, El Salvador, Guatemala, Honduras.

would support the latter. Equally, if the degree of development is a proxy for the capacity of subnational government to deliver in federal-type states, then the degree of development may predict the rational move to decentralised policing.

In their comparative analysis of nine federal countries, Leuprecht et al. (2019) conclude that federal institutional design does affect public security. Their comparative observations support the thesis that federal and democratic commitments go hand-in-hand and that democratic governance and a federal political culture are necessary if not sufficient conditions for federal security institutions, practices and outcomes.

They find, moreover, that federal approaches to security do indeed work best where subsidiarity prevails; also required is consensus on the levels of government best suited to tackle different security challenges. They find that in diverse or heterogeneous federal countries – like both Kenya and Nigeria – delivering and administering security risks becomes a zero-sum game. Further, they find that the less optimal the performance of the federal system, the more likely it is for security to be under-delivered, and that the scarcer security is, the more contentious its delivery and administration. They conclude that decentralisation emerges as a key determinant of the legitimacy and efficacy of public security.²⁴³

Legitimacy is often measured by trust. Lowarcharin, along with Judith Stallman, tested the degree of police decentralisation against measures of trust in policing, and found that in more developed countries (human development index >0.8) the decentralisation of policing is associated with improvements in trust over 12 years, while the opposite occurs in less-developed countries.²⁴⁴ The authors opine that this suggests that, for policing decentralisation to yield the benefits observed in more-developed countries, less-developed countries may need to improve managerial systems, human resources and technological capacity at subnational levels before devolving policing.²⁴⁵

Their findings could equally support the thesis suggested by the Canadian case study, namely that incremental, asymmetrical devolution over time – with central responsibility for basic training, minimum standards and specialised services, but with policing devolved to capable subnational government within a multilevel accountability framework – may best harness the benefits of policing decentralisation in developing countries.

In conclusion, centralised policing does not necessarily yield the theorised benefits in emerging countries – in fact, the opposite may emerge – while decentralised policing too may hold risks where subnational entities are weak. The case study of Canada point to ways in which the risks of decentralised policing may be managed through multilevel arrangements.

South Africa has a highly centralised policing arrangement, much like that of Nigeria and Kenya. How and why this came about is the subject of the next chapter.

²⁴³ See Leuprecht C ‘Conclusion’ in Leuprecht, C Kölling M & Hataley T (eds) *Public Security in Federal Politics* (2019) 261-285.

²⁴⁴ Lowarcharin G & Stallman J (2019) ‘Decentralization and citizen trust: An empirical study of policing in more and less developed countries’ *Journal of Public Affairs* e1974.

²⁴⁵ Lowarcharin & Stallman (2019).

Chapter 3:

The reasons for centralised policing in South Africa

3.1 Introduction

The constitutional framework for policing and criminal justice in South Africa, like that of developing federal countries such as Kenya and Nigeria, is predisposed towards national control of the policing function. This is unlike the classic developed federal countries considered in Chapter 2, which embrace more complicated models of policing that often involve federal, provincial or state, and local police services, as well as intergovernmental accountability structures. The literature shows that the reasons commonly asserted for centralised policing arrangements in federal countries are to avoid the emergence of armed partisan regional forces, to prevent the local corruption of policing, to advance development through economies of scale, and to promote public safety. In the previous section, it was observed that these theorisations do not necessarily play out in practice. In South Africa, policing is highly centralised under the national government, with a limited oversight role for provinces. How and why did this come about, given the quasi-federal nature of the Constitution? Were the same considerations at play in South Africa as in other states?

3.2 Constitutional framework

The constitutional and legal framework emphasises national control over all aspects of policing, including structure, functioning, strategy, operations and accountability. Chapter 11 of the 1996 Constitution provides for the Security Services of South Africa,¹ making the national Parliament and the national executive paramount.² The national police's objects are those that are key to policing, namely '[to] prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.³

The Constitution seeks to achieve a degree of demilitarisation of the police through national civilian guidance established by national legislation,⁴ and further provides for national independent investigations into police misconduct.⁵ The latter provision is contained in the section dealing with limited provincial oversight and implies that a national body must investigate complaints arising from provincial oversight. The sections dealing with provincial oversight are discussed below; provincial oversight and provision for provincial needs are largely toothless.

The Constitution does not prescribe the structure and functioning of the SAPS in detail, in contrast to the Interim Constitution of 1993 which clearly detailed which functions were to be carried out under the control of national and provincial commissioners, respectively. In section 205, the Constitution of

¹ Chapter 11 Constitution of the Republic of South Africa 1996. According to its section 199(1), 'The security services of the Republic consist of a single defence force, a single police service, and any intelligence services established in terms of the Constitution.'

² Among the governing principles are that national security is subject to the authority of (national) Parliament and the national executive (s 198(d) Constitution).

³ Section 205(3) Constitution 1996.

⁴ In section 208, the Constitution provides simply that '[a] civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing'.

⁵ Section 206(6) of the Constitution provides that 'an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service' on receipt of a complaint lodged by a provincial executive.

1996 provides only that the police service must be ‘structured to function’ in the national, provincial and, where appropriate, local spheres of government;⁶ provincial commissioners are also specifically provided for.⁷ Beyond that, it simply provides that ‘[n]ational legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces’.

The national legislation concerned is the South African Police Service Act 68 of 1995 (SAPS Act), which in turn draws on the Interim Constitution but affirms a highly centralised arrangement. This chapter examines the reasons for and evolution toward this policing framework, after which it analyses the limited provincial powers.

3.3 The reasons for policing centralisation

In 1910, the unitary state of the Union of South Africa was created from the colonies of the Cape, Natal, Transvaal and Free State.⁸ The four police forces of the colonies were amalgamated to form the South African Police (SAP) in 1913. Apartheid was adopted as a formal government policy⁹ after the National Party (NP) won the 1948 general election, and South Africa became a unitary republic in 1961.¹⁰ Under the ‘separate development’ policy, four ‘independent’ states¹¹ and six self-governing ‘homelands’¹² (collectively termed ‘Bantustans’) were established from the 1970s for black ethnic groups,¹³ with the Bantustans over time each establishing their own police forces.

Opposition to apartheid turned to armed struggle from the 1960s,¹⁴ which was in turn met with violence by state security, including police. In addition, competition and mistrust within and between black communities often flared up into violence. In 1990, following escalating political conflict, international pressure and the fall of the Berlin wall, negotiations commenced to end apartheid, with the ANC having been unbanned and Nelson Mandela released from prison. Battles for power surfaced and violence increased dramatically, in particular between the ANC and the Inkatha Freedom Party (IFP), the party that governed the KwaZulu homeland and entertained national aspirations. The escalating violence led political parties to negotiate the 1991 National Peace Accord, which paved the way for further negotiations.

At the time of the negotiations, the South African Police (SAP) existed under the Minister of Law and Order and each of the Bantustans had its own police force, while there also existed other forms of police associated with municipalities – as well as the forces associated with the armed struggle. How was policing to be organised and controlled in the new South Africa? While there were notionally ten police forces, policing by the SAP and Bantustan forces was not equal. Under apartheid, the police in these territories were oriented towards controlling dissent, protecting the political elite, and maintaining ‘law and order’ to the benefit of the ‘external’ ‘white’ South Africa; crime prevention was not a goal and was incidental to the larger aim of controlling the populace to maintain the

⁶ Section 205(1) Constitution.

⁷ Section 207(4) Constitution.

⁸ Union of South Africa Act of 1909.

⁹ Through legislation commencing with the Population Registration Act (1950), which required racial classification, and the Group Areas Act (1950 and subsequent amendments), which allowed the government to proclaim areas for different races.

¹⁰ Republic of South Africa Constitution Act of 1961.

¹¹ Transkei in 1976, Bophuthatswana in 1977, Venda in 1979, and Ciskei in 1981.

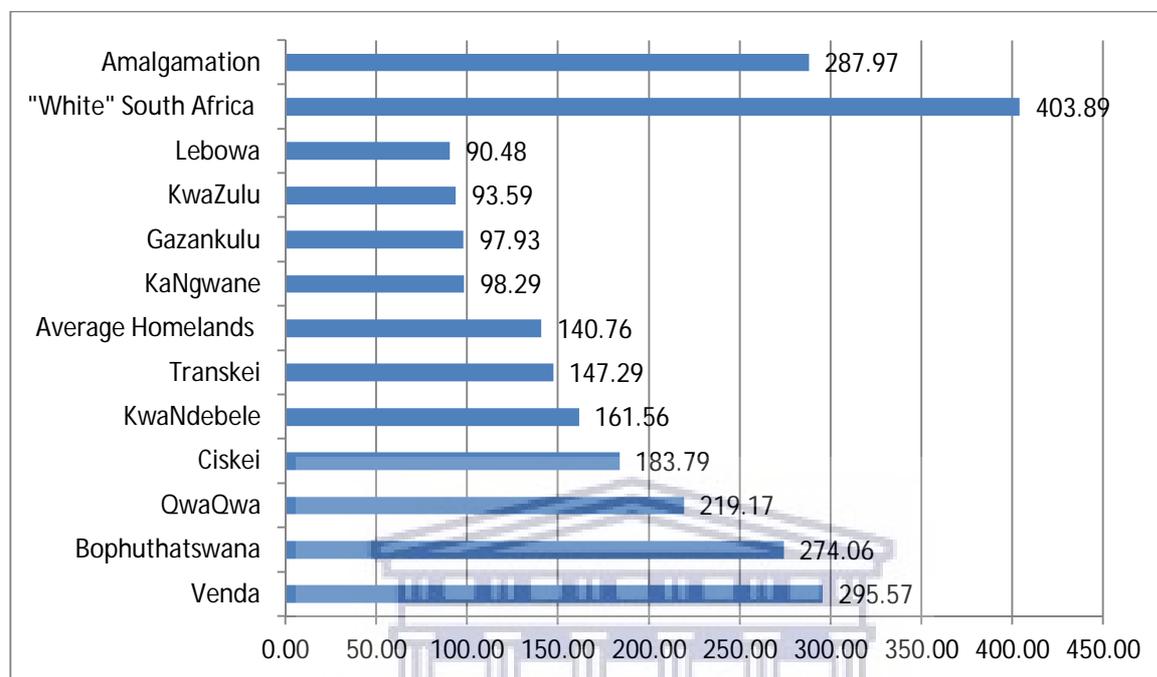
¹² Gazankulu, KwaZulu, Lebowa, KwaNdebele, KaNgwane, and Qwaqwa.

¹³ Through various laws, commencing with the Promotion of Black Self-Government Act 46 of 1959.

¹⁴ The ANC launched its armed wing, Umkhonto we Sizwe (‘Spear of the Nation’, or MK) in December 1961, with Nelson Mandela as its commander-in-chief.

apartheid system.¹⁵ Notwithstanding their formidable reputation as agents of repression, the number of police deployed indicated there was little attempt by the state to provide real policing to protect the ordinary people of those areas, as is apparent in the figure below.¹⁶

Figure 1: Number of police per 100 000 in 1994



Source: Author's own calculations based on SAPS data¹⁷

Accordingly, policing was centralised in the 1996 Constitution for three main reasons. First, the ANC's general preference for centralisation as a means to effect national transformation, including equalising the distribution of resources, meant that little attention was given to any other policing model, particularly as the federal-type Constitution was itself a concession. Secondly, the SAP wanted to protect its interests, which entailed a centralised solution cementing its existing control, and argued that centralisation would aid transformation. Thirdly, and possibly most importantly, the ANC wanted to prevent the infamously partisan KwaZulu Police¹⁸ from continuing in the new era – in the 1994 election, the ANC had lost the province of KwaZulu-Natal to the IFP.

¹⁵ As Rauch puts it, 'By the early 1990s, (all) the police in South Africa had acquired a reputation for brutality, corruption and ineptitude. Police organisations were militarised, hierarchical, and ill-equipped to deal with "ordinary crime".' Rauch J 'Police Reform and South Africa's Transition: Paper presented at the South African Institute for International Affairs conference' (2000) CSVR available at <http://www.csvr.org.za/docs/policing/policereformandsouth.pdf> accessed 30 November 2019.

¹⁶ The homeland forces had just less than 26,000 serving just over 18 million people. This implies a ratio of 400 police for every 100,000 in 'white' South Africa, compared to only 141 per 100,000 of the population on average for the homelands. By contrast, 'white' South Africa, excluding the homelands, boasted in excess of 120,000 police officers serving a population of just less than 42 million.

¹⁷ SAPS 'Old TBVC States and Self-Governing Territories (Homelands) prior to 1995' (undated) available at http://www.saps.gov.za/about/tbvc_info.php (accessed 28 November 2019).

¹⁸ The KwaZulu Police was set up in accordance with the Self-Governing States Constitution Act of 1971 and the KwaZulu Police Act of 1980, passed by the KwaZulu Legislative Assembly.

3.3.1 The problem of the KwaZulu Police

As early as the National Peace Accord negotiations, police centralisation was on the agenda in an attempt to deal with the 'problem of the KwaZulu Police (KZP)'.¹⁹ Although the KZP was one of many policing agencies, its partisan use of illegitimate violence was well-documented. In June 1992, the Legal Resources Centre (LRC) and Human Rights Watch (HRW) published a report, entitled *Obstacle to Peace: the Role of the KwaZulu Police in the Natal Conflict*,²⁰ which used court records, affidavits, witness statements and other documents to describe abuses by the KZP.²¹

In March 1993, the Goldstone Commission,²² appointed in terms of the National Peace Accord, announced an investigation into the KZP. Its interim report in March 1994 on criminal political violence by elements of the SAP, the KZP and IFP confirmed fears regarding the KZP, and an international team of investigators headed by the Attorney-General of Transvaal was appointed to seek prosecutions.²³ With the anti-ANC track-record of the KZP thus confirmed, the ANC policy position was that regionalised policing would allow regionally-based political parties to use the police for their own political ends.²⁴

An ANC document entitled *Policing the Transition: Transforming the Police* enumerated nine reasons for a single national police force, with four seemingly referring to problems with the KZP.²⁵ The document claimed that regional police forces are susceptible to the persecution of regional 'outsiders', that regional police forces are likely to become regional militias, and that corruption is more likely when the loci of policing and political power are closer together and afford direct dependency linkages.²⁶ The transitional arrangements guaranteed all public servants their jobs in the new era, so the ANC also feared that the KZP would continue to persecute the ANC in the province. By placing all police under central control, the ANC theoretically would have the power to reign in those who had been formerly employed in the KZP.

3.3.2 Centralisation as a means to transformation

The desire to quash the KZP dovetailed with the ANC's preference for the centralisation over federalism. The ANC regarded the provincial system, as Christina Murray puts it, as 'an imposition ... required

¹⁹ Marais E 'Policing the Periphery: Police and society in South Africa's "homelands"' (1992) 22nd Congress of the Association for Sociology in South Africa available at <https://www.csvr.org.za/publications/1456-policing-the-periphery-police-and-society-in-south-africas-qhomelandsq> (accessed 28 November 2019).

²⁰ Manby B et al. 'Traditional Dictatorship: One Party State in KwaZulu Homeland Threatens Transition to Democracy' (1993) Human Rights Watch available at <https://www.hrw.org/reports/1993/southafrica2/> accessed 28 November 2019.

²¹ Manby (1993) (no page numbers). The abuses included murder and assault of political opponents of Inkatha; abduction of ANC-aligned or non-Inkatha activists; participation or collusion with vigilante groups in the intimidation and attack of individuals accused of not supporting Inkatha; failure to intervene to prevent attacks by Inkatha members carried out in the presence of the KZP; and disruption of funerals, memorial services and meetings of non-Inkatha groups.

²² *Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation* appointed by former President FW de Klerk on 24 October 1991, in terms of the Prevention of Public Violence and Intimidation Act 139 of 1991, to investigate incidents of public violence and intimidation in South Africa prior to the 1994 general election.

²³ Human Rights Institute of South Africa 'Goldstone Booklet' (2009) available at <http://hurisa.org.za/wp-content/uploads/2009/11/Goldstone-Booklet.pdf> accessed 28 November 2019.

²⁴ Shaw M *Crime and Policing in Post-Apartheid South Africa: Transforming under fire* (2002) 28.

²⁵ ANC 'Policing the Transition: Transforming the Police' (undated) available at <http://www.anc.org.za/content/policing-transition-transforming-police> (accessed 17 May 2017).

²⁶ ANC (undated) 5.

by the negotiated transition to democracy – provinces are seen as a compromise'.²⁷ Nico Steytler and Johan Mettler argue that federalism was key to the ultimate success of the peace-making process.²⁸ The ANC thus made federal concessions to secure the peace – but once power had passed into its hands, there was a retreat.

The ANC maintained that policing should be a national function under the central government, while the NP and others preferred independent regional police.²⁹ The ANC's main argument for police centralisation was the same as its general argument: regionalised policing would allow transformation to take place at different speeds.³⁰ Moreover, the duplication of functions was unaffordable, and the standard of training and support services would be poor in a regional arrangement.³¹ A national effort was needed to retrain and create an appropriate police force in line with constitutional values: regional police forces would not be more human-rights conscious or non-discriminatory than national police forces.³² Artificial boundaries and barriers between regional police raise jurisdictional problems in combating crime. Finally, the ANC claimed that the existence of regional police forces in other countries arose from distinct historical conditions, whereas 'the tendency throughout the world is for greater centralisation and co-ordination of policing agencies in the interests of crime-prevention'.³³

Police reform was discussed at the Kempton Park negotiation forum, and also at bilateral meetings between the ANC and NP. The chief negotiators were Nicholas (Fink) Haysom, an ANC lawyer and academic, and the reformist SAP general, Andre Pruis, who had joined the SAP only a few years previously.³⁴ These parties held no candle for the federal ideal and were more concerned with transforming the police force into a reformed police service. The ANC saw federalism in general as a method of thwarting ANC majority rule.

The SAP was in favour of centralisation. Shaw argues that to reduce the likelihood of a new government intervening in police matters, it wished to present itself as an apolitical, professional organisation willing to serve any government; since Mandela's release in 1990, the SAP had been on a major internal reform drive, seeking, in Shaw's words, to 'manage change itself in the hope that it would not have change thrust upon it later'.³⁵ The SAP generals tended to share the ANC's view that management and reform would be more effective if centrally controlled; this led to conflict between the SAP negotiators and their NP principals.³⁶ It was, however, in the SAP's interests to delink from the NP to demonstrate its independence from its former political masters.³⁷

Although the NP saw federalism as a brake on ANC central government, in regard to policing it eventually bowed to the SAP. The NP was more concerned with power-sharing and ensuring a place for itself in national government than with securing a federal state.³⁸ Furthermore, no consideration was given to other, more nuanced multilevel-government approaches: Janine Rauch argues that the

²⁷ Murray C 'Provincial Constitution-making in South Africa: The (Non) Example of the Western Cape' (2001) 49 *Jahrbuch des öffentlichen Rechts* 482.

²⁸ Steytler N & Mettler J 'Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy' (2001) 31(4) *Publius: The Journal of Federalism* 93-106.

²⁹ Rauch (2004) 13.

³⁰ Shaw M *Crime and Policing in Post-Apartheid South Africa: Transforming under fire* (2002) 28.

³¹ ANC 5.

³² ANC 5.

³³ ANC 5.

³⁴ Rauch (2004) 13.

³⁵ Shaw M 'The bloody backdrop: negotiating violence' In Friedman S & Atkinson D (eds) *SA Review 7: The small miracle: South Africa's negotiated settlement* (1994) 296.

³⁶ Rauch (2004) 13.

³⁷ Shaw (2002) 28.

³⁸ See Steytler & Mettler (2001).

negotiations were narrow and superficial, and less heated than expected given the role of the police in enforcing apartheid and their failure to bring the ongoing violence under control.³⁹

The major agreements on policing were contained in sections 214-222 of the Interim Constitution; most were concerned with the central-vs-regional control debate.⁴⁰ Shaw argues the ANC had no capacity devoted to policing issues and relied on academics to negotiate the policing arrangements in the new constitution.⁴¹ He maintains as well that because there were few ANC police cadres to bring to the police (unlike in the case of the military), ANC strategists recognised that they had no option but to adopt the police and begin a process of transformation.⁴² Shaw quotes Penuel Maduna as saying in 1992 that the alternative of throwing the SAP out was just not feasible.⁴³

For the IFP and elements of the far-right, an insufficient degree of federalism in the Interim Constitution was a deal-breaker. This led to their withdrawal from the negotiating process and their return to the peace process only after significant changes were made to the Constitution to provide certain guarantees of a degree of federalism.⁴⁴ The outcome in relation to policing was that South Africa would have a unified, single, national police agency, but with a level of provincial control and organisation. This was strongly limited from the centre – in part to retain the centralised situation already in the SAPS Act.

The limited degree of provincial control in the Interim Constitution did not survive the final, post-constitution-making process – the status quo remained largely in place.

3.3.3 Maintaining the status quo: ‘Bantustan’ police forces run by the SAP

The final centralisation arrangement did little more than preserve the SAP status quo. The ‘sunset clause’ agreement at the Multi-Party Negotiating Forum, which secured jobs for civil servants in apartheid’s bureaucracies and ruled out the possibility of a purge of officials, meant that the SAP’s continued existence was effectively guaranteed.⁴⁵ The negotiators only needed to agree on institutional reforms and their timing.⁴⁶

The policing negotiations thus did little more than cement the dominant role of the SAP extant at the time of transition. The SAP was the country’s ‘only’ police force – its sole rivals were the ‘homeland’ police forces, which were in effect its offspring and under its control.⁴⁷ The pre-existing ethnic homeland police forces were never ‘stand-alone’ police forces independent of SAP control. As such, the claim that there were 11 separate police agencies is not an accurate reflection of the situation. Etienne Marais argues that the SAP wielded significant influence, even control, over the police forces of all the homelands, including those of the ‘independent’ TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states – although the TBVC states’ police had autonomy in theory, in practice it was limited.⁴⁸

³⁹ Rauch (2004) 12.

⁴⁰ Rauch (2004) 13.

⁴¹ Shaw (1994) 296.

⁴² Shaw (2002) 27.

⁴³ Shaw (2002) 27.

⁴⁴ Reflected in Constitution Amendment Acts 2 and 3 of 1994.

⁴⁵ The agreement to retain public servants was reflected in section 236(2) of the Interim Constitution. In respect of the police, it was reflected in section 12(2)(b) of the South African Police Service Proclamation R5 of 1995.

⁴⁶ Shaw (1994) 296.

⁴⁷ Shaw (1994) 296.

⁴⁸ Marais (1992) (no page numbers).

Even the controversial KZP was an extension of the SAP: the Commissioner of Police, who ran it, was appointed by the Pretoria government, and it was funded by the South African Department of Regional and Land Affairs (formerly the Department of Development Aid).⁴⁹ From May 1989 to December 1992, the Commissioner of the KZP was Major-General JH Buchner, a former officer in the SAP security branch.⁵⁰ Marais's research finds that, as late as 1992, all the police forces other than Transkei's had seconded SAP members at management level, including four out of the six of the commissioners of self-governing territories; Venda had the services of 'retired' members of the SAP as commissioners.⁵¹ Bophuthatswana, which had been vocal about its 'independence', had more than 20 seconded SAP officers in key positions.⁵²

Marais also points to 'co-ordinating committees' as a symbol of dependence; they focused on uniformity, particularly of training and promotion, with Bophuthatswana and Transkei only withdrawing from the co-ordinating committee in 1990.⁵³ Furthermore, the police forces of the six self-governing territories did not have their own security branches, with the South African security branch still being active in these areas until as late as 1992, despite the security branch's supposedly having been 'transformed' into a crime-focused unit called the Criminal Intelligence Service.⁵⁴ The security branch and other SAP units had powers that extended throughout South Africa, excluding the four 'independent' states; a sergeant of the SAP had full police powers inside or outside a self-governing area, while a commissioned officer of that homeland only had authority to act inside the homeland territory.⁵⁵

Crucially, funding of the homeland police was formally administered by a South African department, with budget applications being checked by the SAP, who wielded 'enormous influence over the development of policing and the determination of priorities'.⁵⁶ A common complaint among senior homeland police officers was that they could not be promoted to the same level as their counterparts in the SAP, because funds had not been approved for posts above the level which the SAP had determined for a police force of a particular size; the SAP in effect put the ceiling on promotion in most homeland police forces at brigadier level (the exception being the KZP).⁵⁷

All the homeland police forces relied on the SAP criminal records service for fingerprint-matching, tracing stolen cars, and other forensic services, while training was conducted mainly by the SAP.⁵⁸ Of the self-governing areas, only KwaZulu and Lebowa had their own basic training facilities, and of the TBVC states, Venda was still reliant on the SAP; 'management training' was offered at three levels by the SAP, and none of the homelands attempted to develop their own alternatives.⁵⁹

The nature of the borders of many homeland territories, and the lack of meaningful border control between any of the TBVC states and South Africa, ensured that the policing agencies had to co-

⁴⁹ Manby (1993).

⁵⁰ Manby (1993).

⁵¹ Marais (1992).

⁵² Marais (1992).

⁵³ Marais (1992).

⁵⁴ Marais (1992).

⁵⁵ Marais (1992).

⁵⁶ Marais (1992).

⁵⁷ Marais (1992).

⁵⁸ Marais (1992).

⁵⁹ Marais (1992).

operate closely. In Bophuthatswana, most serious crime was thought to be 'cross-border', and close relationships with individual SAP stations and units were common in most border regions.⁶⁰

Marais's 1992 research finds that at a senior level in all the police forces, except Bophuthatswana's, re-incorporation into the SAPS was considered inevitable: 'We have no problem with re-incorporation. We don't foresee any problems because after all we were created by the SAP.'⁶¹ By re-absorbing the partially independent homeland police forces, the SAPS preserved the SAP almost entirely as it had existed in terms of personnel, structure, and functioning: when the SAPS was created in 1995, senior SAP managers were firmly in control of change, occupying the key senior positions in the SAPS.⁶² The SAPS Act of 1995 served to formalise these arrangements.

While the SAP sought to entrench the status quo, the record of the KZP, along with KwaZulu's brinkmanship in leveraging violence to wring more provincial powers out of the Constitution, meant that the ruling ANC party in the Constitutional Assembly sought to ensure the KZP would never rise again, doing so by diluting the limited Interim Constitution's provincial powers over policing in the final Constitution. The latter limits the provincial role to monitoring and oversight, with a weak power to recommend dismissal of the provincial commissioner. This results in the awkward situation in which less politically powerful provinces supposedly exert oversight over a national police force acting under the direction of the national minister.

The passage of the SAPS Act was seen as 'shattering' the hopes of those in favour of a more decentralised policing model.⁶³ This was the case even though it was passed within the Interim Constitution framework. The Constitution of 1996 further centralised matters. The evolution of the constitutional framework in policing closely reflects the political situation and power of the ANC in the post-1994 period.

3.4 The evolution of the constitutional framework

In contrast to the 1996 Constitution, the Interim Constitution provided for some direct provincial political control over the SAPS. The Interim Constitution was finalised before the 1994 election and needed to reflect a sufficiently federal arrangement to secure the participation of the IFP. There were key differences between the Interim and Final Constitution, with policing more centralised, but the Constitutional Court ultimately certified the 1996 Constitution on the basis that, 'viewed in their totality', provincial powers had not been overly reduced.⁶⁴

3.4.1 Ambiguous role for the provinces in the Interim Constitution

The Interim Constitution provided that SAPS was structured at national and provincial levels and had to function 'under the direction' of the national government *and* the various provincial governments.⁶⁵ A provincial premier was obliged to appoint a member of the executive council (MEC) with responsibility for the functions of the Provincial Commissioner.⁶⁶ This provincial responsibility was matched by the provincial power to approve or veto the appointment of a Provincial Commissioner

⁶⁰ Marais (1992).

⁶¹ Marais (1992).

⁶² Shaw (2002) 28.

⁶³ Lambrechts D and Prinsloo JH 'The powers and functions of the South African Police service - a 'new' socio-legal perspective?' (1996) 9(2) *Acta Criminologica* 89.

⁶⁴ *Certification of the Amended Text of the Constitution of The Republic of South Africa* 1997(1) BCLR 1 para 203.

⁶⁵ Section 214(1) Interim Constitution.

⁶⁶ Section 217(1) Interim Constitution.

made by the National Commissioner,⁶⁷ and to institute ‘appropriate proceedings’ against the Provincial Commissioner in whom it had lost confidence.⁶⁸ The provincial legislature was empowered to pass legislation, with some limits, on the Provincial Commissioner’s policing functions.⁶⁹ These functions were to be exercised *subject to the directions of the provincial MEC*.⁷⁰ On the face of it, the provincial functions were extensive:

- the investigation and prevention of crime;
- the development of community policing services;
- the maintenance of public order;
- the provision in general of all other visible policing services, including the establishment and maintenance of police stations, crime reaction units and patrolling services;
- protection services in regard to provincial institutions and personnel;
- transfers within the province of members performing functions in terms of this section; and
- the promotion, up to the rank of lieutenant-colonel, of members of the Service performing the provincial functions laid out in this section.⁷¹

These provincial functions were (and continue to be, via transitional provisions)⁷² subject to the functions of the National Commissioner.⁷³ Thus, the Provincial Commissioner’s function to investigate and prevent crime excludes organised crime, which is exclusively under the ambit of the National Commissioner.⁷⁴ Similarly, the provincial function to investigate crime is reliant on the exclusive national function to carry out forensic services.⁷⁵ The provincial function to prevent crime is reliant on the national function to keep crime intelligence data.⁷⁶ The provincial power to transfer staff within the province who carry out provincial functions excludes the power to recruit and appoint those staff, and excludes staff in the province not carrying out provincial functions.⁷⁷ The provincial function of public order policing is subject to national intervention, if the Provincial Commissioner fails to establish public order.⁷⁸

⁶⁷ Section 217(2)(a) Interim Constitution.

⁶⁸ Section 217(2)(b) Interim Constitution.

⁶⁹ Section 217(3) Interim Constitution. Provincial laws were not to permit lower standards of performance than required in national legislation, nor detract from citizen’s rights in national legislation (s 217(4)).

⁷⁰ Section 219(1) Interim Constitution.

⁷¹ Section 219(1)(a)-(g) Interim Constitution.

⁷² This delineation of National versus Provincial Commissioner functions has been retained through the transitional provisions of the 1996 Constitution, which in terms of item 24 Schedule 6 provide that sections 215 (powers and functions of the SAPS), 218(1) (National Commissioner functions) and 219(1) (Provincial Commissioner functions) continue in force as if the previous Constitution had not been repealed, subject to certain amendments in Annexure D, any further amendment or repeal by an Act of Parliament, and consistency with the new Constitution. The amended SAPS Act continues to refer to section 219(1), though not to section 218(1) in delineating the National and Provincial Commissioner’s role, yet fails to repeal section 218(1).

⁷³ Section 219(1) Interim Constitution.

⁷⁴ Section 218(1)(d) Interim Constitution.

⁷⁵ Section 218(1)(i) Interim Constitution.

⁷⁶ Section 218(1)(f) Interim Constitution.

⁷⁷ Section 218 (1)(h) Interim Constitution.

⁷⁸ Section 218 (1)(k) Interim Constitution.

A number of administrative functions⁷⁹ were also allocated to the Provincial Commissioner, but these were not subject to the provincial MEC's political control either at national or provincial level.⁸⁰ The Provincial Commissioner was required to follow the directions of the National Commissioner when carry out these additional functions.⁸¹

The functions of the National Commissioner were extensive and overarching, and included the appointment of the provincial commissioners themselves (subject to the provincial MEC veto).⁸² In the Interim Constitution, these national functions could be assigned to the Provincial Commissioner, after consultation with the relevant provincial MEC, provided that the National Commissioner ensured that the Provincial Commissioner had sufficient resources to carry out the functions.⁸³

The Interim Constitution thus provided for a degree of provincial political control over the police and envisaged the possibility of asymmetry in provincial policing. This was not retained, with the final negotiations occurring after the ANC earned a large majority in national elections in the first democratic election.⁸⁴ Possibly even more important was its narrow loss to the IFP in KwaZulu-Natal as well as to the NP in the Western Cape.⁸⁵ After the election, the Constitutional Assembly – comprising the members of the House of Assembly and Senate (consisting of representatives from each province) sitting together – was duly formed, with the ANC having a large majority in it, albeit not the two-thirds majority necessary for passing the 'final' Constitution.

3.4.2 Interpretation of the Constitutional Principles

In terms of the negotiated settlement, the final Constitution was to be based on the Constitutional Principles contained in the Interim Constitution.⁸⁶ The Interim Constitution provided that government must be structured to function at national, provincial and local level,⁸⁷ and that the powers and functions of the national government and provincial governments and the boundaries of the provinces must defined in the Constitution.⁸⁸

⁷⁹ Section 219(1) Interim Constitution. The functions were the maintenance and discipline of the police service in the province; the recruitment of members of the service responsible for Provincial Commissioner functions; functions assigned by the National Commissioner; and the transfer of members under the relevant provincial command to or from positions outside of the relevant provincial jurisdiction (subject to any mechanisms established by the Interim Constitution's Board of Commissioners).

⁸⁰ Section 219(2) Interim Constitution.

⁸¹ Section 219(1) Interim Constitution.

⁸² Section 218(1)(b) Interim Constitution. Functions were the general function of ensuring impartiality, accountability, transparency and efficiency, internal security, international police liaison, training of the police service as well as members of any municipal police service, border and import and export control functions, national protection services, establishment of a special task force for high-risk operations, and any other functions necessary to achieve the objectives of the police or which it is appropriate to control nationally (s 218(1)).

⁸³ Section 218(2) Interim Constitution.

⁸⁴ The ANC secured 252 of 400 seats in the National Assembly. See IEC '1994 National and Provincial Elections' available at <http://www.elections.org.za/content/uploadedfiles/NPE%201994.pdf> accessed 4 November 2019.

⁸⁵ The IFP secured 41 of 81 seats in KwaZulu-Natal, while the NP secured 23 of 42 seats in the Western Cape.

⁸⁶ 'Seventh Report of the Technical Committee on Constitutional Issues to the Negotiating Council' 30 June 1993 available at <https://www.justice.gov.za/legislation/constitution/history/INTERIM/TCR/2210.PDF> accessed 28 November 2019.

⁸⁷ Constitutional Principle XVI, Schedule 4, Interim Constitution.

⁸⁸ Constitutional Principle XVIII, Schedule 4, Interim Constitution.

Last-minute amendments to the Interim Constitution enhanced provincial powers.⁸⁹ In particular, an amendment to Constitutional Principle XVIII provided that the powers and functions of the provinces could not be diminished substantially in the final Constitution relative to what they were under the Interim Constitution.⁹⁰ This amendment was in response to demands by the IFP, which wielded the threat that violence in KwaZulu-Natal would scupper the democratic transition.⁹¹

Constitutional Principle XVIII notwithstanding, the final version of the Constitution effected reductions in some provincial powers and gains in others. Provincial policing powers, as limited as they were, suffered the greatest reduction. The Constitutional Court, in certifying the Constitution, chose to consider provincial powers in their totality in applying Constitutional Principle XVIII.⁹² The Court held that the substantial reduction in provincial policing power was sufficiently balanced, in its view, by other gains in provincial power. Thus, taken as a whole, provincial powers had suffered a reduction, but the reduction was not considered sufficiently substantial for the Court to fail to certify the Constitution.

Under the 1996 Constitution, policing was thus firmly in the hands of the national government; conversely, there are few explicit policing powers for provinces.

3.5 The Constitution of 1996

Chapter 11 of the Constitution of 1996 provides for the security services of South Africa.⁹³ Among the governing principles are that national security is subject to the authority of the (national) Parliament and the national executive.⁹⁴ The security services consist of ‘a single defence force, a single police service, and any intelligence services established in terms of the Constitution’.⁹⁵ The national police service must be ‘structured to function’ in the national, provincial and, where appropriate, local spheres of government.⁹⁶ This is different from the Interim Constitution, and echoes the wording of Constitutional Principle XV, but leaves open the question of what the meaning is of ‘structured to function’ – political control does not seem to be implied. National legislation must establish the powers and functions of the police service⁹⁷ as well as of any municipal police services.⁹⁸ There is no constitutional provision explicitly envisaging a provincial police service; provincial traffic enforcement, however, is envisaged. Legislative competence of the provinces is limited.

3.5.1 Limited legislative competence of the provinces

The Constitution drastically limits the provincial legislative role to matters of monitoring and oversight. Schedule 4 contains the functional areas of concurrent national and provincial legislative competence.⁹⁹ Although Schedule 4 lists ‘police’ as a concurrent competence, this is limited to ‘the extent that the provisions of Chapter 11 of the Constitution confer on provincial legislatures

⁸⁹ Contained in Constitutional Amendment Acts 2 and 3 of 1994.

⁹⁰ Constitutional Principle XVIII, Schedule 4, Interim Constitution, after amendment by section 13, Constitution of South Africa Amendment Act 2 of 1994.

⁹¹ Steytler N and Mettler J (2001) 94.

⁹² *Certification AT* para 203.

⁹³ Chapter 11 Constitution of the Republic of South Africa 1996.

⁹⁴ Section 198(d) Constitution.

⁹⁵ Section 199(1) Constitution.

⁹⁶ Section 205(1) Constitution.

⁹⁷ Section 205(2) Constitution.

⁹⁸ Section 206(7) Constitution.

⁹⁹ Section 44(1)(ii) Constitution.

legislative competence'.¹⁰⁰ Confusingly, nowhere does Chapter 11 explicitly refer to the *legislative* competence of provinces. Section 206 provides for political responsibility for the police, referring to executive responsibilities in section 206(4). Other subsections do not refer to either the provincial executive or provincial legislature, giving rise to the inference that provincial competencies referred to in other subsections are both executive and legislative competencies.

In particular, section 206(3) provides that:

- provinces are entitled to monitor police conduct;
- provinces are entitled to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- provinces are entitled to promote good relations between the police and the community;
- provinces are entitled to assess the effectiveness of visible policing; and
- provinces are entitled to liaise with the minister with respect to crime and policing in the province.¹⁰¹

This suggests provincial legislative competence may be limited to the provisions of section 206(3). Indeed, in both the final Certification judgement¹⁰² and the Khayelitsha Commission matter,¹⁰³ the Constitutional Court appeared to accept that the legislative competencies of the provinces related to the provincial competencies listed in section 206(3).¹⁰⁴ The Western Cape is the only province which has passed legislation in terms of this legislative competence.¹⁰⁵ Compared to the legislative competence in the Interim Constitution, no direct influence over policing seems possible in terms of the provisions of section 206(3) read on its own.

3.5.2 Limited provincial executive competence

National political control has paramouncy: the President appoints the National Commissioner, who controls and manages the police, in line with national policy as determined by the national minister and under the direction of the National Commissioner. The provincial executive competence is limited in comparison to the direct political control provided for in the Interim Constitution. A provincial executive is responsible for implementing:

- policing functions vested in it by Chapter 11;¹⁰⁶
- policing functions assigned to it by national legislation;¹⁰⁷ and
- policing functions allocated to it in the national policing policy.¹⁰⁸

Almost all the powers vested in the provincial executive are themselves mediated through the national minister or national legislation.

¹⁰⁰ Schedule 4 Constitution.

¹⁰¹ Section 206(3)(e) Constitution.

¹⁰² *Certification AT*.

¹⁰³ *Minister of Police and Others v Premier of the Western Cape and Others* 2013 (12) BCLR 1365 (CC) (*Minister of Police 2013*).

¹⁰⁴ See paragraphs 396 and 399 *Certification AT* and paragraph 34 *Minister of Police 2013*.

¹⁰⁵ Western Cape Community Safety Act 3 of 2013.

¹⁰⁶ Section 206(4)(a) Constitution.

¹⁰⁷ Section 206(4)(b) Constitution.

¹⁰⁸ Section 206(4)(c) Constitution.

- Provincial *requirements* must be taken into account in national legislation establishing the powers and functions of the police service and enabling the police service to discharge its responsibilities effectively.¹⁰⁹ This could suggest that national legislation must provide a mechanism for provincial requirements to be taken into account so that the police service may discharge its responsibilities effectively. Alternatively, it could suggest that the legislation itself must take into account provincial requirements in establishing powers and functions.¹¹⁰
- Provincial governments must be *consulted* before the Minister determines national policing policy.¹¹¹ The minister must consult the provinces before making national policy, but need not obtain their concurrence on that policy.¹¹² This is hence more of a procedural than a substantive executive competence.
- Provincial needs and priorities, as determined by the provincial executives, must be taken into account by the minister in determining national policing policy.¹¹³ This suggests that the minister may not ignore provincial needs and priorities in determining national policy and must take them into account. By comparison, the Interim Constitution permitted provinces directly to pass provincial legislation on functions carried out by the Provincial Commissioner.
- Provincial needs and priorities, as determined by the provincial executive, may result in different national policies for different provinces.¹¹⁴ Uniformity is not required, but it is the national minister and not the MECs who determine those differences in policy.
- Provincial executive concurrence is required for the National Commissioner of Police to appoint Provincial Commissioners of Police, with the national minister mediating if there is no concurrence.¹¹⁵ This is a slightly lesser power than the veto on appointments which the MEC enjoyed under the Interim Constitution.
- Provincial Commissioners of Police are responsible for policing in the province as prescribed by national legislation,¹¹⁶ subject to the obligation on the National Commissioner to exercise control over and manage the police service in accordance with the national policing policy and the directions of the minister.¹¹⁷ Unlike the case with the Interim Constitution, there is no provision for provincial political control over the Provincial Commissioner.
- If the Provincial Commissioner has lost the confidence of the provincial executive, the latter may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, the Provincial Commissioner, in accordance with national legislation.¹¹⁸ This

¹⁰⁹ Section 205(2) Constitution.

¹¹⁰ The wording of the provision is open to interpretation: 'National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.'

¹¹¹ Section 206(1) Constitution.

¹¹² The Interim Constitution specifically detailed the meanings of 'in consultation with' and 'after consultation' in sections 233(3) and (4). While there are no cognate provisions in the final Constitution, a similar understanding of the two terms was likely to have been intended during the drafting of the final Constitution.

¹¹³ Section 206(1) Constitution.

¹¹⁴ Section 206(2) Constitution.

¹¹⁵ Section 207(3) Constitution.

¹¹⁶ Section 207(4)(a) Constitution.

¹¹⁷ Section 207(4)(b) Constitution.

¹¹⁸ Section 207(6) Constitution.

formulation is similar to that contained in the Interim Constitution, and remains an indirect and weak power of holding a Provincial Commissioner to account.

Provincial legislatures must receive annual reports on policing in the province from the Provincial Commissioner.¹¹⁹ An ‘independent complaints body established by national legislation’ (IPID) must investigate any complaints by a provincial executive relating to misconduct or offences committed by members of the police in the province.¹²⁰

Provinces are responsible for policing functions assigned to them by national legislation. At the time the Constitution was passed, national legislation existed in the form of the SAPS Act of 1995, but no functions are assigned. The Act’s rushed passage to replace the Police Act of 1958 reflected the SAP’s desire to control change in the organisation. The transitional constitutional provisions provide that all law in force when the new Constitution took effect continues in force, subject to any amendment or repeal, and consistency with the new Constitution.¹²¹ The legislation was drafted with the Interim Constitution in mind, but did not incorporate the most far-reaching of the Interim Constitution provisions relating to provincial control of the new South African Police Service (SAPS). Thus the SAPS Act, in the absence of the Interim Constitution, further attenuates the provincial role. Subsequent legislation tends to place onerous oversight obligations on provinces, without expanding their powers to hold the police to account.

3.5.3 SAPS further centralised in the SAPS Act

The legislative framework for the SAPS is provided for mainly in the SAPS Act, which was passed while the Interim Constitution was still in effect. The Interim Constitution, frequently referenced in the SAPS Act, envisaged a far greater role for the provinces. The SAPS Act has been amended on 10 occasions, most recently in 2012, and further amendments are pending. The references in the SAPS Act to both the Interim and Final Constitution, along with the frequent, often opaque, amendments, make the SAPS Act an inaccessible law with uncertain provisions.¹²² Some but not all provisions of the Interim Constitution referred to in the SAPS Act were retained through transitional provisions in the Constitution of 1996.¹²³ Almost every provision of the SAPS Act further centralises policing.¹²⁴

The key centralising provisions of the SAPS Act are for:

1. a political national Civilian Secretariat for Policing to advise the national minister;

¹¹⁹ Section 207(5) Constitution.

¹²⁰ Section 206(6) Constitution.

¹²¹ Schedule 6 item 2(1) Constitution.

¹²² Chapter 3 of the SAPS Act provides for ‘the establishment and composition of the service referred to in section 214 of the Constitution’. The reference is to section 214 of the Interim Constitution, which provided for direction by both national and provincial government – but transitional provisions did not keep section 214 in effect. Thus, the founding provision of the SAPS Act refers to a provision no longer in force, which had provided for provincial control.

¹²³ Item 24 Schedule 6 Constitution 1996.

¹²⁴ Section 218(1) of the Interim Constitution delineated the National Commissioner’s functions and remains in force through transitional provisions; the original section 11(1) of the SAPS Act provided that the National Commissioner ‘may exercise the powers ... to give effect to s 218(1)’ but this section 11 was replaced during amendments in 2012. Section 218(1) of the Interim Constitution is far more specific and less general than the explicit provisions of the final Constitution and the SAPS Act read together, which generally defer to the National Commissioner. The fact that the SAPS Amendment Act sought a slight amendment to section 218(1) (relating to training) suggests that section 218(1) must still be ‘read in’ to the SAPS Act despite the replaced section 11. This puts a range of key functions in the hands of the National Commissioner.

2. the appointment by the President of the National Commissioner, who maintains overall control of the SAPS;¹²⁵
3. the appointment of provincial commissioners by the National Commissioner without a veto by the province concerned, albeit that consultation is required;
4. the centralisation under the National Commissioner¹²⁶ of the majority of ‘transformational’ functions -- such as training, restructuring and the determination of the fixed establishment – as well as support functions such as forensics, border control and national protection services;
5. a board which consists of the SAPS national and provincial commissioners only, which must be consulted before the National Commissioner determines the distribution of the numerical strength of the service;
6. functions of the Provincial Commissioner relating to day-to-day control of policing in the province,¹²⁷ with discipline and recruitment subject to the National Commissioner’s directions¹²⁸ but not to provincial political direction;
7. ‘national prevention and investigation of crime’ being subject to central decision-making by the Directorate for Priority Crime Investigation (DPCI) as to whether it will be investigated by the DPCI or provincially;¹²⁹
8. national public order policing, which may be deployed in support of a Provincial Commissioner,¹³⁰ who also has the function of maintaining public order;¹³¹
9. the national minister’s making regulations and the National Commissioner’s making standing orders – these standing orders take preference over any Provincial Commissioner’s orders,¹³² and neither the regulations nor the standing orders are subject to provincial political input;
10. uniform centrally determined training¹³³ as well as conditions of service and recruitment processes;¹³⁴ and
11. centrally determined recruitment and requirements for the volunteer Reserve Police.¹³⁵

¹²⁵ Section 207(1) Constitution 1996.

¹²⁶ The National Commissioner must be in control of all strategic aspects of the police, including developing a plan for each year setting out priorities and objectives; determining the ‘fixed establishment’ and the number and grading of posts; determining the distribution of the numerical strength, after consultation with the board (consisting of national and provincial commissioners); organising or re-organising the service at national level into components, units or groups; establishing and maintaining training institutions; establishing and maintaining workshops for the management of the service; performing legal acts on behalf of the service (s 11(2)(a)-(g) SAPS Act). Operational functions remain in the hands of the National Commissioner, including crime data, forensics, national public order policing, border control and national protection services (s 218 Interim Constitution).

¹²⁷ The Provincial Commissioner’s functions are those referred to in section 219 of the Interim Constitution in terms of section 12(1) of the SAPS Act.

¹²⁸ Section 219(2) Interim Constitution.

¹²⁹ Chapter 6, SAPS Act sections.

¹³⁰ Section 17 SAPS Act.

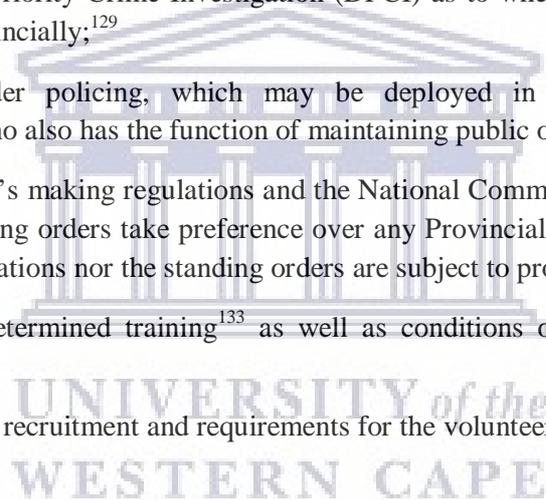
¹³¹ Section 219(1) Interim Constitution.

¹³² Section 25 SAPS Act.

¹³³ Section 32 SAPS Act.

¹³⁴ Section 28 SAPS Act.

¹³⁵ Section 48 SAPS Act.



Political leaders of the province have no influence over the exercise of powers by the Provincial Commissioner, save for the weak power to recommend dismissal (which may be ignored by the National Commissioner). The retained section 219(1) of the Interim Constitution makes the Provincial Commissioner's exercise of powers subject to the relevant provincial MEC 'referred to in section 217' – however, section 217 was not among those policing provisions retained in transitional provisions.¹³⁶ This leaves some ambiguity, as other transitional provisions provide that references to an MEC under the old order must be construed as a reference to an MEC under the new order.¹³⁷ Certainly, provincial commissioners do not behave as if they have to carry out their functions subject to provincial direction by the MEC, as a result reducing provincial involvement to the provisions of the Constitution of 1996 discussed above.

The Constitution requires that the SAPS Act take into account provincial requirements.¹³⁸ During its drafting and passage, the legislation could not have been drafted with an eye on this section 205(2) constitutional requirement because it was drafted in the absence of its existence, and at the time the Interim Constitution instead gave provinces the power in section 217(3) to legislate on the *functions* of the police under the control of the Provincial Commissioner in terms of section 219(1).¹³⁹ While the functions of the Provincial Commissioner persist in the new era (subject to the National Commissioner and national minister), the provincial legislative powers relating to Provincial Commissioner functions were not retained. Nothing in the SAPS Act currently appears to take cognizance of 'the requirements of the provinces' in 'establishing the powers and functions of the police service and enabling the police service to discharge its responsibilities effectively'. While there is provision on policing needs and priorities to be taken into account in policy, that is an entirely separate constitutional requirement.

The Interim Constitution provided that the police must be 'structured to function' in the national and provincial spheres¹⁴⁰ – unlike the 1996 Constitution, which appends the words 'and where appropriate, local sphere of government'.¹⁴¹ The structuring of the functioning of SAPS at national and provincial level is described in the SAPS Act, but the local level of the SAPS is not described, save in the provisions relating to community police forums and boards, which stop short of describing the functioning of the SAPS at local level.

3.6 Conclusion

As in Nigeria and Kenya, preventing the emergence of regional armed partisan police forces was among the primary reasons for the high degree of police centralisation evident in the Constitution of 1996, with the spectre of the KZP looming large. Equally important was the ANC's general preference for centralisation, in the light of which the degree of federalism evident in the Constitution was itself a compromise. These were key to the retreat from the more devolved policing provisions contained in the Interim Constitution, with the final negotiations occurring once the national election had been won by the ANC – and the provincial election in KwaZulu-Natal lost to the IFP.

The need for central processes to effect transformation and development and to combat crime adequately was cited in the rhetoric in favour of centralisation, as was the need to avoid wasteful duplication and jurisdictional conflict. The SAP itself was keen to demonstrate its independence from

¹³⁶ Item 24, Schedule 6, Constitution 1996.

¹³⁷ Item 3(e), Schedule 6, Constitution 1996.

¹³⁸ Section 205(2) Constitution.

¹³⁹ Section 217(3) Interim Constitution.

¹⁴⁰ Section 214(1), Interim Constitution.

¹⁴¹ Section 205 Constitution.

its former political masters and maintain the status quo of a large, centrally controlled police service. The drafting of the SAPS Act before the finalisation of the Constitution 1996, and the failure to retain the Interim Constitutions provisions to which it referred, further centralised matters.

The SAPS Act viewed in its entirety thus reinforces the centralised national control provided for in the Constitution of 1996. The National Commissioner is key to every matter of import, while the Provincial Commissioner reports to the National Commissioner and is part of the national police service. Provincial politicians have no control over provincial commissioners. Such centralisation is held to afford particular benefits. The most urgent of these, from the point of view of the government elected in 1994, was to effect a 'transformation' of the SAPS from a 'force' responsible for implementing unjust laws to protect a minority to a 'service' attending to the needs of all in the country. The next chapter considers whether the vaunted benefits of centralisation in fact materialised for the new SAPS that emerged.



Chapter 4:

Centralised in every way

4.1 Introduction

This chapter will explore the extent to which the mooted benefits of centralisation have emerged through the highly centralised structure and functioning of the SAPS. The theorised benefits include preventing the emergence of armed partisan or separatist regional forces, preventing the local corruption of policing, advancing development and transformation through economies of scale, and promoting public safety. The chapter will also consider whether the constitutional mandate of the SAPS to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law, is being met.

4.2 Transformation and development

Before 1990, the South African Police force (SAP) was required to enforce laws of racial segregation, secure a minority government, protect the white population from crime and political disruption, and root out 'terrorists' belonging to 'banned' organisations – most notably, members of the ANC, who were to be their new political masters. The enormity of the task of transformation was not lost on either the SAP or the new government. Trust is essential to effective policing and transformation was necessary to improve trust. As described in Chapter 3, centralisation was seen by both the SAP and ANC as necessary to transform the SAP into the SAPS.

The SAP itself began the transformation process before the transition, in the hope that it could control it, with its 1991 Strategic Plan highlighting de-politicisation of the police force, increased community accountability, more visible policing, improved and effective management practices, reform of the police training system (including racial integration), and restructuring of the police.¹ The National Peace Accord of 1991 also introduced new policing procedures for handling political violence as well as a code of conduct and mechanisms for dealing with misconduct.²

After the first election, the ministry responsible for policing was renamed as the Ministry of Safety and Security (instead of Law and Order). Cultural change had already been signalled through the SAP's change in name, which now had the word 'Service' appended to it. Other symbolic changes included a less militaristic uniform; abolition of military ranks in favour of the British model of commissioner, superintendent and directors (a decision reversed in 2010); new insignia (an aloe with nine spikes, ironically representing the provinces); changing the colour of police vehicles from yellow to white; and changing the names of the most notorious police stations, such as that of John Vorster Square, which became Johannesburg Central.³ Thanks to centralisation, these changes could be made relatively quickly throughout the country. True transformation – legitimisation, political and demographic realignment, demilitarisation, reduction in police violence, restructuring and the rational distribution of resources – was, however, more difficult to effect.

¹ Rauch J 'Police Reform and South Africa's Transition' CSV (2000) 2 available at <http://www.csvr.org.za/docs/policing/policereformandsouth.pdf> accessed 30 November 2019.

² Rauch (2000) 2.

³ Rauch (2000) 5-6.

4.2.1 Legitimation

Deeper legitimisation of the police was to be achieved in part through ‘community police forums’ (CPFs) based on the imported notion of community policing⁴ – not through civilian control or influence by democratically elected provincial or local governments. As Eric Pelser puts it, ‘[T]he political prerogative informing community policing was one of democratic accountability — the police were to be democratised and legitimised.’⁵ Pelser problematises the assumptions underpinning community policing in the South African context, including the notion of ‘community’ in a highly polarised society and the institutional capacity of the police to respond innovatively to community input, as required by the model.⁶

Initially composed of members of former peace committees, in turn composed of political party representatives,⁷ the politicisation of CPFs has endured – as has the interpretation by the SAPS of community policing as an ‘add-on’ function to the ‘other’ responsibilities of the police,⁸ rather than a fundamental reimagining of the way SAPS polices. Although almost every police station has a CPF that meets SAPS requirements in terms of holding meetings and similar bare indicators, true community-directed policing has not emerged, and CPFs are frequently simply a signal of ‘vacuous virtue’.⁹

Indeed, by substituting CPFs for democratically elected local governments, their introduction may have worked against, rather than for, local accountability and legitimation. Furthermore, the removal of the Interim Constitution’s ‘hard’ monitoring powers and functions conferred to CPFs meant they have no real means of holding police to account (see Chapter 5).

4.2.2 Political and demographic realignment

Political and demographic legitimisation was achieved in a number of ways, including through the ‘lateral’ absorption of former ANC and PAC members into the SAPS, demographic transformation of the composition of the SAPS, and remunerative adjustments. All of these measures were facilitated by centralisation, which permitted large-scale transformation of the composition of the police in a relatively short time. The negotiated agreement to incorporate former liberation movements’ armed forces into the security services was less significant for the police than the army, where fears of a possible coup had to be staved off.¹⁰ However, small numbers of bodyguards effected entry into SAPS VIP protection, as did ANC intelligence personnel into SAPS Crime Intelligence, and members of ANC and IFP self-defence and self-protection units, respectively, as SAPS constables; most significantly, civilians made lateral entry into SAPS senior management.¹¹ Rauch notes that the extent of lateral entry was restrained until 1999 when the Mbeki presidency commenced.¹²

The precedent for lateral entry was set: coupled with leap-frogging promotions, it assumed even greater prominence during Jacob Zuma’s presidency (2009-2018) and contributed to the corrupt capture of key elements of the SAPS, particularly within crime intelligence. Richard Mdluli, the corrupt head of crime intelligence, who himself was irregularly appointed, allegedly appointed 250

⁴ Rauch (2000) 8.

⁵ Pelser E ‘The Challenges of Community Policing in South Africa: Occasional Paper 42’ (1999) Institute for Security Studies available at <https://www.africaportal.org/documents/4475/paper42.pdf> accessed 30 November 2019.

⁶ Pelser 5-8.

⁷ Rauch (2000) 9.

⁸ Pelser 11.

⁹ Pelser 1.

¹⁰ Rauch (2000) 7.

¹¹ Rauch (2000) 7.

¹² Rauch (2000) 7.

people into the division – including 26 family members and friends who had no policing experience.¹³ Capture of this kind impacted on the entire country, and it is unclear whether crime intelligence has been able to recover yet¹⁴ (see section 4.5 below).

During the transition, the transformation imperative was paramount. In common with other police forces on the continent, the SAPS was able to protect a minority with a relatively small number of poorly remunerated officers owing to its propensity to use force. A democratic police service would need to field more police as well as remunerate them adequately. At the outset of the democratic era in 1995, the SAPS, incorporating all homeland forces, had some 140,000 members who were in general poorly remunerated – an important reason lateral entry was resisted by some potential appointees.¹⁵ Increases in the remuneration of public servants have been a key aim of government since 2007: incremental adjustments since then means state employees now generally earn better than their private-sector counterparts.¹⁶ SAPS’ employees, particularly police officers, are also relatively well paid. As Andrew Faull remarks, in the South African context, ‘getting a job with the SAPS is akin to winning the lottery’, as even constables earn an amount that puts them in the top five per cent of salaries.¹⁷

At the same time, the imperatives of controlling crime and of demographic change in the composition of the SAPS led to large increases in recruitment. As outlined above, the National Commissioner determines the ‘fixed establishment’ (number of posts). The fixed establishment is composed of both those employed under the Public Service Act (who are not police officers) and those employed under the regulations¹⁸ associated with the SAPS Act (who are police officers with associated powers). There were 199,810 of both posts for the 2016-2019 Medium Term Expenditure Framework (MTEF).¹⁹ The number of SAPS employees is thus equal to some 1.2 per cent of all employed people in South Africa, 1.8 per cent of formally employed South Africans,²⁰ and 15 per cent of all state employees (excluding the SANDF).²¹

This figure of about 199,000 was reached as early as 2012 and accompanied by a profound change in the SAPS’ racial profile, such that by 2012 its profile matched the percentage composition of the South African labour force (comprising unemployed and unemployed persons aged 15 to 65) (see Table 1).

Table 3: Demographic composition of SAPS employees

	Black African	‘Coloured’	Indian/Asian	White	Total
1995 SAPS	75414	10732	4605	50097	140848
	54%	8%	3%	36%	100%

¹³ Burger J ‘South Africa’s damaged intelligence system is at a crossroads’ *ISS Today* April 2018.

¹⁴ Wiener M ‘Grabbing at thin air: Politics, internal squabbles cripple SAPS Crime Intelligence’ *News24* 29 March 2019 available at <https://www.news24.com/Analysis/grabbing-at-thin-air-an-analysis-of-crime-intelligence-20190325> accessed 4 November 2019.

¹⁵ Rauch 7.

¹⁶ National Treasury (2019) *Medium Term Budget Policy Statement 2019* Annexure B Compensation Data 57 available at <http://www.treasury.gov.za/documents/mtbps/2019/mtbps/Annexure%20B.pdf> accessed 4 November 2019.

¹⁷ Faull A ‘Are South African police salaries fair?’ *Daily Maverick* 27 November 2018 available at <https://www.dailymaverick.co.za/article/2018-11-27-are-south-african-police-salaries-fair/> accessed 19 August 2019.

¹⁸ Police Act Regulations of 1964 and SAPS Employment Regulations of 2010.

¹⁹ SAPS *Presentation to the Portfolio Committee on Police Processes of the Fixed Establishment at Police Stations 13 March 2018* (2018) 18 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180313SAPS.pdf> accessed 21 August 2019.

²⁰ According to Statistics South Africa Quarterly Labour Force Survey for Quarter 1 2019, there were 16.3 million employed South Africans in that quarter, and 11.2 million in formal non-agricultural employment.

²¹ National Treasury (2019).

2012 SAPS	149174	21228	5293	23650	199345
	75%	11%	3%	12%	100%
2012 Labour force	13384000	1936000	530000	2067000	17917000
	75%	11%	3%	12%	100%
2017 SAPS	149096	20598	4815	18788	193287
	77%	11%	2%	10%	100%
2017 SA Population	45656400	4962900	1409100	4493500	56521900
	81%	9%	2%	8%	100%

Source: Bruce (2013), Statistics South Africa Quarterly Labour Force Survey (2017) Q2; SAPS Annual Reports

This was achieved through what David Bruce has called ‘*en masse* recruitment’ that saw some 123,606 people recruited by the SAPS from 2002 to 2012 even as there was attrition of 35,426 – of whom at least 75 per cent were white SAPS employees (Table 1). Concerns about a lack of attention to the recruitment process finally received official acknowledgment when National Commissioner Bheki Cele told the Portfolio Committee on Police in September 2010 that the SAPS had sacrificed quality for quantity in the drive to increase its numbers.²²

In addition to their being poorly screened, those recruited between 1994 and 2003 received only six months’ training before being appointed as constables, and, for a brief period in 2004, only four months’ training.²³ In 2003 and 2004 alone, some 26,512 new recruits were appointed.²⁴ While the duration of training has increased subsequently, its quality remains of concern,²⁵ as does the recruitment process. In 2019, a parliamentary question revealed that 4,174 police officers had been convicted of criminal offences; of these officers, 32 were in senior management positions.²⁶

Bruce recommends that three of the National Planning Commission proposals be implemented to address this: a National Policing Board should be established to set standards for recruiting, selecting, appointing and promoting police; a two-stream system (basic police stream and officer’s stream) should be introduced to create a high calibre of police officers and recruits; and the capacity and training of new detectives and specialised investigators should be improved.²⁷ This would have profound implications for effectiveness and efficiency, but has not yet been implemented.

Rapid recruitment resulted in a more racially and gender representative SAPS, the size of which has contributed significantly to the creation of a black middle class.²⁸ However, as Bruce noted in 2013, this rapid recruitment has been accompanied by a tendency toward political partisanship in which

²² Bruce D ‘New Blood: Implications of *en masse* recruitment for the South African Police Service’ *SA Crime Quarterly* 43 (2013) 23.

²³ SAPS ‘Briefing to the Portfolio Committee on Police: SAPS Basic Training Learning Programme’ (2016) available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160525SAPS_Basic.pdf accessed 14 November 2019.

²⁴ Bruce (2013) 19.

²⁵ Hosken G ‘SAPS cuts training at “quality’s expense”’ *TimesLive* 28 April 2016 available at <https://www.timeslive.co.za/news/south-africa/2016-04-28-saps-cuts-training-at-qualitys-expense> accessed 3 November 2019; Hlatshaneni S ‘Police unions disagree on recruitment, training processes’ *The Citizen* 13 March 2019 available at <https://citizen.co.za/news/south-africa/government/2100220/police-unions-disagree-on-recruitment-training-processes/> accessed 3 November 2019.

²⁶ Makinana A ‘Thousands of convicted criminals in the police, says Bheki Cele’ *TimesLive* 8 April 2019 available at <https://www.timeslive.co.za/politics/2019-04-08-thousands-of-convicted-criminals-in-the-police-says-bheki-cele/> accessed 3 November 2019.

²⁷ National Planning Commission ‘Building Safer Communities’ National Development Plan (NDP) (2012) available at <https://nationalplanningcommission.wordpress.com/building-safer-communities/> accessed 4 November 2019.

²⁸ Bruce (2013) 21.

police seemingly victimise opponents of the ruling party's leadership or opposing factions of the ruling party.²⁹

In addition, Bruce problematises the ongoing recruitment in favour of black Africans, saying that if the SAPS is to project itself as reflecting the common identity of South Africa, it needs to be 'both African and diverse', with recruitment figures and natural attrition of older minority groups suggesting that it is likely to become overwhelmingly black African³⁰ and thus not representative of the demographics of some provinces and urban municipalities. The number of SAPS employees remained in the region of 190,000 to 200,000 over the period 2012 to 2018, with the percentage of black Africans increasing to 77 per cent.³¹ The preferential recruitment of black Africans is likely to continue, as the government uses total population figures in setting 'equity targets' – the total population includes children, and thus has proportionally more black Africans than the labour force, owing to the younger age profile of the black African population. Furthermore, international immigration of black Africans of close to 3 million since 2000³² has boosted the black African population (see Table 1).

4.2.3 Demilitarisation

Altering the militaristic nature of the former SAP and the new SAPS was frequently mentioned as one of the objectives of transformation, one which centralisation would help to achieve. Professional policing, by contrast, posits the idea of well-trained police officers who are able to exercise discretion in a rational manner. Although a form of 'demilitarisation' was effected at the time of the transition with the removal of military ranks, the SAPS remained an organisation dependent on military-type hierarchy and obedience to orders. The internally unpopular removal of military ranks was reversed in 2010, a move accompanied by the return of a tough-on-crime approach.³³ The Farlam Commission of Inquiry³⁴ into the police killings at Marikana³⁵ implicated the 'militaristic' nature of the SAPS in its 2015 findings and recommended demilitarising the SAPS as per the recommendation of the National Planning Commission.³⁶

Arguably, the quality of recruits in the democratic era and the poor training they received suggests that the military model of obedience and rules may in fact have been the only feasible one, with 'professional' policing, which implies the exercise of discretion, being a chimera. The SAPS have held on to their military ranks, and demilitarisation remains fiercely debated internally at the time of writing even as it is poorly understood within the SAPS. At the same time, the high levels of police killing by the SAPS, in addition to the Marikana incident, bring into question whether the SAPS has in any real sense transformed through centralisation.

²⁹ Bruce (2013) 22.

³⁰ Bruce (2013) 24.

³¹ SAPS *Annual Report 2017/2018* (2018) 28.

³² Statistics South Africa *Mid-year population estimates* (2019) Table 3.

³³ DefenceWeb 'Military police ranks in effect' DefenceWeb 1 April 2010 available at <https://www.defenceweb.co.za/security/civil-security/military-police-ranks-in-effect/> accessed 3 November 2019.

³⁴ The President appointed the Commission to 'investigate matters of 'public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province from Saturday 11th August to Thursday 16th August 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction of property' – Proclamation 50 of 2012 GG 35680 of 12 September 2012.

³⁵ SAPS tactical unit members killed 34 striking mineworkers using R5 assault rifles at two locations near Marikana on 16 August 2012.

³⁶ Farlam J 'Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province' available at http://www.justice.gov.za/comm-mrk/docs/20150710-gg38978_gen699_3_MarikanaReport.pdf accessed 7 November 2019.

4.2.4 Police violence and the use of force

The extent to which people in South Africa are killed by police in police action incidents or who die in police custody remains at very high levels. The rate at which people are killed by or in the care of the South African police (see Table 4 below) is more than double the rate per population estimated in the US.³⁷ The SAPS is involved in the vast majority (98 per cent) of cases referred to the IPID, including death cases.³⁸ Furthermore, very few cases result in prosecutions or convictions.³⁹ During 2017/18 there were only 99 convictions related to IPID cases, of which only 33 related to deaths as a result of police action or in police custody, despite 400 or more incidents occurring each year.⁴⁰ This does not imply that the SAPS was cleared of wrongdoing in the majority of cases: some 122 death cases were referred to the National Prosecuting Authority (NPA) for a decision, with about 72 per cent of all referrals ‘awaiting response from the NPA’.⁴¹ The high rate of deaths and the low number of prosecutions suggest, inter alia, that the accountability framework is inadequate.

Table 2: IPID cases (2014/15–2017/18)

South Africa IPID cases	2014/15	2015/16	2016/17	2017/18
Total IPID-reported deaths	667	616	769	759
Police action – number of deaths	423	400	467	558
Police action – death incidents	396	366	394	436
Police custody deaths	244	216	302	201
Torture	145	145	173	217
Assaults	3711	3509	3827	3661

Source: *IPID Annual Reports*

Comparison with the record of the SAP under apartheid is difficult, not least because figures did not include the homelands. However, comparison with ‘white’ South Africa would suggest the rate has not improved significantly: the worst year (1985) under apartheid saw 763 reported deaths by police, while the next-worst year (1984) saw 287.⁴² This suggests a comparable rate of killings by police in years other than 1985, outside of the homelands, to the rates currently experienced.⁴³ The present level of lethal force, exercised with relative impunity, appears at the spatial level of the province to be associated with low rates of police officers per capita (see Figure 1). This suggests that inadequate policing may encourage more reckless forms of policing.

³⁷ See Chapter 2 above. The rate in the US in 2015 was about 5 per million people, and in South Africa, about 11 per million people.

³⁸ In 2017/18 the IPID investigated 5,524 cases involving SAPS members, 118 cases involving municipal police (MPS) and nine involving civilians on various criminal offences, with 15 deaths attributable to MPS action. *IPID Annual Report 2017/18* (2018) 38.

³⁹ See Muntingh L & Dereymaeker G *Understanding impunity in the South African law enforcement agencies* CSPRI (2013) 44 available at <https://acjr.org.za/resource-centre/understanding-impunity-in-the-south-african-law-enforcement-agencies> accessed 26 August 2019.

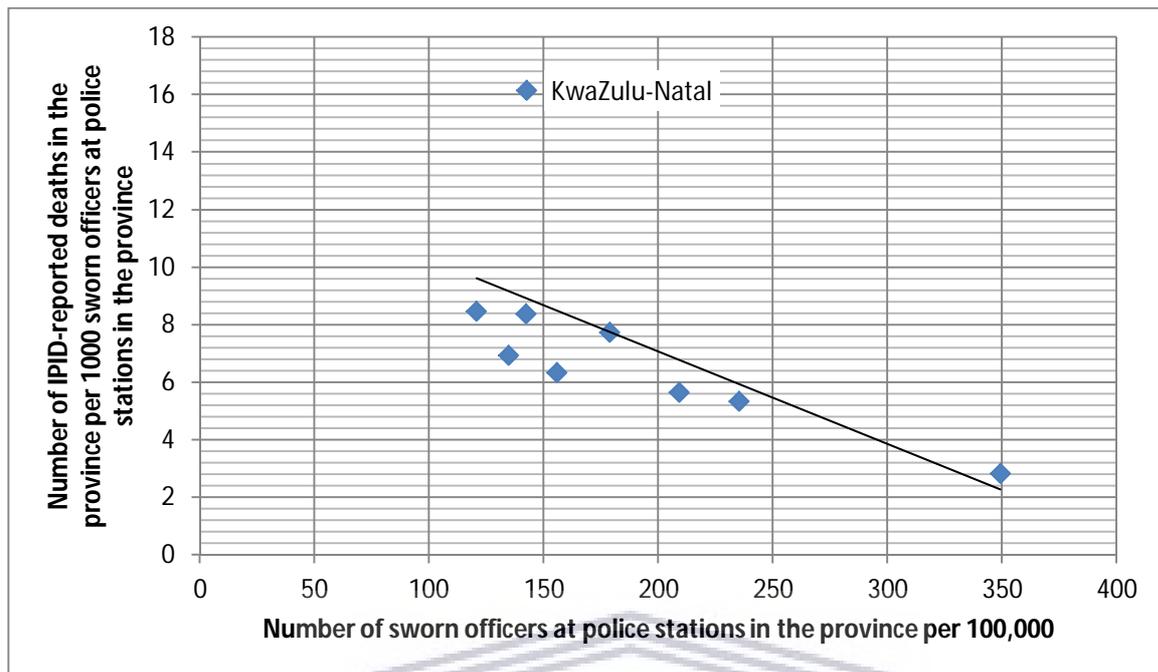
⁴⁰ *IPID Annual Report 2017/18* (2018) 68. .

⁴¹ *IPID Annual Report 2017/18* (2018) 64.

⁴² Bruce D (2005) ‘Interpreting the Body Count: South African statistics on lethal police violence’ *South African Review of Sociology* 36(2) (2005) 151 available at <https://csvr.org.za/docs/policing/interpreting.pdf> accessed 3 November 201.

⁴³ Assuming 32 million people in 1984/85, in 1984 there was a rate of 9 per million and 1985 a rate of some 24 per million; currently the rate in South Africa is about 11 per million.

Figure 1: Relationship between resourcing and use of lethal force by police (2018, provinces)



Source: Source: Author’s own calculations based on IPID data, Statistics South Africa population data, and SAPS parliamentary reply on provincial sworn officers

KwaZulu-Natal, however, is a clear outlier to the general trend, with rates of killing double that expected, suggesting other factors are at play. While improving equality of resourcing may mitigate the trends regarding deaths due to police action or in police custody in places where resources are inadequate, the data indicate overall a high level of use of force by police. Consequently, central control does not seem markedly to have facilitated a wholesale change in the way the SAPS polices. The problem of KwaZulu-Natal is discussed further below.

4.2.5 Discipline

Centralisation is also intended to aid the appropriate and consistent application of standards, with a disciplinary system to deal with failings of individual police. In addition to the failings above, lesser disciplinary infractions tend not to meet with internal disciplinary consequences: few disciplinary hearings are instituted, and the vast majority result in no consequences; the rate of disciplining has more than halved since 2008.⁴⁴

4.2.6 Restructuring

‘Restructuring’ was among the intended actions of the SAPS at transition to effect transformation. The National Commissioner is empowered to restructure SAPS and can thus, with relative ease, make structuring decisions with consequences for the whole country. In practice, there has been ongoing restructuring, with each new commissioner seemingly seeking to make his or her mark.

Much of it has been damaging to the delivery of public security, however. For example, although the number of detectives has almost doubled since 2010, this is not reflected in the investigation outcomes (see section 4.6). The quality of the SAPS’ investigatory capacity was severely compromised by a series of internal restructuring processes that centralised a limited number of

⁴⁴ See ‘Failing to discipline in SAPS Fostering a culture of impunity’ (2019) ACJR available at <https://acjr.org.za/resource-centre/fact-sheet-9-failing-to-discipline-v-3.pdf> accessed 30 November 2019.

specialists while decentralising the majority of detectives to police-station level. Of particular concern was the scattering and emasculation of the ability to address serial offenders.⁴⁵ The SAPS' controversial internal restructuring led to the disbandment of SAPS units which had specialised in combating, inter alia, gangs and drugs. In particular, the South African Narcotics Bureau (SANAB) was disbanded. Analysts predicted that years of specialist knowledge and intelligence built up over years of infiltrating drug networks and setting up informants would be lost.⁴⁶ Ironically, this restructuring sought to 'decentralise' detective work to police stations, thus undoing the benefits of specialisation offered by more centralised arrangements.

Anthony Minnaar notes that the restructuring toward large but fewer multi-disciplinary detective units led to SAPS detectives becoming investigators of a range of crimes instead of being able to concentrate on selected crime fields and build expertise in them.⁴⁷ In terms of the restructuring in 2002, three types of units were planned to remain, while two new types of units, the serious and violent crime units and the organised crime units, with broad mandates, were to emerge: phased reductions saw 21 units with only 600 detectives based in organised crime units throughout the country.⁴⁸ With regard to the Pretoria SANAB, for example, only five of its members joined the new organised crime units; some were transferred to other remaining specialist units, and the remaining 30 were deployed at police stations.⁴⁹

The ongoing restructuring of the specialist units that commenced in 2002, and which was deepened in 2006 with the removal of the 'area' level of the SAPS, led to the loss of specialist skills and demotivated many senior detectives; as state capture deepened, some also may have left due to concerns about their pensions.⁵⁰ This loss of experience and skills is not readily replaceable, given that detectives tend not to undergo formal training in the SAPS but learn 'on-the-job' from other detectives.⁵¹ The implications of this loss of skilled investigative capacity are discussed in Chapter 7.

Restructuring of specialist units also led to a mistimed reduction in specialist public order policing capacity during the same time as public protests began to accelerate. This reduction in public order capacity has been exacerbated by the SAPS' hands-off attitude to (frequently politicised) land invasions and its disinclination to become involved in protests, save after violence has already occurred. This is also examined further in Chapter 7.

In 2006, as mentioned, another round of restructuring saw the removal of the 'area level' within the SAPS hierarchy and affected the remaining specialised units. Despite the grand plans and rationalisations, both sets of restructuring were widely regarded as mistakes.⁵² There is evidence to suggest that gangsterism and organised crime worsened during this period, partly as a result of the reduction in the SAPS' capacity and the disbandment of the Directorate of Special Operations DSO.⁵³

⁴⁵ See Omar B 'Investigating psychologically related-crimes: The work of the SAPS Investigative Psychology Unit' *SA Crime Quarterly* 25 (2008) 37-38.

⁴⁶ Louw M 'SANAB all but ceases to exist' *News24* 23 January 2003.

⁴⁷ Minnaar A 'The Scorpions lose their sting: Challenges to the incorporation of the DSO into the SAPS' *SA Crime Quarterly* 24 (2008) 25.

⁴⁸ Redpath J *Leaner and meaner? ISS Monograph* 73 Institute for Security Studies (2002).

⁴⁹ Louw M 'SANAB all but ceases to exist' *News24* 23 January 2003.

⁵⁰ Essop, R 'SAPS suffers massive detective exodus' *Eyewitness News* 16 October 2014 available at <https://ewn.co.za/2014/10/16/Police-service-suffers-with-a-lack-of-detectives> accessed 5 March 2019.

⁵¹ Portfolio Committee on Police 'Report of the Portfolio Committee on Police on the Detective Dialogue held on 5 September 2012, dated 23 October 2012' available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/comreports/121024pcpolicereport.htm> accessed 27 August 2019.

⁵² See, inter alia, Omar (2007) and Burger, J 'After years of systematic damage by former national commissioner Jackie Selebi, specialised units are slowly being rebuilt' *ISS Today* 31 March 2014.

⁵³ Goga K 'Taking stock of the last 20 years: responses to organised crime in a democratic South Africa' (2014) 48 *SA Crime Quarterly* 67-68.

The evidence includes the trend in the number of robberies at business premises, which increased more than five-fold.⁵⁴ This is a strong indicator of a deteriorating situation: business-reported crime tends to be reported consistently, given that businesses are likely to be insured. The data thus strongly suggest a worsening of the situation in relation to organised robberies of businesses. Moreover, for a crime to be classified as a robbery, violence must be an element of it,⁵⁵ which therefore suggests that businesses were increasingly subject to violence.

Another indicator of increasing organised criminal activity is the large increase in treatment-demand for heroin as a primary drug of abuse in Cape Town, Gauteng and Mpumalanga.⁵⁶ An increase in heroin-linked psychiatric disorders was also observed.⁵⁷ Heroin is not grown locally and requires sophisticated import networks to be made available; by 2015, the UNODC said that South Africa had become the regional hub for drug trafficking.⁵⁸ This strongly suggests that organised crime's drug trafficking networks were being consolidated during this period.

In addition to this damaging centrally determined restructuring, over time the SAPS has become increasingly top-heavy in structure.

4.2.7 Centralised structure

Centralisation is intended to create economies of scale, by, inter alia, providing one level of administration for a large number of employees. However, the current structure is top-heavy in management. The structure discussed here is as it was presented by the SAPS to Parliament in March 2018.⁵⁹ The structure of the SAPS is guided by the relevant constitutional provisions setting out functions under the National Commissioner and under the Provincial Commissioner.

National Commissioner positions are (1) in the National Commissioner office; (2) at head office; and (3) at offices in provinces, reporting nationally. This includes some operational units such as national public order police, which fall under 'Operational Responses Services'. Provincial Commissioner functions are located at the provincial head office, which may encompass operational entities such as 'specialised units' of the detective service. Between the level of province and police station, there was the 'area' level, but as mentioned it has been disbanded; however, the 'cluster' level has been reintroduced (see below), a level that operates under a national 'Divisional Commissioner'.

The structure is both highly centralised and bloated at top levels, with duplication at national and provincial level and a preponderance of senior positions involved in 'strategic direction' – notwithstanding that notionally political strategic direction is the preserve of elected government. A disproportionately large number of posts relate to the National Commissioner and the competencies of this office, with one-quarter of all posts located at this level. Given that reduced duplication and reduced posts through economies of scale are often posited as a benefit of centralisation, the size of the national level calls into doubt whether this has come to pass in the case of the SAPS.

⁵⁴ Robberies at business premises almost quadrupled from 3,677 in 2004-2005 to 13,885 in 2008-2009 and continued to increase thereafter, exceeding 20,000 by 2016-2017 – a 560 per cent increase in the number recorded at the outset of the disbandment. SAPS Crime Statistics 2005-2006 to 2015-2016 and 2007-2008 to 2017-2018, available on <https://www.saps.gov.za/services/crimestats.php> accessed 8 February 2019.

⁵⁵ Snyman CR *Criminal Law* (1989) 491.

⁵⁶ Njuho P and Davids A 'Extent and Influence of Recreational Drug Use on Men and Women Aged 15 Years and Older in South Africa' (2010) 9(1) *African Journal of Drug & Alcohol Studies* 33-48.

⁵⁷ Weise L "'Defeating the dragon" – can we afford not to treat patients with heroin dependence?' *South African Journal of Psychiatry* (2010) 16(3) 75.

⁵⁸ Hutson T 'Ports a conduit for drug smugglers' *The Mercury* 17 August 2018.

⁵⁹ SAPS 'Presentation to the Portfolio Committee on Police Processes of the Fixed Establishment at Police Stations' 13 March 2018 Slide 18 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180313SAPS.pdf> accessed 21 August 2019.

National Commissioner functions

Under the National Commissioner, there are three types of post. The first are those posts reporting directly to and falling within the office of the National Commissioner, such as Internal Audit.⁶⁰ The second are those reporting to the National Commissioner on national competencies but with some degree of independence, among them the various deputy national commissioners (for example, of Crime Detections). These in turn have under them 'Divisional Commissioners' e.g. 'Detective Service'⁶¹ and also the Directorate for Priority Crime Investigation (DPCI, also known as 'The Hawks, which replaced the DSO). At these levels, the role is largely to provide 'direction'. Thus, the role of the Divisional Commissioner for the Detective Service is 'to provide direction on the effective investigating of crime on all levels of the SAPS'.⁶² The above together amount to 15,910 posts, or some 1 in 12 of all SAPS employees.⁶³ Thirdly, there are national competencies that are represented at provincial level. There are Provincial Heads in relation to national competencies, including 'Criminal Record and Crime Scene Management', which reports to its respective national leadership and is only tangentially under the Provincial Commissioner.⁶⁴ In addition, there is the DPCI Provincial Head, who reports to the National DPCI head. The posts in relation to the Provincial Heads of national competencies and the DPCI amount to 33,604 posts and are termed 'national units in provinces'.⁶⁵

Taken together, the national competencies described above consume just more than *one-quarter* of all the posts in the SAPS, at 50,320 posts.⁶⁶ Since a disproportionate number of these are senior, and therefore well-remunerated, posts, they may account for significantly more of the total employee costs of the SAPS, once again calling into question whether the benefits of economies of scale are evident in this particular centralised arrangement.

⁶⁰ Reporting directly to the National Commissioner and working within his or her office are: Heads of Executive Support, Internal Audit, Crime Registrar, and Presidential Protection Service (1,734 posts); National Head: Management Advisory Services (Heads of Organisational Development, Strategic Management, Corporate Communication, Marketing and Liaison Services, and Programme and Project Management) (405 posts) SAPS Presentation (13 March 2018) Slides 18 and 19.

⁶¹ These are: National Head: Directorate for Priority Crime Investigation (DPCI) (3,366 posts); Divisional Commissioner: Counter Intelligence (934 posts); Deputy National Commissioner 'Policing', who has Divisional Commissioners for Visible Policing (3,683 posts), Operational Response Services (8,652 posts) and Protection and Security Services (5,390 posts); Deputy National Commissioner 'Crime Detection', who has Divisional Commissioners for Detective Service (462 posts), Forensic Services (8,194 posts) and Crime Intelligence Division (7,023 posts); Deputy National Commissioner 'Human Resource Management', who has Divisional Commissioners for Personnel Management (647 posts), Human Resource Development (3,981 posts), Human Resource Utilization (141 posts); Deputy National Commissioner 'Asset and Legal Management', who has Divisional Commissioners for Supply Chain Management (3,187 posts), Technology Management Systems (1,085 posts), Financial Management and Administration (709 posts), Legal and Policy Services (107 posts); Deputy National Commissioner 'Management Interventions', who has three Regional Commissioners, along with a Divisional Commissioner for Research (577 posts). See SAPS Presentation (13 March 2018) Slides 18 and 20.

⁶² Portfolio Committee on Police 'Report of the Portfolio Committee on Police on the Detective Dialogue held on 5 September 2012, 23 October 2012' Slide 23 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/comreports/121024pcpolicereport.htm> (accessed 27 August 2019).

⁶³ SAPS Presentation (13 March 2018) Slide 18.

⁶⁴ The Provincial Heads of national competencies are in relation to: Crime Intelligence, Crime Registrar, Internal Audit, Protection and Security Services, Criminal Record and Crime Scene Management, and Technology Management Services. See SAPS Presentation (13 March 2018) Slide 20.

⁶⁵ SAPS Presentation (13 March 2018) Slide 18.

⁶⁶ SAPS Presentation (13 March 2018) Slide 18.

Provincial Commissioner functions

The nine provincial commissioners, who are appointed by the National Commissioner in consultation with provincial MECs,⁶⁷ report to the National Commissioner⁶⁸ rather than the provincial executive; they are required to account only once a year to their respective provincial parliaments.⁶⁹ The provincial organisation structure is standard and determined at national level.⁷⁰ The Provincial Commissioner has direct control over the Provincial Heads in his or her office.⁷¹ Also directly under the Provincial Commissioner are deputy provincial commissioners for Policing, Crime Detection, Human Resource Management and Asset Management.⁷² Some of the so-called ‘specialised units’ are located at this level, under Policing and Crime Detection. The provincial level contains some direct operational posts, but has a number of apparent duplications with national level – for example, asset management and human resource management appear at both levels. Centralisation does not seem to remove the necessity for such duplications.

Clusters and police stations

The level of the ‘cluster’, which is notionally under the Deputy Provincial Commissioner, has been inserted between the level of province and police stations. This echoes the previously disbanded ‘area’ level.⁷³ Neither areas nor clusters bear any relation with the municipal or ward boundaries of local government. The number employed at that level is 1,832 posts.⁷⁴

Below the level of cluster is the level of the service points that interact directly with the public. Some 120,475 employees are allocated to police stations;⁷⁵ in early 2019, about 92,000 of them were police officers actually employed at police stations, rather than public servants.⁷⁶ The allocations to head office and the provincial head offices thus consume about 40 per cent of human resources, with police stations being allocated only 60 per cent.⁷⁷ Although the specialised units account for 17,238 posts at provincial level, this still implies that some 31 per cent of posts are neither specialists units nor working at police stations – an exceptionally top-heavy structure.

⁶⁷ Section 6(2) SAPS Act.

⁶⁸ Section 207(4)(b) Constitution 1996.

⁶⁹ Section 207(5) Constitution 1996.

⁷⁰ Section 11(1) Constitution 1996.

⁷¹ Legal and Policy Services, Organisational Development and Strategic Management, Communication, Liaison and Marketing.

⁷² Deputy Provincial Commissioners for Policing, under whom are Provincial Heads for Visible Policing, Operational Response Services, Operational Command Centre; Crime Detection, under whom are Provincial Heads for Crime Investigation Services, Specific Crime Investigations, FCS (Family Violence, Child Protection, and Sexual Offences unit), Organised Crime Investigations, Commercial Crime Investigations; Human Resource Management, under whom are Provincial Heads for Personnel Management, Human Resource Development, Human Resource Utilisation; Asset Management, under whom are: Provincial Heads for Supply chain management, Financial management and administration. See SAPS Presentation (13 March 2018) Slide 20.

⁷³ SAPS Presentation (13 March 2018) Slide 21.

⁷⁴ SAPS Presentation (13 March 2018) Slide 18.

⁷⁵ SAPS Presentation (13 March 2018) Slide 18.

⁷⁶ SAPS *Police Service Act Personnel at Police Stations January 2019* National Assembly Internal Question Paper 1 Question 18 36/1/4/1(2019) 7 February 2019.

⁷⁷ The number of posts allocated to ‘police stations’ are allocated to all types of SAPS service points. Satellites and contact points are notionally associated with a particular police station. The SAPS has the following service points, in order of decreasing hours of operation and services: Police Stations (1,144), which provide a full service; Satellite Police Stations, which provide a limited-hours service; Contact Points (no reporting of crime); and mobile Contact Points. See SAPS ‘Calculation of Theoretical Human Resources Requirements Clusters, Police Stations, Satellite Police Stations and Contact Points’ (2013) available at <http://www.khavelitshacommission.org.za/bundles/bundle-eleven/category/291-saps-station-documents.html?download=2457:11.17.%20THRR%20Guideline%202012-2013%20Final%20II> accessed 21 August 2019.

Centralisation has also been associated with uniformity of structure among police stations. Since 2012, there are four basic models of police stations, based solely on number of posts.⁷⁸ There is no room for deviation from these centrally determined models, meaning that very different areas are policed in largely the same way. This does not lead to equal outcomes, because different areas require different approaches. For example, in informal areas it is not possible to patrol by motor vehicle because of inadequate road width and road conditions. Patrolling by motorcycle or foot requires a much higher deployment of police than patrols by motor vehicle. Thus, standardisation has unequal outcomes.

Exacerbating the top-heavy vertical structure are inequalities apparent horizontally among provinces and policing areas. While the Provincial Commissioner does ostensibly have the power to move employees within the province,⁷⁹ this is constrained by the number and size of police stations and their uniform personnel structuring. The result is that areas notorious for violent crime are less well policed than formal areas with low-level crime – something that centralisation is intended to avoid. This is discussed in the next section.

4.2.8 Financing

Transformation also required the SAPS to be adequately funded. The National Treasury responded accordingly, with nominal expenditure on the SAPS having increased dramatically since 1996/7, from almost R10 billion to more than R80 billion by 2017/18 (see Figure 2), and with the SAPS Performance Plan for 2019/2020 calling for R98 billion.⁸⁰

The current level of financing purchases SAPS some 190,000 to 200,000 employees and some 48,000 vehicles⁸¹ – theoretically one vehicle per sworn officer on duty.⁸² At present, only 34,690 vehicles (72 per cent) are located in the provinces.⁸³ Some 78 per cent of the 2019/20 budget is allocated to ‘compensation of employees’,⁸⁴ and only 8 per cent to ‘operational expenses in the provinces’.⁸⁵ The latter, amounting to R126 per capita, is probably the reason for the SAPS’ frequent complaint at local level of under-resourcing. By programme, some 21 per cent is allocated to ‘Administration’⁸⁶ and some 3 per cent to ‘Protection Services’⁸⁷ (mostly for high-ranking politicians). Thus, centralisation makes the SAPS appear under-resourced even while it consumes significant funding.

⁷⁸ Category A, headed by a captain (452 police stations) (maximum 90 posts); Category B, headed by a lieutenant-colonel (313 police stations) (91-180 posts); Category C1, headed by a colonel (134 police stations) (181-360 posts); and Category C2, headed by a brigadier (246 police stations) (more than 360 posts). See SAPS Presentation (13 March 2018) Slides 10, 11 and 12; read with SAPS (2013) 18.

⁷⁹ Section 12(3) SAPS Act.

⁸⁰ SAPS ‘Annual Performance Plan 2019/2020 – Presentation to the Select Committee on Security & Justice 17 July 2019’ Slide 18 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/190717SAPS.pdf> accessed 7 November 2019.

⁸¹ NCOP Select Committee on Security and Justice ‘Deputy Minister of Police overview; SAPS & DPCI Annual Performance Plan 17 July 2019 available at <https://pmg.org.za/committee-meeting/28618/> accessed 7 November 2019.

⁸² Sworn officers comprise three-quarters of the total; shift requirements suggest that one-third may be on duty at a time.

⁸³ SAPS (17 July 2019) Slide 71.

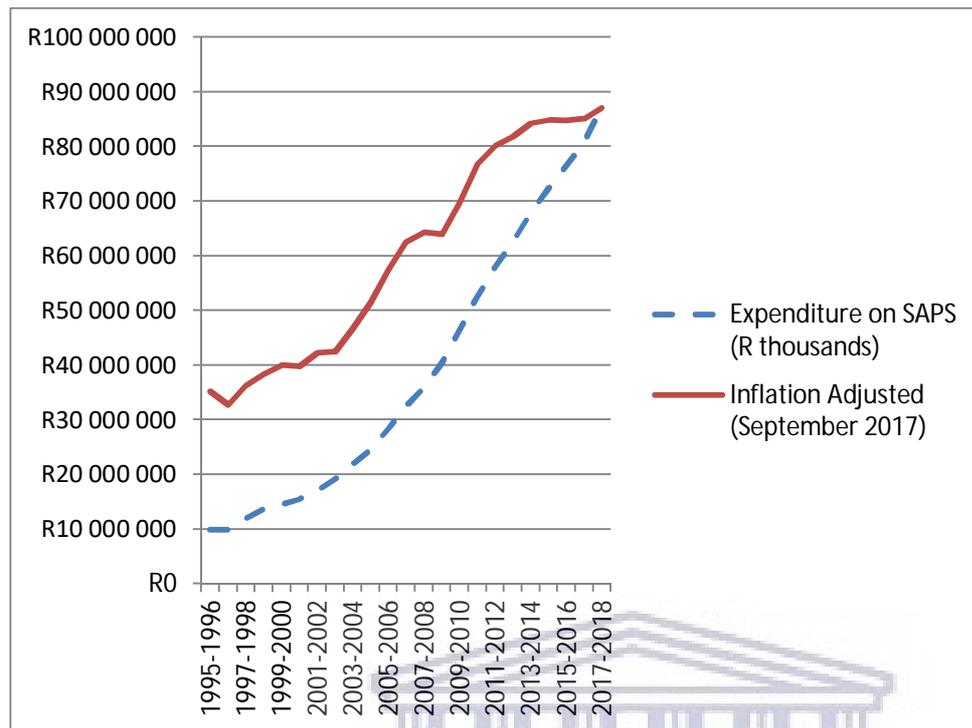
⁸⁴ SAPS (17 July 2019) Slide 17.

⁸⁵ SAPS (17 July 2019) Slide 20, own calculations.

⁸⁶ SAPS (17 July 2019) Slide 31, own calculations.

⁸⁷ SAPS (17 July 2019) Slide 61, own calculations.

Figure 2 Real and nominal expenditure on police (1995-96 to 2017-18)



Source: National Treasury National Expenditure Reviews, own calculations

4.3 Distribution of resources

The Constitution makes human dignity, freedom and equality the bedrocks of the constitutional order.⁸⁸ Not only does the SAPS have the primary mandate to prevent and investigate crime, to maintain public order, and to uphold the law, but it must do so in a way that honours the broader constitutional framework. Providing policing services in a broadly equitable fashion is hence a constitutional requirement as well as one of the theorised benefits of centralisation.

This is a challenge, considering that the new South African state to emerge after 1994 inherited criminal justice systems and police forces from the former ‘white’ South Africa and so-called self-governing territories (see Chapter 3). The provision of police services in these areas was focused on control of dissent and protection of the elite; comprehensive policing in service of the people was not provided. Furthermore, some 85 per cent of the police served ‘white’ South Africa.⁸⁹ The constitutional expectation is that the centralised SAPS would address these inequalities over time.

4.3.1 Distribution of police resources

During hearings of the Khayelitsha Commission,⁹⁰ a provincial oversight intervention (described in more detail in Chapter 5), witness after witness complained of a lack of police resources to prevent and respond to crime in the three policing areas of Khayelitsha township. This prompted the commissioners to call for evidence on the number of police officials assigned to the area and other policing areas. The fixed allocation for the policing areas of the Western Cape was provided by the

⁸⁸ Section 1(a) Constitution 1996.

⁸⁹ Authors’ own calculations, based on SAPS *Old TBVC States and Self-Governing Territories (Homelands) prior to 1995* (undated) available at http://www.saps.gov.za/about/tbvc_info.php (accessed 23 August 2019).

⁹⁰ Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha.

SAPS. Marrying these with population data, it was found that the Khayelitsha areas had relatively low per capita allocations, with one, Harare, having the lowest allocation in the province, that of only 111 per 100,000, despite a violent-crime problem evidenced by its high murder rate.⁹¹ Furthermore, the province as a whole demonstrated an inverse relationship with the murder rate, such that poorer black areas with high murder rates had lower per capita allocations. One of the findings of the Commission was that the SAPS should review its method of allocation and make appropriate adjustments.⁹²

Three years passed after the final report of August 2014, during which time the SAPS failed to make substantial changes to the fixed allocations in the province. Large numbers of murders continued to occur in areas with low allocations, including in Nyanga, which recorded 860 murders in three years: 1 in 12 of all murders in the province were recorded there.⁹³ Yet in 2016, Nyanga was accorded a fixed allocation of only 325 to serve a population of more than 200,000 people – a ratio of only 160 per 100,000, compared to the South African median of 280 per 100,000.⁹⁴

The Social Justice Coalition took the SAPS to the Equality Court seeking a declaratory order that the allocations constituted unfair discrimination, and an order for redress.⁹⁵ During the litigation, the data on fixed allocations for the entire country were made available.⁹⁶ This data revealed that the problem, although especially pernicious in the Western Cape, was not confined to it. The pattern of poorer black areas, irrespective of high murder rates, having low fixed establishments per capita, appeared to pertain throughout the country, albeit that it was pronounced in the Western Cape.

Ultimately, the court declared that the allocation and the method used to determine it discriminate unfairly on the basis of race and poverty, insofar as it had been shown to do so in the Western Cape.⁹⁷ Redress was left for a later hearing (not yet heard at the time of writing). After the hearing, the minister declared that the SAPS would not appeal, seeming to take some strategic pre-election comfort in the limitation of the finding to the Western Cape, and acknowledging the inequality.⁹⁸

The data showed that the patterns of policing throughout the country still look very similar to those under apartheid, with ‘township’ areas with large informal settlements having low per capita allocations of police despite their high murder rates. The lowest allocations of all appear in areas in or near the former Bantustans. Analysis of the data revealed that, 25 years later, areas which were formerly Bantustan areas still had some of the lowest ratios of policing in the country – ones disturbingly close to, or even lower than, the ratios observed before 1994, and suggesting that the SAPS has done no more than keep pace with population growth.⁹⁹

⁹¹ Redpath J Expert Evidence (2013).

⁹² Recommendation 7 in O’ Regan K & Pikoli V *Towards a Safer Khayelitsha: The report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha* (2014) 449.

⁹³ Author’s own calculations, based on SAPS data available at <https://www.saps.gov.za/services/crimestats.php> accessed 23 August 2019.

⁹⁴ Author’s own calculations, based on PLV2 data.

⁹⁵ *Social Justice Coalition and Others v Minister of Police and Others* EC03/2016) [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) (14 December 2018).

⁹⁶ Annexure PLV2 to the affidavit of Brigadier Preston Lance Voskuil, head of organisational development, SAPS.

⁹⁷ *Social Justice Coalition and Others v Minister of Police and Others* para 94.

⁹⁸ Mortlock M ‘Police resource allocation is skewed in black areas - Bheki Cele’ *Radio 702* 25 January 2019 available at <http://www.702.co.za/articles/335412/police-resource-allocation-is-skewed-in-black-areas-bheki-cele> accessed 26 August 2019.

⁹⁹ Thus, Lebowakgomo and Seshego, the former main cities of Lebowa, have policing rates of 104 and 110 per 100,000 population in 2016, respectively; similarly, Nongoma, the first capital of KwaZulu, has a policing rate of 109 per 100,000; Bhisho, the former capital of Ciskei, and KwaMhlanga, the former capital of KwaNdebele, both have policing rates of 145 per 100,000; Giyani, the former capital of Gazankulu, has a policing rate of 153

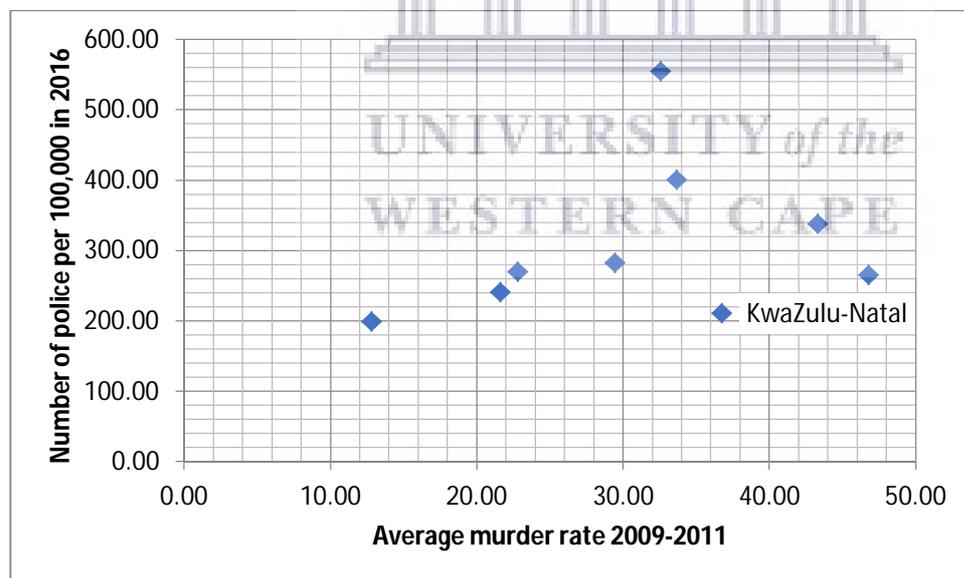
Furthermore, the low ratios of policing in former homeland areas either broadly match those areas that show high murder rates (such as Eastern Cape), or evince wide discrepancies between SAPS-recorded murders and the South African Medical Research Council’s National Burden of Disease (NBD) estimates (such as in Limpopo). This raises the possibility that (1) the SAPS fails to prioritise some high-murder-rate areas despite their high rate of murder, and/or that (2) some murders are not recorded by the SAPS because it (the SAPS) is sparsely distributed.

Further evidence of the SAPS’ failure to expand policing sufficiently lies in the fact that the combined number of police stations in existence in 1994 was 1,123. At the time of writing, there were 1,146, suggesting that in 25 years the SAPS has only managed to amass an additional 23 police stations. This is despite opening 55 new police stations in four provinces since 1994 (and closing 24, of which eight were burned down by the community).¹⁰⁰ The evidence thus strongly suggests that the SAPS is not providing policing in an equitable fashion across the country.

While the problems of rural policing are not unique to South Africa, many former homeland areas are not in any sense rural anymore. The low rates of policing have little to do with the rural-urban divide, but far more to do with the failure to equalise services and with misplaced reliance on the so-called ‘fourth sphere of government’, traditional leadership (discussed in chapters 8 and 9).

The irrationality of the allocations is even observable at provincial level, in contrast to the similar analyses in Canada and the US. Indeed, the data suggests no relationship between prior murder rates and later allocations of resources to police stations. Thus, centralisation has achieved neither equalisation nor rational allocation of resources. There is a possibility that in KwaZulu-Natal this may have been a deliberate tactic (see Figure 3 and section 4.4).

Figure 3: Relationship between police resources allocated to police stations and prior murder rate, provinces



Source: Own calculations using PLV2 data and SAPS crime data

per 100,000. Yet 230 per 100,000 is the average allocation per policing area in 2016, while the median for a policing area is 280 per 100,000. Author’s own calculations, based on PLV2 and municipal population data.

¹⁰⁰ Mhlongo M Parliamentary Question NW 248 to the Minister of Police 10 March 2017 available at <https://pmg.org.za/committee-question/4701/> accessed 27 August 2019.

4.3.2 Withdrawal of reservists and commandos

The increasing national budget permitted yearly increases in the number of police and other employees within SAPS until 2011-2012, reaching a peak of 199,345; per capita policing peaked in the same year, suggesting the increases consistently outpaced population growth until then (see Figure 5). Police reservists, who numbered close to 65,000 in 2010, further increased the number of people involved in policing by one-third, albeit on a part-time basis.¹⁰¹ Similarly, prior to 2003, 186 SANDF commando units were involved in landward border protection and law and order tasks of the police in the interior, with 82,000 members¹⁰² bolstering the number of people carrying out policing (in 2003 there were approximately 135,000 SAPS members).¹⁰³ Thus, reservists together with the commandos in effect doubled the number of people combating crime.

In 2003, the decision was taken to disband the commando units incrementally, partly due to allegations that some of them were implicated in human rights abuses, and partly precisely because the SAPS, and not the SANDF, has the mandate to prevent crime.¹⁰⁴ In response to security concerns that rural farmers in particular raised about the decision, the SAPS indicated that a number of measures would be taken to fill the gap that had been created, including (1) expansion of the number of police; (2) expansion of the number of reservists; and (3) implementation of sector policing.¹⁰⁵ The number of people employed in the police did increase, by almost a third (48,000) over the period 2003 to 2009 when the disbandment was undertaken;¹⁰⁶ the exact location of their deployment in relation to areas formerly served by the commandos is not clear. However, a mere three years after the disbandment was completed, the SAPS placed a moratorium on the recruitment of reservists, with their numbers ultimately dwindling to only 11,000 in recent figures.¹⁰⁷

Consequently, with the removal both of reservists and commandos, there was a net loss in the number of people involved in policing country-wide, with that loss involving often highly-motivated volunteers. It is hence unsurprising that, among the interventions of provinces described in Chapter 5 and of municipalities in Chapter 7, so many of them involve attempts to harness this volunteer capacity towards crime prevention.

The very low police allocations in certain areas also constrained the implementation of sector policing, which at its most basic involves demarcating the precinct into smaller sectors, appointing sector managers and teams, compiling a sector profile, and establishing a sector-crime forum.¹⁰⁸ Since this division of resources occurs only from among the visible policing component allocated to a police station – which in turn is a small component of the total – in sparsely populated rural areas, often those most at risk of farm attacks, the feasibility of sector policing is constrained by low numbers.¹⁰⁹

¹⁰¹ Kohler-Barnard D 'SAPS reveals 82% drop in police reservists over 8 years' *DA Press Release* 1 November 2018 available at <https://www.da.org.za/2018/11/saps-reveals-82-drop-in-police-reservists-over-8-years> accessed 29 August 2019.

¹⁰² Human Rights Watch (HRW) 'The State Response to Violence on Farms' (2001) available at <https://www.hrw.org/reports/2001/safrica2/Safarms8.htm> accessed 29 August 2019.

¹⁰³ SAPS Annual Report 2003/4.

¹⁰⁴ HRW (2001).

¹⁰⁵ Parliamentary Monitoring Group 'Defence Portfolio Committee: Withdrawal of SANDF Commandos in Support of SAPS' 7 February 2005 *available at* <https://pmg.org.za/committee-meeting/4763/> accessed 29 August 2019.

¹⁰⁶ See the relevant SAPS Annual Reports.

¹⁰⁷ Kohler-Barnard D (2018).

¹⁰⁸ Maroga M 'Sector Policing: What are the challenges?' (2004) CSVr available at <http://www.csvr.org.za/docs/policing/sectorpolicing.pdf> accessed 29 August 2019

¹⁰⁹ For example, some 25 per cent of police stations have a fixed allocation of 42 or fewer employees, suggesting a shift number of at most 14 on duty; the number allocated to visible policing is likely to be three, which must then be divided amongst the demarcated sectors. Authors' own calculations, based on PLV2 data.

4.4 Partisan regional policing

Three months after the 1994 elections, newspapers reported that police stations in the former KwaZulu still hoisted the old KwaZulu flag instead of the new South African flag. The Provincial Commissioner was summoned to Pretoria by the Minister of Safety and Security to have it impressed on him that the KZP, 'like any other former homeland police force, was now part of the new SAPS'.¹¹⁰

Later in the year, the Minister also blocked the graduation of 600 former KZP recruits because some were said to be 'known criminals'.¹¹¹ An 'Independent Task Group', appointed by the Transitional Executive Council¹¹² in late 1993 to report on 'hit squads' in the KZP, had concluded that KZP hit squads were implicated in an unquantifiable number of deaths in KwaZulu-Natal.¹¹³ In September 1994, its successor, the 'Independent Task Unit' (ITU), a team of detectives operating directly out of the Ministers' office, was appointed to investigate formally.¹¹⁴ Although they concluded a range of investigations, the then provincial Attorney-General refused to prosecute and bitter opposition by senior members of the SAPS led to the disbandment of the ITU.¹¹⁵

Elements of the KZP thus remained within the new SAPS, and the SAPS in the region continued to be of concern. The centralised SAPS appeared to manage this indirectly by shutting down problematic police stations and keeping the number of police deployed in the former KZP regions low (see chapters 5 and 9). The rate of killing by police in the province remains disproportionate (see Table 5). Ironically, once political control of the province shifted from the IFP, it was provincial politicians who sought to intervene in dealing with elements of the police in KwaZulu-Natal (see Chapter 5).

Thus, while centralisation indeed prevented a separatist partisan police from emerging in the province, it is by no means clear, even decades after the transition, that the 'problem of the KZP' has been resolved by the centralisation of the SAPS.

4.5 Corruption

Corruption at the highest levels of the SAPS began to be exposed early in the democratic era, with National Commissioner Jackie Selebi, appointed by Mbeki in 2000, being convicted of corruption in 2010 and his prosecution commencing soon after Mbeki was recalled as President by the ANC.¹¹⁶ Policing and the criminal justice system continued to be directly affected by the grand-scale corruption and state capture associated with the Zuma presidency in the period May 2009 to February 2018.¹¹⁷ In particular, the capture of crime intelligence at the SAPS head office permitted large-scale

¹¹⁰ De Vos P 'Policing' in *South African Human Rights Year Book* (6) 193-211 (1995) 197 available at <https://constitutionallyspeaking.co.za/wp-content/uploads/2015/11/Policing-1995-Yearbook.pdf> accessed 4 November 2011.

¹¹¹ De Vos (2011) 198.

¹¹² The interim government.

¹¹³ TEC Task Group *Second Interim Report TEC Task Group into the matter of hits squads in the Kwazulu Police* 29 March 1994 available at <https://omalley.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/03lv02424/04lv03275/05lv03336/06lv03344/07lv03351.htm> accessed 30 November 2019.

¹¹⁴ Manby B 'The South African Independent Complaints Directorate' 195-223 in Goldsmith AJ and Lewis C *Civilian Oversight of Policing: Governance, Democracy, and Human Rights* (2000) Bloomsbury 198.

¹¹⁵ Manby (2000) 198.

¹¹⁶ Selebi was found guilty of corruption in terms of section 4(1)(a)(i)(bb) of the Prevention and Combating of Corrupt Activities Act, which criminalises public officers' receiving gratification in order to act in a manner that amounts to the misuse or selling of information or material acquired carrying out their duties. See *S v Selebi* (25/09) [2010] ZAGPJHC 53 (5 July 2010).

¹¹⁷ See Wiener M *The Ministry of Crime: An Underworld Exposed* Pan Macmillan (2018).

criminal networks to flourish.¹¹⁸ Furthermore, corruption and mismanagement associated with police spending,¹¹⁹ under central control, prevented SAPS funds from being optimally converted into desirable outcomes; qualified audits have occurred in recent years.¹²⁰

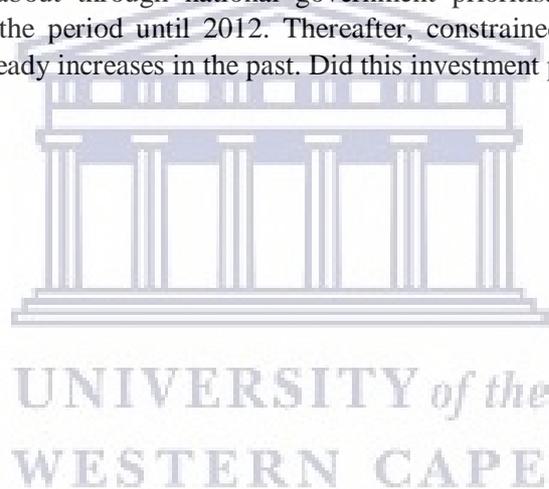
Corruption also thrived at lower levels, with as many as 2,000 SAPS-confiscated firearms, including submachine guns and light machine guns, being sold by SAPS members to gangs in the Western Cape over the period 2006-2015; these weapons were ultimately linked by ballistics tests to more than 1,000 murders and 1,400 attempted murders.¹²¹

Thus, while centralisation may avoid corruption of local policing by local politicians, corruption of a national police force is equally possible and has consequence that are felt across the entire country. Indeed, the evidence suggests that earlier improvements in public security were reversed during the Zuma presidency.

4.6 Public security

4.6.1 Financing of SAPS per capita

Large amounts have been spent on the SAPS, taking inflation and population into account (see Figure 4 below). This has come about through national government prioritisation, which led to rapid increases in spending over the period until 2012. Thereafter, constrained national finances saw a levelling off following the steady increases in the past. Did this investment prevent crime?



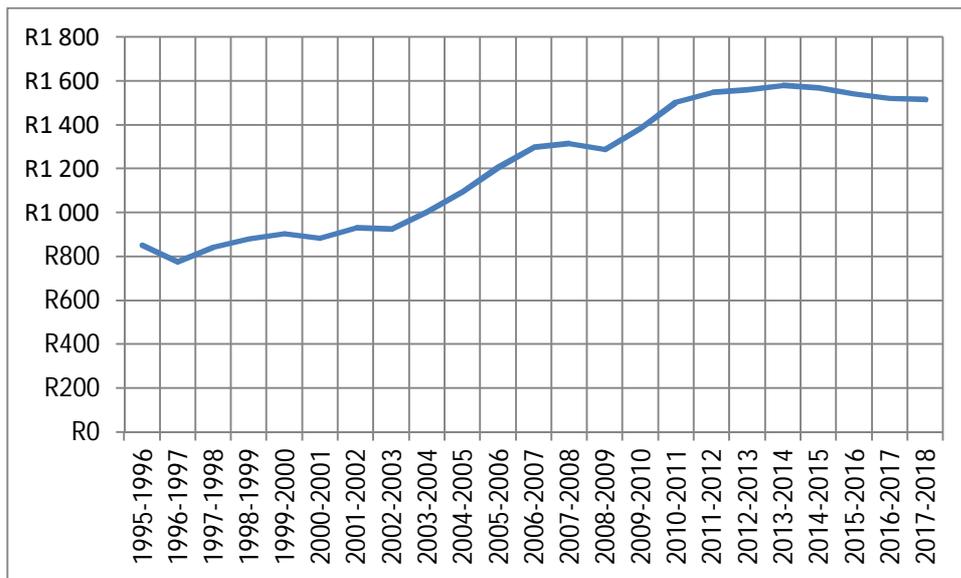
¹¹⁸ Grootes S ‘The rise and fall of Richard Mdluli, a man who damaged our society’ *Daily Maverick* 17 January 2018 available at <https://www.dailymaverick.co.za/article/2018-01-17-analysis-the-rise-and-fall-of-richard-mdluli-a-man-who-damaged-our-society/> accessed 29 August 2019.

¹¹⁹ See, inter alia, Mokone T ‘Cost of empty SAPS headquarters balloons to R1.6bn’ *TimesLive* 10 July 2019 <https://www.timeslive.co.za/politics/2019-07-10-cost-of-empty-saps-headquarters-balloons-to-r16bn/> accessed 29 August 2019; Thamm M ‘Consequence creep as top cops suspended and new procurement plan introduced’ *Daily Maverick* 15 June 2018 available at <https://www.dailymaverick.co.za/article/2018-06-15-consequence-creep-as-top-cops-suspended-and-new-procurement-plan-introduced/> accessed 29 August 2019; Staff Reporter ‘SAPS spent more than R52m on 169 torches’ *IOL* 9 November 2017 available at <https://www.iol.co.za/news/south-africa/western-cape/saps-spent-more-than-r52m-on-169-torches-11930783> accessed 29 August 2019.

¹²⁰ Gerber J ‘Police committee wants “new blood” after SAPS receives second qualified audit in a row’ *News24* 28 September 2018 available at <https://www.news24.com/SouthAfrica/News/police-committee-wants-new-blood-after-saps-receives-second-qualified-audit-in-a-row-20180928> accessed 29 August 2019.

¹²¹ Thamm M ‘The Killing Fields: How illegal firearms turned the Cape Flats into a war zone’ *Daily Maverick* 4 April 2018 available at <https://www.dailymaverick.co.za/article/2018-04-04-the-killing-fields-how-illegal-firearms-turned-the-cape-flats-into-a-war-zone/> accessed 29 August 2019.

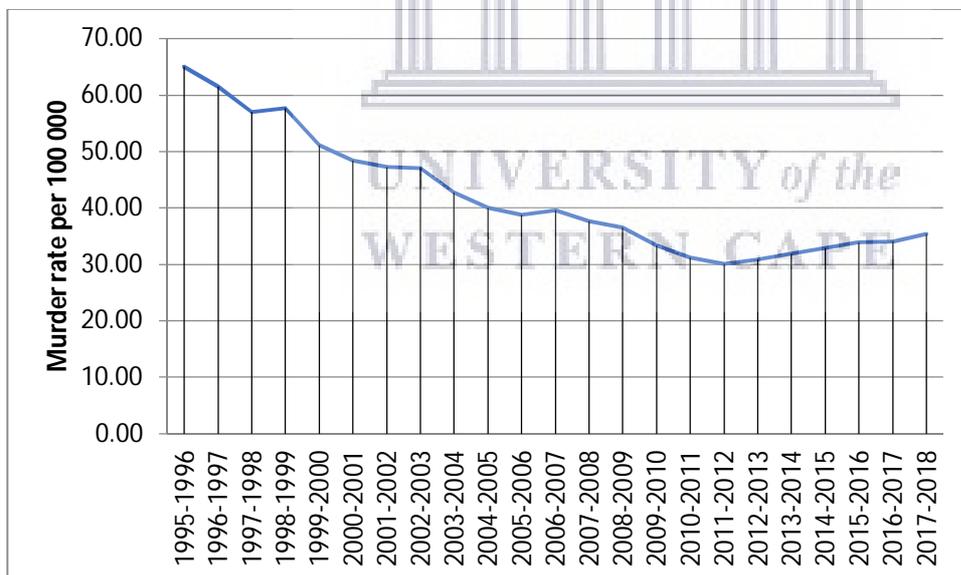
Figure 4: Per capita spending on the SAPS (1996-1997 to 2017-2018; inflation-adjusted)



Source: Own calculations using National Treasury reports and Statistics SA population estimates

Based on the SAPS-recorded murder rate metric, the SAPS was able to claim that, viewed nationally, it was contributing to the prevention of violent crime, at least until 2011/12, as the murder rate halved compared to 1995/96 (see Figure 5 below).

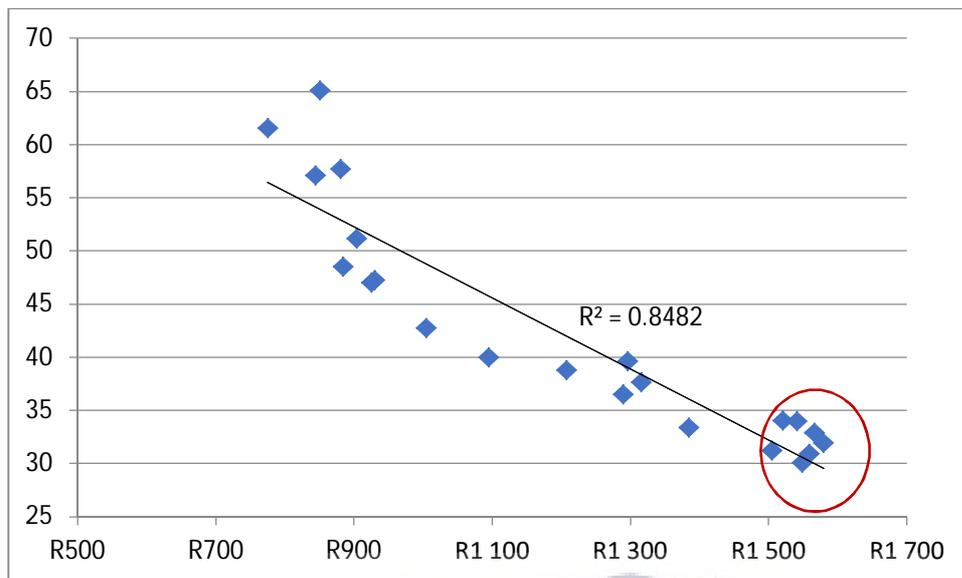
Figure 5: SAPS-recorded murder rate per 100,000 in post-apartheid South Africa



Source: Own calculations using SAPS Crime Data; Statistics SA Mid-year population estimates

Furthermore, there was a significant correlation between spending on police and the reduction in the murder rate, pointing to a relationship between police spending and reduction in the murder rate (see Figure 6 below).

Figure 6: Relationship between real per capita expenditure and the murder rate (data points 1995/96 to 2017/18)



Source: Data in figures 5 and 6 above

This apparent progress was associated with a great increase in the cost of funding the police. According to the National Expenditure Reviews, nominal expenditure on the SAPS increased from almost R10 billion in 1995-1996 to more than R80 billion in 2017-2018, as noted earlier.¹²² Adjusting the figures to September 2017 prices shows a real increase in expenditure on the SAPS from R35 billion to almost R90 billion.¹²³ (Expenditure on SAPS as a percentage of consolidated national spending in 2018/19 is 5.9 per cent and 6.7 per cent of allocated expenditure.)¹²⁴

The observed correlation suggests that 85 per cent of the yearly variation in the murder rate could be predicted by inflation-adjusted spending on police (see Figure 7). Of course, spending on other government services also increased, which too may have had an impact on crime. Nevertheless, the correlation supports the idea that policing played some role in the observed reduction in the SAPS murder rate – the idea, in other words, that the SAPS contributed to the prevention of violence. Other possible contributory reasons for the reduction in the murder rate over that period include the reduction in political violence and a change in South Africa’s age-demography.¹²⁵

This trend of improvement did not last, however. The data post-2012, clustered around the R1,500 per capita level of police spending (Figure 7), suggest no clear relationship in the years since 2012 – and it is at around this point that prevention may be considered to have begun to falter.

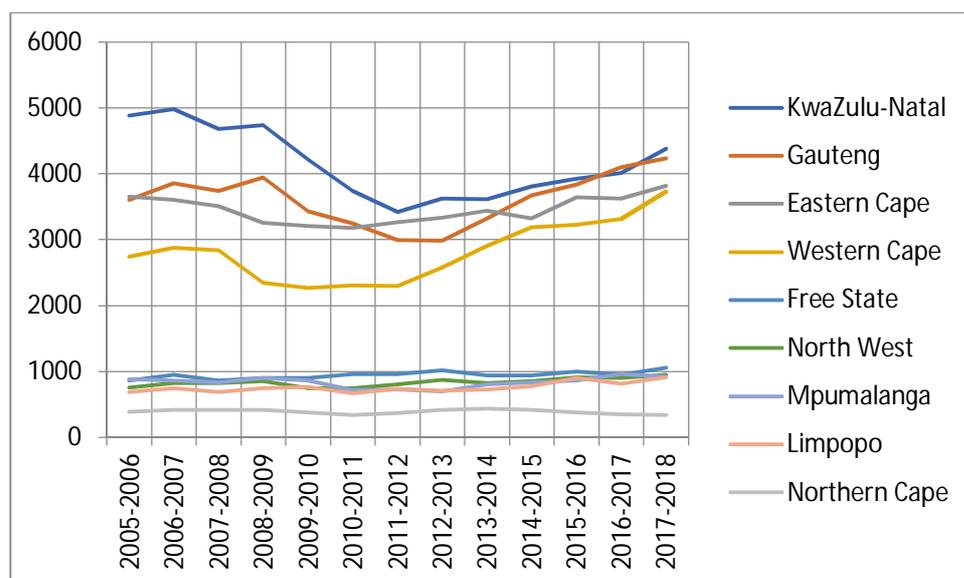
¹²² All budgetary information is obtained from National Treasury *Estimates of National Expenditure* collated by the Treasury here: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>. accessed 24 August 2019.

¹²³ Authors’ own calculations, based on National Treasuring information for relevant years and inflation information from the Consumer Price Index.

¹²⁴ National Treasury *2018 Budget Highlights* (2018) available at <http://www.treasury.gov.za/documents/national%20budget/2018/sars/Budget%202018%20Highlights.pdf> accessed 28 August 2019.

¹²⁵ As South Africa’s population ages, younger age groups usually associated with higher crime rates form a smaller percentage of the population.

Figure 7: Number of murders recorded by the SAPS by province (2005/6 to 2017/18)



Source: SAPS Crime data

Indeed, disaggregating the trend by province reveals that the earlier reduction in the number of murders recorded by the SAPS from 2005/2006 to 2011/12 was driven predominantly by reductions in KwaZulu-Natal (see Figure 7), from almost 5,000 murders to less than 3,300, which accounted for half of the observed reduction. For most provinces, the period of improvement in the raw number of murders levelled off more or less in 2008. (Gauteng improved over the period 2008–2011, possibly for the reasons discussed in Chapter 5 concerning the possible impact of a provincial intervention.) This suggests prevention considered nationally may have faltered after 2005/2006, with national figures showing the trend from 2011/12. This is also the case when population growth is taken into account: the lowest murder rate per 100,000 population was recorded in 2010/11. For reasons outlined in Chapter 1, murder recorded by the SAPS is considered a relatively robust metric, particularly in places like the Western Cape, where mortuary data matches SAPS data closely. Estimates published in *The Lancet*¹²⁶ of ‘death due to interpersonal violence’ reveals the difference between such estimates and the SAPS figures. These estimates are based on National Burden of Disease (NBD) data obtained from Statistics South Africa¹²⁷ and are regarded as credible estimates of the true level of homicide to 2012.¹²⁸

¹²⁶ Pillay-van Wyk V et al. ‘Mortality trends and differentials in South Africa from 1997 to 2012: second National Burden of Disease Study’ *The Lancet* 4(9) (2016)..

¹²⁷ According to the summary: ‘The estimates are based on cause of death data from death notifications for 1997–2012 obtained from Statistics South Africa. These data were adjusted for completeness using indirect demographic techniques for adults and comparison with survey and census estimates for child mortality. A regression approach was used to estimate misclassified HIV/AIDS deaths and so-called garbage codes were proportionally redistributed by age, sex, and population group population group (black African, Indian or Asian descent, white [European descent], and coloured [of mixed ancestry according to the preceding categories]). Injury deaths were estimated from additional data sources. Age-standardised death rates were calculated with mid-year population estimates and the WHO age standard. Institute of Health Metrics and Evaluation Global Burden of Disease (IHME GBD) estimates for South Africa were obtained from the IHME GHDx website for comparison.’

¹²⁸ Personal communication, Richard Matzopoulos Chief Specialist: Burden of Disease Research Unit, South African Medical Research Council 20 August 2019.

Table 3: Murders recorded by SAPS and deaths due to interpersonal violence estimated using the NBD, by province

	2005- NBD est.	2005- SAPS	Per cent difference	2010- NBD est.	2010- SAPS	Per cent difference	2012- NBD est.	2012- SAPS	Per cent difference
KZN	6267	4891	-28%	4898	3740	-31%	4784	3623	-32%
EC	4521	3653	-24%	3426	3179	-8%	3330	3335	0%
G	5630	3607	-56%	4730	3246	-46%	4627	2988	-55%
WC	2843	2741	-4%	2355	2308	-2%	2294	2575	11%
FS	1318	860	-53%	999	958	-4%	973	1019	5%
NW	1020	750	-36%	751	743	-1%	732	867	16%
L	1129	686	-65%	892	663	-35%	877	701	-25%
M	839	877	4%	670	717	7%	653	693	6%
NC	644	390	-65%	487	339	-44%	771	412	-87%
RSA	24211	18455	-31%	19208	15893	-21%	19041	16213	-17%

Source: Pillay v Wyk et. al (2016) and SAPS Annual Reports

While the estimates also show a reduction in death due to interpersonal violence to 2010, there is little difference between the 2010 and 2012 estimates, suggesting a levelling off (see Table 3 above). Similar public health sector estimates post-2012 are not available.

Taken together, the various sources of data, including the SAPS murder rate, suggest that crime prevention, such as may have been occurring partly as a result of SAPS action, faltered at some point between 2010 and 2012, with most indicators clearly suggesting a worsening trend after 2012. The percentage of people reporting property crimes,¹²⁹ while previously improving, also stagnated around this time, making other SAPS crime data less reliable too. This worsening trend is clearly related to trends in SAPS performance in responding to crime, in police visibility and in the investigation of crime.

4.6.2 SAPS' slow response to crime in progress

One of the mechanisms by which crime may be prevented by police is 'speedy response to crime in progress'. This crime prevention effect may be theorised to occur not only through a possible deterrent effect on potential offenders via rational choice theory, but instead because speedy response improves public trust¹³⁰; improved trust in turn results in better community co-operation with the police, which in turn has an ameliorating effect on crime.¹³¹ The SAPS itself measures reaction times, but this measurement is not automated and is manually recorded by the police officers themselves whose performance is measured by the responses they give.¹³² Such data are wide open to manipulation, and thus SAPS reaction times as published in the SAPS Annual Report should be

¹²⁹ The percentage of respondents experiencing one or more thefts from the home measured in the Afrobarometer Survey was lowest in 2008-2009, at 63 per cent, but otherwise hovered between 69 per cent and 72 per cent. See

¹³⁰ Jackson J, Bradford B and Stanko B *Just Authority?: Trust in the Police in England and Wales* (2012) 138. Malone M & Dammert L 'The police and the public: policing practices and public trust in Latin America' *Policing and Society* (2020) available at

<https://www.tandfonline.com/doi/ref/10.1080/10439463.2020.1744600?scroll=top> accessed 24 May 2020.

¹³¹ Goldsmith (2005).

¹³² Faull A 'The 'Truth' About Police Pocket Books' (2015) UCT Centre of Criminology (2015) available at <http://www.criminology.uct.ac.za/news/truth-about-police-pocket-guides> accessed 20 August 2019.

treated with a great deal of caution – the most recent report lists average reaction times of about 20 minutes, which are, coincidentally, very similar to the ‘target’ response times.¹³³

The Statistics South Africa *Victims of Crime Survey* may better represent the response-time trends. The 2016 survey found a large proportion of households in the Northern Cape (44 per cent), KwaZulu-Natal (46 per cent), North West (47 per cent) and Mpumalanga (52 per cent) indicating that it takes two or more hours for police to respond to an emergency call; overall, some 29 per cent in South Africa said the same.¹³⁴ Yet less than 2 per cent said it took them more than two hours to go to a police station themselves using their usual mode of transport, suggesting that the slow SAPS response is not a function of physical distance from the police station.¹³⁵ Thus, the SAPS response to crime in progress is unlikely to assist in the prevention of crime.

4.6.3 SAPS’ poor police visibility

Police visibility is a component of general deterrence of crime, which is one of the theorised mechanisms of prevention; more important and measurable, however, is probably the role of (benevolent) police visibility in improving public trust.¹³⁶ The same survey found that only a third of households in South Africa saw a police officer daily, while large proportions in the Eastern Cape (39 per cent), North West (29 per cent), KwaZulu-Natal (26 per cent) and Mpumalanga (26 per cent) said they ‘never’ saw a police officer in their area.¹³⁷ Thus, police visibility is likely to be largely inadequate in affecting crime.

4.6.4 SAPS’ failure to investigate crime

The SAPS is the only policing entity authorised by the Constitution and the SAPS Act to investigate crime. The investigation of crime is crucial to the concept of justice and trust in the system as a whole, as it results in verdicts in court. Investigations which are procedurally correct and fair also contribute to trust in policing.¹³⁸ Investigations also contribute modestly to the prevention of crime where they lead to prolific offenders being incapacitated by incarceration.¹³⁹ However, the most reliable evidence indicates that the SAPS has been failing in this regard too. The SAPS uses metrics such as the ‘detection rate’ and the ‘trial-ready docket rate’ to measure its performance in investigating crime, apparently sensible-sounding metrics that show large improvements over the periods for which they are available (2010 onwards).¹⁴⁰ Nevertheless, they are deeply misleading given the way in which they are defined by the SAPS.

The detection rate, according to the SAPS definition, includes as ‘detections’ cases that (1) are withdrawn by the complainant before a perpetrator is charged; (2) cases where the prosecutor declines

¹³³ SAPS *Annual Report 2017/18* (2018) 89-90.

¹³⁴ Statistics South Africa *Victims of Crime Survey* (2016) 63 available at.

<https://www.statssa.gov.za/publications/P0341/P03412016.pdf> accessed 30 November 2019.

¹³⁵ Statistics South Africa *Victims of Crime Survey* (2016) 62.

¹³⁶ Hawdon JE, Ryan J, & Griffin SP ‘Policing Tactics and Perceptions of Police Legitimacy’ 6(4) *Police Quarterly* (2003) 469–491.

¹³⁷ Statistics South Africa *Victims of Crime Survey* (2016) 62

¹³⁸ Goodman A (2005).

¹³⁹ Cohen J (1983) ‘Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls’ *Crime and Justice*(5) 1-84.

¹⁴⁰ From 2010 to 2016, a doubling in trial-ready dockets and an 8 per cent increase in detections. See Redpath J Presentation Trends in the exercise of prosecutorial discretion: Armchair discussion on the National Prosecuting Authority 22 November 2016 (2016) Slide 5.

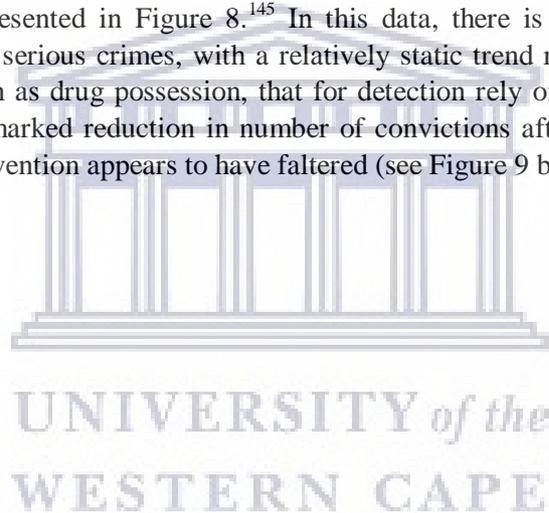
to prosecute; and (3) unfounded cases.¹⁴¹ As Trevor Budhram and Nicolaas Geldenhuys have remarked:

[T]he rationale for the inclusion of unfounded cases and cases withdrawn out of court in the detection rate is not clear. Since these cases often involve little or no investigation at all, it does not make sense to regard all of them as successful investigations.¹⁴²

Similarly, trial-ready dockets include those cases which the NPA chooses to ‘mediate informally’ even if the SAPS investigation has not yet been completed.¹⁴³ Informal mediation often occurs before any investigation at all has happened. Informal mediations exceed 150,000 per year, according to the NPA Annual Reports.¹⁴⁴ Consequently, these two indicators are nearly meaningless and cannot provide a true reflection of the extent to which crime is investigated.

A better measure is the trend in prosecutions and convictions, since only successful investigations lead to prosecutions and convictions. Convictions are reported on by both the SAPS and NPA. The SAPS data counts convictions on charges, with data published on serious crime charges, while NPA data counts cases. There are usually more charges than cases – in other words, the numbers are larger in the SAPS data.

The data on charges are presented in Figure 8.¹⁴⁵ In this data, there is a marked trend toward a reduction in convictions for serious crimes, with a relatively static trend recorded for ‘police action crimes’, that is, crimes, such as drug possession, that for detection rely on police action rather than reports by the public. The marked reduction in number of convictions after 2012/2013 matches the period over which crime prevention appears to have faltered (see Figure 9 below).



¹⁴¹ ‘This classification may only be used when the investigation clearly discloses that an offence has not been committed, for example when property, alleged to have been stolen, is found to have been mislaid or lost.’ SAPS Standing Order (General) 325 Closing of case dockets available at <https://www.khayelitshacommission.org.za/bundles/bundle-twelve/category/266-1-expert-reports.html?download=2584:6i.%20MVE%20SO%20325%20Annex%20I&start=40> accessed 20 August 2019.

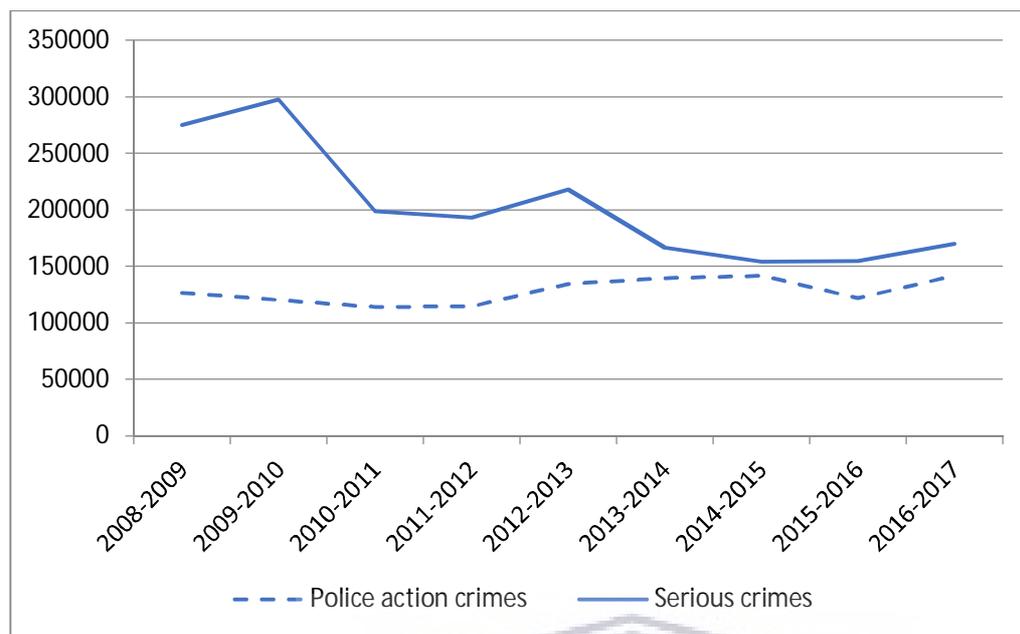
¹⁴² Budrum T and Geldenhuys N ‘A Losing battle? ‘Assessing the detection rate of commercial crime’ *SA Crime Quarterly* 61 September 2017 10.

¹⁴³ SAPS *Annual Report 2017/18* (2018) 152.

¹⁴⁴ Redpath J ‘Decline in convictions could be down to preference for informal mediation’ *Business Day* 21 November 2016 available at <https://www.businesslive.co.za/bd/opinion/2016-11-21-decline-in-convictions-could-be-down-to-preference-for-informal-mediation/> accessed 30 November 2019.

¹⁴⁵ The number of convictions became consistently available in SAPS Annual Reports post-2008, with data from the previous year included in that report. See *SAPS Annual Report 2007/8* (2008) ‘Detective Service’.

Figure 8: Convictions on charges recorded by SAPS (2008/9 to 2016/17)



Source: SAPS Annual Reports

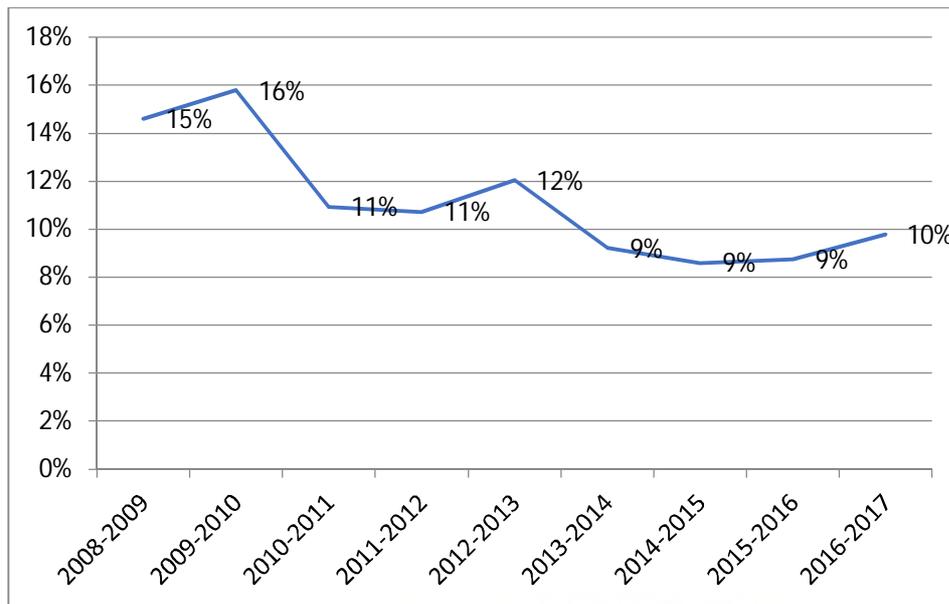
Not only has there been a reduction in convictions but the serious-crime conviction rate¹⁴⁶ has also declined. Less than 10 per cent of reported serious crimes have been matched by a conviction in court since 2013/2014 (see Figure 10). The failure to investigate, prosecute and convict means the SAPS is also failing to uphold and enforce the law. While the NPA is also responsible for achieving convictions, a good investigation is a *sine qua non* for a conviction. The NPA frequently blames poor dockets for the dwindling rate of convictions.¹⁴⁷

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¹⁴⁶ Convictions for serious crime, expressed as a percentage of reported serious crime.

¹⁴⁷ See, for example, Eliseev A 'NPA vs SAPS: Justice is down and out' *Daily Maverick* 20 November 2014 available at <https://www.dailymaverick.co.za/article/2014-11-20-npa-vs-saps-justice-is-down-and-out/> accessed 28 August 2019; De Wet P 'The NPA's annual report figures show a troubled criminal justice system' *Mail & Guardian* 13 September 2016.

Figure 9: Conviction rate of serious reported crime (2008/9 to 2016/17)



Source: SAPS Annual Reports for number of reported crimes and for number of convictions; author's own calculations for conviction rate

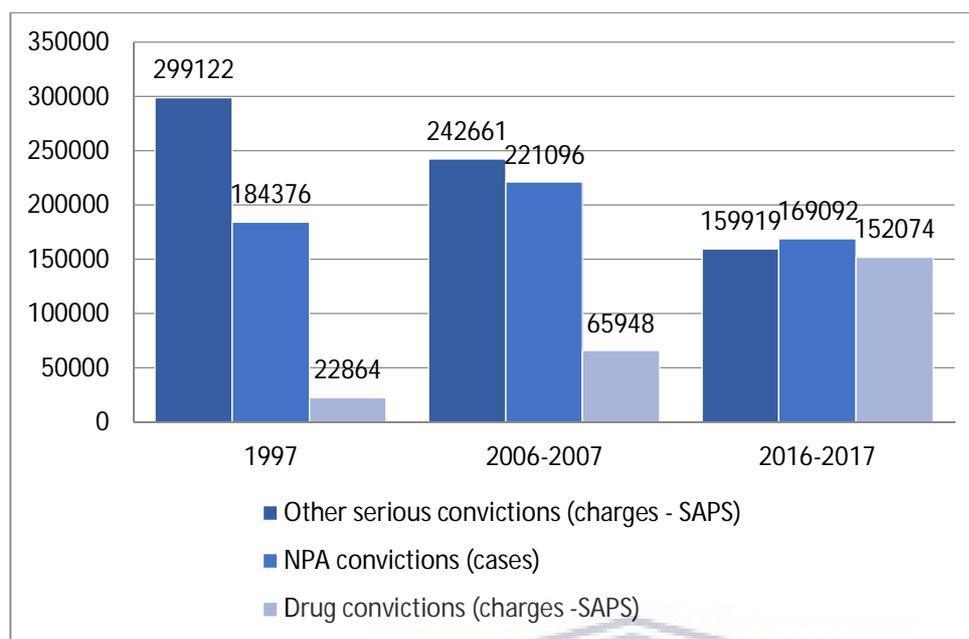
The overall number and rate of conviction does not provide insight into the nature of crimes for which accused are being convicted. Analysing convictions by crime-type shows a disturbing trend in which drug crimes overshadow all other types. Figure 11 suggests the disproportionate extent to which court time and resources are being employed in relation to a single crime – one highly likely to involve nothing more than possession of small amounts of cannabis. The evidence that cannabis is likely to be involved is that from 2012/2013 to 2016/2017 it comprised more than 99 per cent by mass of all confiscations of drugs.¹⁴⁸

Data on admissions to South African correctional centres ceased being available after 2011. Prior to that, a steadily decreasing trend was apparent, with a drop from about 200,000 per year in 2002/3 to less than 100,000 per year in 2010/11. (Prisons remain over over-occupied due to long sentences and remand imprisonment.) This is also suggestive of an increasing failure to convict proportionally more serious charges that warrant imprisonment as a sentence.¹⁴⁹ The consequences of the failure to identify and incapacitate serious offenders – while over-policing less serious offenders - are likely to play out in subsequent years, through reductions in trust and failure to incapacitate serial offenders who continue their criminal careers.

¹⁴⁸ Redpath J *Fact Sheet on the Performance of the NPA* (2018) available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> accessed 30 November 2019.

¹⁴⁹ Redpath J *Round Table on Remand Detention* (2013) available at <https://acjr.org.za/resource-centre/round-table-on-remand-pre-trial-detention-in-south-africa> accessed 30 November 2019.

Figure 10: Convictions for charges (SAPS) compared to NPA convictions



Source: SAPS spreadsheet 1997 ; SAPS Annual reports 2007/8 and 2016/17; NPA Annual Reports 2006/7 and 2016/17

At the same time, court hours have reduced from 4 hours 9 minutes in 2002/3 to only 3 hours 6 minutes in 2017/18.¹⁵⁰ This strongly suggests that convictions are being obtained in an unopposed fashion and that it is not court time that is limiting convictions. Investigations are thus returning fewer serious convictions not relating to drugs than obtained in 2006-2007, and even fewer than obtained in 1997 (see Figure 11). In 2016/17, serious charge convictions exceeded NPA case convictions, suggesting that some NPA cases did not involve the 20 most serious crimes reported on by the SAPS.

The evidence suggests that the SAPS is deteriorating in the investigation of crime, as well as deteriorating in incapacitating serious offenders most likely to re-offend. The trends in regard to public protests show similar deterioration.

4.6.5 Increase in public protest and associated violence

The constitutional mandate of SAPS includes the ‘maintenance of public order’.¹⁵¹ On the face of it, the SAPS cannot be held responsible for the incidence of service delivery protests and strike-action violence. However, where it is the SAPS’ failings that are the subject of the protest, then the incidence of protest does partly reflect on their mandate.

Unfortunately, many protests do relate to the SAPS’ failings. A study in 2014 of seven municipalities found that the most common category of reason for a notification for a planned protest was ‘crime and the justice system’, with 32 per cent of reasons falling in this category (338 of 1,069 notifications).¹⁵² Similarly, the Institute for Security Studies’ Protest and Public Violence Monitoring (PPVM) project found that the second most-recorded grievance category (accounting for 16 per cent of incidents)

¹⁵⁰ Redpath (2018).

¹⁵¹ Section 205 Constitution 1996.

¹⁵² Grant L ‘Taking to the streets: Who is protesting and why?’ *Mail & Guardian* 28 April 2014 available at <https://mg.co.za/data/2014-04-28-taking-to-the-streets-who-is-protesting-and-why> accessed 24 August 2019.

consisted of grievances about the police's inability to reduce crime levels or solve particular crimes.¹⁵³ Thus, to the extent that the SAPS is responsible for dissatisfaction with crime and justice system outcomes, it itself is partly driving the incidence of public protest, records of which have increased fifteen-fold since 2010 (see Table 4).

Furthermore, if protestors believe they can act with impunity within protests due to the SAPS' inaction, violence may be more likely to occur during a protest, and if the SAPS fails to act to contain violent protest as it occurs, more damage may occur. While the SAPS cannot be expected to prevent protests from occurring at all, the extent to which they become violent, and the extent to which damages are caused, are measures of the degree to which the SAPS is meeting its constitutional mandate to maintain public order. The evidence suggests that in metropolitan municipalities protests are not only escalating in number but escalating in the proportion that are violent (see Table 4).

Table 4: Protests in metropolitan municipalities¹⁵⁴

Protests in metropolitan municipalities	2010	2011	2012	2013	2014	2015	2016	2017
Non-violent	880	1454	1996	2162	2573	5015	5347	5244
Violent	62	135	114	328	205	1100	488	932
TOTAL	942	1589	2110	2490	2778	6115	5835	6176
% Violent	7%	8%	5%	13%	7%	18%	8%	15%

Furthermore, the evidence suggests that the total value of damage to property as a result of protest is increasing. The South African Special Risk Insurance Association (SASRIA), the state-owned entity providing special risk cover to all individuals, businesses and government entities that own assets in South Africa, covers against risks such as civil commotion, public disorder, strikes, riots and terrorism. In January 2019, it reported that between 2012 and 2019 it received more than 20,000 claims, in addition to observing a notable increase between 2017 and 2019: during the first five months of the 2018/19 financial year, it received more than 2,000 newly registered claims totalling an estimated R1 billion.¹⁵⁵ The number of claims has more than doubled since 2014.¹⁵⁶ The claims received were from commercial businesses, predominantly from South Africa's industrial and commercial hubs including the Western Cape, Gauteng and Eastern Cape.

Accurate information on the number of people killed or injured by protesters is not available. However, news reports suggest that security guards are increasingly at risk of being injured or killed during protests, especially those related to strike action or student fees.¹⁵⁷ During xenophobic attacks

¹⁵³ Lancaster L 'Unpacking discontent: where and why protest happens in South Africa' 2018 64 SACQ (2018) 29-43 available at <http://www.scielo.org.za/pdf/sacq/n64/04.pdf> accessed 24 August 2018.

¹⁵⁴ Samkangwe C et al. *Counting the Cost of Community Protests on Public Infrastructure* South African Local Government Association (2018) 7 available at <http://www.salga.org.za/SALGA-Dullah%20Omar%20Institute/Documents/Dlulisa.pdf> accessed 24 August 2019.

¹⁵⁵ Ntsaluba G 'Violent protests have cost R1bn in past 9 months – Sasria' *The Citizen* 22 January 2019 available at <https://citizen.co.za/news/south-africa/protests/2067966/violent-protests-have-cost-r1bn-in-past-9-months-sasria/> accessed 24 August 2019.

¹⁵⁶ SASRIA Integrated Report 2018 (2018) available at <http://www.sasria.co.za/wp-content/uploads/2018/09/Sasria-IR-2018.pdf?x80196> accessed 24 August 2019.

¹⁵⁷ (no author) '1 Critical, 8 others injured in violent protest action in Jet Park, Boksburg' *Arrive Alive*, available at <https://www.arrivealive.co.za/news.aspx?i=38013&s=0&page=1-Critical-8-others-injured-in-violent-protest-action-in-Jet-Park-Boksburg> accessed 24 August 2019; Friedman D 'PICS: Security guard dies after being set alight in plastics strike chaos' *The Citizen* 5 December 2012 available at

in 2008, arguably a form of violent public protest, some 62 foreign migrants lost their lives and 670 were injured.¹⁵⁸ The number of deaths of protestors as a result of police action during protests since 1994 to 2018, excluding the Marikana massacre (at which 35 were killed),¹⁵⁹ is unknown, but at least 23 were reported in the press.¹⁶⁰ The IPID recorded 11 deaths as a result of crowd management in 2013/14,¹⁶¹ eight in 2014/15,¹⁶² 12 in 2015/16,¹⁶³ five in 2016/17,¹⁶⁴ and eight in 2017/18.¹⁶⁵ It remains unclear why tactical unit police were deployed with live ammunition at Marikana.¹⁶⁶

Vigilantism is another form of protest again laid firmly at the door of the SAPS, inasmuch as it arises when police are perceived as failing to take action against known perpetrators. In 2017/18, the SAPS attributed 849 murders to mob justice, equal to 4 percent of all murders.¹⁶⁷ The Khayelitsha Commission heard evidence of how commonplace it was in the area.¹⁶⁸ The incidence of vigilantism is closely related to insufficient policing, which in turn is related to the unequal and irrational allocation of resources across the country – a phenomenon that was not well understood until recently, and which centralisation did not remedy even though doing so is a stated aim.

4.6.6 Trust in police

Ultimately, a police service meeting its mandate would enjoy the trust of the public, which trust in turn would operate to improve its effectiveness. Both absolutely and relatively, SAPS scores poorly in relation to the trust of its citizens, with fewer than half saying they trust the police ‘somewhat’ or ‘lot’ (see Figure 7 below; 2015 scores labelled). Although improvement has been measured since 2002, this has waned in recent surveys; furthermore the SAPS is the least trusted of a range of national

<https://citizen.co.za/news/south-africa/2046048/pics-security-guard-dies-after-being-set-alight-in-plastics-strike-chaos/> accessed 24 August 2019; University of Cape Town *Press release: Security officers hospitalised after Fallist attack – UCT* 19 October 2016 available at <https://www.politicsweb.co.za/politics/security-officers-hospitalised-after-fallist-attac> accessed 24 August 2019; Van der Merwe, M ‘#FeesMustFall, Cape Town: The week the line was crossed’ *Daily Maverick* 13 October 2016 available at <https://www.dailymaverick.co.za/article/2016-10-13-feesmustfall-cape-town-the-week-the-line-was-crossed/> accessed 24 August 2019; (No author) ‘Rioters killed after three days of protests in Pretoria’ *Deutsche Welle* 21 June 2019 available at <https://www.dw.com/en/rioters-killed-after-three-days-of-protests-in-pretoria/a-19348590> accessed 24 August 2019; Pijoos I et al. ‘UPDATE: 27 arrested after violence breaks out in Soweto as looters run amok, leaving 3 people dead’ *News24* 29 August 2018 available at <https://www.news24.com/SouthAfrica/News/five-people-arrested-for-two-deaths-amid-soweto-looting-unrest-20180829> accessed 24 August 2019.

¹⁵⁸ Staff Reporter ‘Toll from xenophobic attacks rises’ *Mail & Guardian* 31 May 2008.

¹⁵⁹ On 16 August 2012, South African police opened fire on striking miners armed with machetes and sticks at Lonmin’s Marikana platinum mine, killing at least 35 people. In the days leading to the massacre, 11 people were killed, allegedly by mineworkers. It was the first incident of this kind since the 1994 democratic election.

¹⁶⁰ Author’s own total inferred from news reports.

¹⁶¹ IPID *Annual Report (2013/14)* (2014) 35.

¹⁶² IPID *Annual Report 2014/15* (2015) 52.

¹⁶³ IPID *Annual Report 2015/16* (2016) 58.

¹⁶⁴ IPID *Annual Report 2016/7* (2017) 42.

¹⁶⁵ IPID *Annual Report 2017/18* (2018) 44.

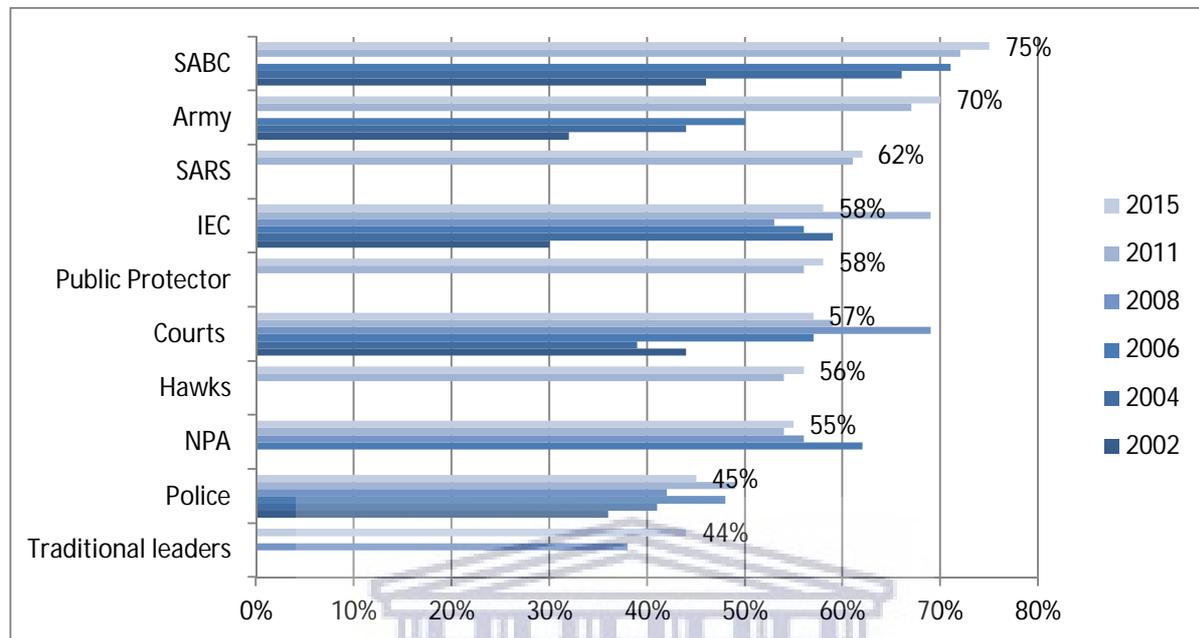
¹⁶⁶ See Bruce D ‘*The sound of gunfire: the police shootings at Marikana Scene 2, 16 August 2012*’ Institute for Security Studies (2018).

¹⁶⁷ SAPS ‘Crime Situation in RSA 2017/2018’ (2018) available at https://www.saps.gov.za/services/long_version_presentation_april_to_march_2017_2018.pdf accessed 28 August 2019.

¹⁶⁸ For example, 43 vigilante incidents occurred in Khayelitsha in January to July in 2006. See Western Cape Government Department of Community Safety *Occasional Paper Recent Trends and Patterns of Vigilantism in the Western Cape* (2013) 7 available at <https://www.khayelitshacommission.org.za/bundles/bundle-two/category/61-file-12.html?download=964:13.%20%20Vigilantism%20in%20the%20W.Cape> accessed 23 August 2019.

government institutions in South Africa, only barely outscoring the lowest-placed institution -- traditional leaders – in 2015.¹⁶⁹

Figure 11: Trust in various institutions in South Africa (2002-2015)



Source: Afrobarometer Surveys

4.7 Conclusion

The mooted benefits of centralisation have not emerged in the South African example. Arguably, the motivations for centralisation particular to South Africa were achieved – keeping the KZP in check, maintaining the status quo of SAPS control, and political realignment of the police along with demographic transformation. The continued exceptionally high rate of deaths by police action in KwaZulu-Natal and extremely low allocation of police is, however, cause for concern. While centralisation prevented armed separatism, it has not ensured democratic policing in the province.

The SAPS initially appeared to be undergoing incremental reform in the way it polices, but the rushed recruitment and training observed in the 2000s negatively impacted on the quality of its members. Gains in public safety achieved prior to 2010 have been reversing rapidly, and poor central decision-making, including that relating to structuring and reservists, has affected public safety throughout the country. Centralisation has not led to the rational or even equal distribution of resources, leaving many areas severely under-policed in spite of high rates of violent crime, even as significant numbers of people are killed as a result of police action or while in police custody. Corruption of elements of the SAPS has also occurred, and it is by no means clear that this has yet been eradicated. National structures of accountability provided for in the constitutional framework, including a weak, political secretariat with few powers and an IPID without prosecution powers, have failed to ensure continuing reform of the SAPS.

The constitutional mandate of the SAPS intersects closely with certain constitutional rights. Given the objects of SAPS, it is the primary state entity which must seek to ‘respect, protect, promote and fulfil’¹⁷⁰ the right not to be deprived of property except in terms of law,¹⁷¹ the right to be free from all

¹⁶⁹ Afrobarometer (South Africa) Surveys, 2002-2015, available at <https://www.afrobarometer.org/countries/south-africa-0> accessed 27 August 2019.

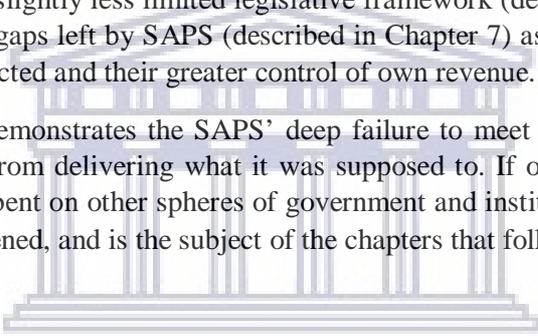
¹⁷⁰ Section 7(2) Constitution 1996.

forms of violence,¹⁷² and the right to life.¹⁷³ The police must fulfil this mandate within the broader constitutional framework underpinned by human dignity, freedom and equality. Indeed, the Constitution requires that national security must 'reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'.¹⁷⁴

The evidence in this chapter suggests that the latter vision is not being met and that the SAPS is implicated in this failure. Indeed, if the current trend continues, in five years the murder rate will exceed 40 per 100 000, implying in excess of 25 000 people murdered each year.¹⁷⁵ In the following chapters, lack of responsiveness to provincial and local concerns will be highlighted as part of the problem. The legislative framework seems to suggest that in many respects subnational government is irrelevant to policing in South Africa. The imperatives of the worsening situation described in this chapter suggest that genuine interventions by subnational government may be interpreted as a fidelity to the deeper obligations on all spheres of government to promote safety and protect the rights of inhabitants.

Indeed, closer inspection of the record of the democratic era shows that even the provinces (see Chapter 5), despite the most limited of mandates and budgets, have attempted to involve themselves in policing to a greater or lesser degree and with more or less success. Municipalities, particularly the larger metros with their own slightly less limited legislative framework (described in Chapter 6), have stepped deliberately into the gaps left by SAPS (described in Chapter 7) as a result of their particular and direct interests being affected and their greater control of own revenue.

In conclusion, this chapter demonstrates the SAPS' deep failure to meet its constitutional mandate, with centralisation very far from delivering what it was supposed to. If one institution of (national) government fails, is it incumbent on other spheres of government and institutions to step in? To some degree, this is what has happened, and is the subject of the chapters that follow.



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¹⁷¹ Section 25(1) Constitution 1996.

¹⁷² Section 12(1)(c) Constitution 1996.

¹⁷³ Section 11 Constitution 1996.

¹⁷⁴ Section 198(a) Constitution 1996.

¹⁷⁵ Own calculations based on SAPS crime data and Statistics South Africa population estimates.

Chapter 5: The provinces want to police

' the battle against crime. That is where the challenge is, but I don't have any authority. I have sat here like a domestic worker incapable of making any impact on crime. I don't have the authority to control police, not even a constable. All the direction comes from the national headquarters. If we could exercise greater authority, we would also have to be more accountable and work harder to end the problems of our provinces'.¹

Gauteng Premier Tokyo Sexwale in late 1997 after leaving office

5.1 Introduction

Chapter 4 demonstrated the failure of centralisation to deliver its mooted benefits and the ongoing failure to deliver public security adequately and equally. These failures may well prompt the obligation on all spheres of government to protect the rights of citizens² and secure their well-being.³ The Constitutional court has already used this general obligation argument in the arena of policing.⁴ Yet the constitutional mandate of the provinces in policing is not only limited but also without strong mechanisms of implementation.

The constitutional provincial role is limited to (1) a weak role of concurrence but no veto in the appointment of the Provincial Commissioner; (2) an ability to indicate a loss of confidence in the Provincial Commissioner, but no ability to force dismissal; (3) oversight, monitoring and assessment of policing in the province, including receiving annual reports from the police; (4) the promotion of good relations between the police and the community; and (5) providing input into provincial policing policy (see Chapter 3.5 for more detail).

In spite of this limited mandate, all the provinces have engaged with policing to varying degrees and with varying levels of success. The manner of engagement has been influenced by the urgency of crime trends, political homogeneity or heterogeneity in relation to the national government, and the overall capacity and level of development of the province concerned.

5.2 National legislative interpretation of the constitutional framework

National legislation has not significantly expanded the constitutional role but instead constrained its interpretation. In regard to provincial oversight, legislation has sought to impose an obligation where the Constitution provided for an entitlement, and in regard to police-community relations, national legislation has provided for a role in the establishment of Community Police Forums (CPFs). National legislation creates a provincial role in municipal policing, and constitutional competence in traffic regulation has ensured provincial traffic policing.

¹ Staff Reporter 'Farewell to the first premier of Gauteng' *Mail & Guardian* 12 December 1997 available *at* <https://mg.co.za/article/1997-12-12-farewell-to-the-first-premier-of-gauteng> accessed 15 September 2018.

² Section 7(2) Constitution.

³ Section 41(b) Constitution.

⁴ *Minister of Police et. al v Premier Western Cape et al.* Western Cape High Court No. 21600/12 (*Minister of Police 2012 WC*).

5.2.1 Oversight of SAPS by provincial secretariats

One of the mooted benefits of centralisation was transformation of the SAPS. This was partly to be achieved through ‘civilian oversight’ of the police at national level. Consequently, the establishment via national legislation of a national Civilian Secretariat for Police Service (CSPS) under the minister is a constitutional imperative in the 1996 Constitution.⁵

Chapter 2 of the SAPS Act, which predated the Constitution, initially satisfied the constitutional imperative; additional stand-alone legislation was passed in 2012,⁶ without repealing Chapter 2. Chapter 2 provides for a ‘Secretariat for Safety and Security’ to be established by the minister,⁷ and empowers, but does not oblige, provincial governments to establish provincial secretariats for safety and security.⁸ In terms of Chapter 2, provincial secretariats have all the functions and powers of the national secretariats, *mutatis mutandis*.⁹ This implies that any member of the provincial secretariats, to the extent necessary for the performance of provincial secretariat functions, may request and obtain information and documents under the control of the police; enter any building or premises under the control of the police; and be entitled to any reasonable assistance from a member of the police.¹⁰ The latter functions are significant for the transparency and accountability of the police.

In 2012, the Civilian Secretariat for Police Service Act (CSPS Act) was passed and placed an obligation on the provinces to exercise civilian oversight over the SAPS – ‘aligned’ to the national Civilian Secretariat for Police Service (CSPS). Confusingly, the prior provisions in Chapter 2 of the SAPS Act were *not* repealed or amended and remain concurrently in force with the provisions of the CSPS Act. The CSPS Act *obligates* each provincial MEC to constitute a provincial secretariat for that province so as ‘to support and align the mandate of that provincial secretariat with the mandate of the national Civilian Secretariat [CSP]’.¹¹ In practice, most provinces created a programme for a provincial secretariat within the provincial departments of safety and security, and for many, the CSPS Act’s obligatory functions have become the entirety of their policing work (see below).

The CSPS Act requires provincial secretariats to align plans and operations¹² and integrate systems and strategies¹³ with the national CSPS, in addition to which they *must* also implement the mandate of the national secretariat where appropriate.¹⁴ The obligatory (‘must’) functions of the provincial secretariats in the CSPS Act are to:

⁵ Section 208 Constitution.

⁶ Civilian Secretariat for Police Service Act 2 of 2011 (CSPS Act).

⁷ Section 2(1)(a) SAPS Act, 1995, prior to amendment.

⁸ Section 2(1)(b) SAPS Act, 1995, prior to amendment.

⁹ Section 3(5) SAPS Act, 1995. This implies that the provincial secretariats have the power to advise the MEC in the exercise of his or her functions; perform functions the MEC thinks necessary to ensure civilian oversight of the police; promote democratic accountability and transparency in the service; promote and facilitate participation by the police in the RDP; provide the MEC with legal services and advice on constitutional matters; provide the MEC with administration, support and administrative services; monitor the implementation of policy and directions issued by the MEC and report to the MEC; conduct research into any policing matter in accordance with the instructions of the MEC; perform any functions assigned by the MEC; and evaluate the functioning of the police and report to the MEC. See Section 3(1)(a)-(j) read with s(5) SAPS Act, 1995.

¹⁰ Section 3(2)(a)-(c) read with s(5) SAPS Act, 1995.

¹¹ Section 16 CSPS Act.

¹² Section 17(1)(a) CSPS Act.

¹³ Section 17(1)(b) CSPS Act.

¹⁴ ‘Mandate’ in the CSPS Act is not defined but presumably relates to both the objects and the functions of the national CSP. Only the CSPS Act refers to objects, whereas both the SAPS Act and CSPS Act refer to the functions of the CSP.

- ‘establish competencies and capabilities’ to monitor and evaluate the implementation of policing policy in the province;¹⁵
- evaluate and monitor police conduct in the province;¹⁶
- develop and evaluate safety models and monitoring tools to ensure alignment with the functions of the Civilian Secretariat;¹⁷
- assist the Civilian Secretariat with any monitoring and evaluation projects;¹⁸
- promote community police relations;¹⁹
- establish and promote partnerships;²⁰ and
- manage the enhancement of community safety structures with the province.²¹

Anecdotal evidence suggests the national secretariat frequently makes demands on provincial departments to carry out research and monitoring projects, without the transfer of any associated funding – these provisions oblige the provinces to comply. The overall conclusion from a reading of the CSPA Act is that it was carelessly drafted, with little cognizance taken of the provincial CSPA, other than to impose obligations. The latter have the effect of consuming the resources of provincial departments and redirecting their attention to national CSPA priorities, yet without providing them with any firm means of holding the SAPS to account, if for example, there is failure by the SAPS to cooperate in exercising its functions. Furthermore, while the CSPA Act explicitly calls for monies to be appropriated from Parliament for the national CSPA, no provision is made for provincial funding of provincial secretariats, notwithstanding that a range of obligations is placed on them. Rather than empowering the provinces, the legislation appears to burden them and make them explicitly subject to instructions from the national CSPA.

5.2.2 Provincial community police forum obligations

Another mechanism of legitimisation of the SAPS was to be through accountability to Community Police Forums and associated Community Police Boards (collectively CPFs). CPFs were originally introduced by the Interim Constitution under the heading of ‘Local Policing’,²² suggesting that the provisions would engender the local-level accountability otherwise absent from the 1993 constitutional framework. David Bruce notes, though, that between the passing of the Interim Constitution in 1993 and the SAPS Act in 1995, ‘there appears to have been a downgrading of the importance attached to the “accountability” function of CPFs’.²³ Ultimately, CPFs were entirely omitted from the Constitution of 1996: their weak accountability functions were allocated instead to the provinces, leaving CPFs with even softer functions such that that the provincial power over CPFs – which is limited to the MEC’s directing the Provincial Commissioner in how to establish CPFs (see below) – is insignificant.

¹⁵ Section 17(2)(a)(i) CSPA Act.

¹⁶ Section 17(2)(a)(ii) CSPA Act.

¹⁷ Section 17(2)(a)(iii) CSPA Act.

¹⁸ Section 17(2)(a)(iv) CSPA Act.

¹⁹ Section 17(2)(b)(i) CSPA Act.

²⁰ Section 17(2)(b)(ii) CSPA Act.

²¹ Section 17(2)(b)(iii) CSPA Act.

²² Section 221 Interim Constitution.

²³ Bruce D ‘The architecture of police accountability in South Africa’ APCOF Policy Paper (2011) 4 available at <http://apcof.org/wp-content/uploads/2016/05/No-2-Unfinished-Business-The-architecture-of-Police-Accountability-in-South-Africa-David-Bruce.pdf> accessed 30 November 2019.

Chapter 7 of the SAPS Act provides for community police forums²⁴ and area²⁵ and provincial policing boards (CPFBS).²⁶ Station, area and provincial commissioners must be members of the respective CPFBS.²⁷ It is the Provincial Commissioner who must establish community police forums at police stations, 'subject to the directions of the Provincial MEC'.²⁸ A similar provision applies to area community police boards, in all 'areas' of the province,²⁹ and to the provincial community police board in the province.

'Subject to the directions of the Provincial MEC' suggests that the provincial MEC may control the way in which the Provincial Commissioner establishes CPFBS; some provinces such as the Western Cape have sought to do so. The often highly politicised CPFBS have sometimes refused to follow provincial instructions regarding their establishment. For instance, in mid-2019, Western Cape CPFBS refused to hold elections for a new term of office, thereby resisting provincial election requirements intended to ensure broader representation of interests groups on CPFBS.³⁰

The legislation obligates the SAPS to 'liaise' with CPFBS, in order to achieve the 'objects' of the SAPS (as per the Interim Constitution of 1993): the prevention of crime; the investigation of any offence or alleged offence; the maintenance of law and order; and the preservation of the internal security of the Republic.³¹ These were specifically retained through the transitional provisions in the Constitution.³² The SAPS Act further obliges the SAPS to 'liaise with the community' through CPFBS, with a view to achieving a range of 'soft' generalised objectives, such as promoting communication and problem-solving, and improving relationships and partnerships provided for in the section 18 of the SAPS Act.³³ This ties in with the provincial obligation to maintain good police-community relations, but risks narrowing the interpretation of police-community relations to relations with the CPFBS.

By contrast, section 221(2) of the Interim Constitution empowered CPFBS to take on a range of specific oversight and accountability functions, ones now accorded to the provinces.³⁴ While section 221(2) was not explicitly retained via transitional provisions, it is still referred to in the SAPS Act: '(A CPFBS) ... shall perform the functions it deems necessary and appropriate to achieve the objects contemplated in section 18, which may include the functions of CPFBS contemplated in section 221(2) of the Constitution'.³⁵ The section 221(2) functions strongly echo the functions now allocated

²⁴ Section 19 SAPS Act.

²⁵ Section 20 SAPS Act. 'Areas' are not defined in either the SAPS Act or SAPS regulations; in practice, they are a geographical unit composed of contiguous police stations.

²⁶ Section 21 SAPS Act.

²⁷ Sections 19(3), 20(3) and 21(3), SAPS Act.

²⁸ Section 19 SAPS Act.

²⁹ Section 20 SAPS Act.

³⁰ 'Community Safety and local CPFBS face off over elections' *Voice of the Cape* 7 November 2019 available at <https://www.vocfm.co.za/community-safety-and-local-cpfs-face-off-over-elections/> accessed 30 November 2019.

³¹ Section 215 Interim Constitution.

³² Item 24(1) Schedule 6 Constitution.

³³ Section 18(1)(a)-(f) SAPS Act: Establishing and maintaining a partnership between the community and the police service; promoting communication between the police service and the community; promoting cooperation between the police service and the community in fulfilling the needs of the community regarding policing; improving the rendering of police services to the community at national, provincial, area and local levels; improving transparency in the police service and accountability of the service to the community; and promoting joint problem identification and problem-solving by the police service and the community.

³⁴ Including (a) the promotion of accountability of the Service to local communities and cooperation of communities with the police service; (b) the monitoring of the effectiveness and efficiency of the police service; (c) advising the police 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; (v) the prosecution of offenders; and (e) requesting enquiries into policing matters in the locality concerned.

³⁵ Section 22 SAPS Act.

to the provinces under the Constitution of 1996, including monitoring effectiveness and efficiency, determining policing needs and priorities, and evaluating visible policing. It is unclear whether the SAPS Act permits the CPFs to arrogate to themselves these functions in the absence of their retention via transitional provisions. It is also unclear whether the CPFs may be regarded as 'organs of state' to which the provincial MEC might delegate these functions.³⁶

In practice, the SAPS has strenuously resisted any attempts by CPFs to carry out section 221(2) functions. In July 2015 it was reported that a letter of instruction by the Gauteng Police Commissioner was issued to police stations 'suspending' the oversight functions of CPFs 'with immediate effect'.³⁷ This was after the provincial MEC resolved that CPFs must be involved in monitoring visits. The provincial role in relation to CPFs is therefore extremely limited.

5.2.3 Limited provincial powers in municipal policing

The Constitution provides sparsely for municipal policing, without mentioning the provinces. The Interim Constitution had made relatively detailed provision for municipal policing, with significant powers for the provinces to determine the nature of municipal policing.³⁸ By contrast, the Constitution simply provides that national legislation must provide a framework for the establishment, powers, functions and control of the municipal police services (MPS).³⁹ The relevant national legislation is Chapter 12 of the SAPS Act, inserted in 1998,⁴⁰ which limits provincial power to approving the establishment of an MPS based on set national criteria and to intervening to appoint an administrator if national standards are not maintained.⁴¹

Provincial powers do not include any direct control over MPS, save where there is a failure to maintain (national) standards or conditions. A degree of provincial oversight is provided for in that, in order to ascertain whether national standards are being maintained, the MEC or designated member of the provincial secretariat may request and obtain information and documents from, and enter any building or premises of, a municipal police service, and is entitled to all reasonable assistance of any member of a municipal police service.⁴² Gauteng's secretariat, for example, has actively sought to determine whether the three MPS in the province comply with the relevant MPS regulations.⁴³

5.2.4 Provincial competence in traffic policing

Historically in South Africa, traffic policing has been separated from crime policing. Traffic policing functions were transferred to provincial administrations and municipalities from the SAP in the apartheid era.⁴⁴ The SAP were relieved of city traffic control in 1934, and by 1965 the then four provincial authorities undertook all traffic policing on provincial roads outside municipal boundaries.⁴⁵ In terms of the Constitution, 'road traffic regulation' is a concurrent national and provincial legislative competence,⁴⁶ while 'provincial roads and traffic' is an exclusive provincial

³⁶ Section 238 Constitution.

³⁷ Moatshe R 'CPF's to lose watchdog function' *The Star* 20 July 2015.

³⁸ Section 221(3) Interim Constitution.

³⁹ Section 206(7) Constitution.

⁴⁰ South African Police Service Amendment Act 83 of 1998.

⁴¹ Section 64N SAPS Act.

⁴² Section 64N(1) SAPS Act.

⁴³ Gauteng Department of Community Safety *Annual Report 2015/16* (2016) 38.

⁴⁴ Montesh *Single Public Service versus Single Police Service: A case for the South African Police Service* Inaugural lecture UNISA (2011) 6 available at http://uir.unisa.ac.za/bitstream/handle/10500/5042/SPS%202011%202_2_.pdf?sequence=1&isAllowed=y accessed 30 November 2019.

⁴⁵ Montesh (2011) 6.

⁴⁶ Schedule 4 Part A, Constitution.

legislative competence;⁴⁷ implementation of both these matters is a provincial executive competence, unless the Constitution or national legislation provides otherwise.⁴⁸ In the democratic era, nine provincial traffic police agencies were established and report to their respective MECs.⁴⁹

This suggest that in the politically uncharged arena of traffic policing, centralisation was not required at the time of the negotiation of the Constitution. In 2010, however, a National Traffic Police Unit was established that deployed national traffic police across the country, ostensibly in terms of section 18 of the Road Traffic Management Corporation (RTMC) Act of 1999.⁵⁰

Section 18 of the RTMC Act does not explicitly override the provincial executive competence for traffic policing, providing that the Shareholders' Committee of the RTMC, comprised of the National Minister, the MECs, and two representatives of local government organisations,⁵¹ must 'establish as many functional units as are required in accordance with the business and financial plan to ensure effective management of, at least, the following functional areas: (a) road traffic law enforcement ...'.⁵² Section 18 hence appears to provide for management or oversight of road traffic law enforcement, rather than traffic policing *per se*. The Western Cape MEC contended that the unit was 'illegal' on a number of grounds.⁵³

Along with mooted centralising of all traffic policing under national government (see Chapter 3), these developments suggests that traffic policing is no longer an apolitical arena and is likely also to be subject to increasing national centralising measures.

5.2.4 Provincial referral of investigations to IPID

Transformation of the SAPS was to be achieved, too, through independent investigation of misconduct by SAPS members, especially deaths in police custody or as a result of police action. Previously, this had been investigated by the SAP itself. The Independent Police Investigative Directorate Act (IPID Act) gives effect to section 206(6) of the Constitution, which refers to an 'independent complaints body established by national legislation' that has to investigate 'complaints by a provincial executive relating to misconduct or offences committed by members of the police'.⁵⁴

The IPID Act replaced Chapter 10 of the SAPS Act, which had created the Independent Complaints Directorate (ICD).⁵⁵ Chapter 10 did not explicitly refer to the provincial executive.⁵⁶ The IPID Act makes this a nationally controlled entity in that it provides that the IPID must be structured at national level with provincial offices.⁵⁷ Provincial heads of provincial offices are appointed by the executive director of the IPID without any input from the provinces.⁵⁸ The provincial heads, however, must

⁴⁷ Schedule 5 Part A, Constitution.

⁴⁸ Section 125(2)(b), Constitution.

⁴⁹ Montesh (2011) 6.

⁵⁰ Barnes C 'National traffic unit is illegal' *Cape Argus* 22 December 2011 available at <https://www.iol.co.za/motoring/industry-news/national-traffic-unit-is-illegal-1203225> accessed 9 November 2019.

⁵¹ Section 6(2) Road Traffic Management Corporation Act 20 of 1999.

⁵² Section 18(1)(a) Road Traffic Management Corporation Act 20 of 1999.

⁵³ Barnes (2011).

⁵⁴ Section 206(6) Constitution.

⁵⁵ Section 36 read with Schedule 2, IPID Act.

⁵⁶ The ICD was provided for in the Interim Constitution as follows: 'There shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner' (s 222).

⁵⁷ Section 3 IPID Act.

⁵⁸ Section 20 IPID Act.

report to the relevant provincial MEC, albeit that the requirement is restricted to matters referred to the provincial head by the relevant provincial MEC.⁵⁹

This reporting requirement is replicated at national level.⁶⁰ The IPID is obligated to investigate any matter referred to it by the provincial MEC,⁶¹ as well as corruption matters within the police if so requested by an MEC.⁶² Primarily, though, it investigates (without any referral required) deaths in police custody⁶³ or as a result of police action,⁶⁴ and a closed list of other serious allegations against police.⁶⁵ The IPID may, but is not obliged to, investigate any other matters relating to systemic corruption involving the police.⁶⁶

It is hence clear that, despite the Constitution's having opened a door to an important provincial role, the IPID Act fails to expand on the role of the provinces, which here is limited to a province referring matters to the IPID that the latter is then obliged to investigate.

5.2.5 Conclusion

The national legislation reflects the contested nature of policing. Murray has noted that the ANC's aversion to the provinces continues to reveal itself in many ways – for instance, innovation by provinces is not welcomed, provincial politicians are treated as a 'nuisance', and national priorities take priority over provincial concerns.⁶⁷ So it is that the provinces were in effect saddled with the almost impossible task of holding a national police service to account while not having any direct powers over policing as such. Yet even the meagre provincial powers of monitoring and oversight have been fiercely contested in the democratic era, particularly in the opposition-led Western Cape province.

5.3 Provincial policing engagement

5.3.1 Introduction

The limited mandate in policing described above gives provinces the daunting task of exercising oversight over a nationally controlled police service without powers to enforce their findings or recommendations. The provinces have strained against this mandate. This has occurred irrespective of political affiliation, but is most apparent in the larger provinces with high and intractable levels of violent crime – and competitive elections. The chapter goes on to describe some of the provincial engagements in policing, constrained as they are by the 'financial constitution' in terms of which the national government has almost exclusive access to the main tax sources while the provinces depend

⁵⁹ Section 21(1)(j) IPID Act.

⁶⁰ Section 9(i) IPID Act. That is, the national office must report to the relevant provincial MEC on matters referred to the executive director by the relevant provincial MEC.

⁶¹ Section 28(1)(h) IPID Act.

⁶² Section 28(1)(g) IPID Act.

⁶³ Section 28(1)(a) IPID Act.

⁶⁴ Section 28(1)(b) IPID Act.

⁶⁵ Any complaint relating to the discharge of an official firearm by any police officer; rape by a police officer, whether or not the police is on or off duty; rape of any person while that person is in police custody; any complaint of torture or assault against a police officer in the execution of her or his duties; corruption matters within the police initiated by the executive director; or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary (ss 28(1)(c)-(g) IPID Act).

⁶⁶ Section 28(2) IPID Act.

⁶⁷ See Murray C 'Provincial Constitution-making in South Africa: The (Non) Example of the Western Cape' (2001) 49 *Jahrbuch des öffentlichen Rechts* 482.

on national transfers for 97 per cent of their revenue.⁶⁸ The nature and success of the interventions also hinge on the capacity and level of development of the province concerned.

5.3.2 Provincial spending on safety departments

All the provinces have established departments of safety of varying configurations. The sum of provincial spending on safety in 2017 was R3.5 billion, compared to the SAPS budget of R85 billion, and comprised less than 1 per cent of spending in every province except the Northern Cape (see Table 1 below). This low level of spending is due to the constraints applicable to provincial revenue, which has three sources: the Provincial Equitable Share (PES), conditional grants, and own revenue.

Table 4: Provincial populations, safety department budgets and per capita expenditure (2017)

Province	Pop. (million)	Total budget R (million)	Budget per capita R	Safety Dept. Budget R (thousand)	Safety Dept. per capita	Safety Dept. Percent (%)	HDI	Clean Audit (%)
Gauteng	14.28	112 459	7 875	632 647	R44	0.56	0.735	52
KwaZulu-Natal	11.07	116 941	10 564	210 661	R19	0.18	0.668	16
Western Cape	6.51	59 857	9 195	303 544	R47	0.51	0.764	85
Eastern Cape	6.50	75 344	11 591	87 014	R13	0.11	0.649	29
Limpopo	5.78	62 616	10 833	95 825	R17	0.16	0.680	10
Mpumalanga	4.44	45 110	10 160	1 934 645	R435 *(R12)	0.03	0.678	24
North West	3.86	39 592	10 257	40 801	R11	0.11	0.688	5
Free State	2.87	33 162	11 555	21 174	R7	0.06	0.711	12
Northern Cape	1.21	16 744	13 838	210 704	R174	1.26	0.682	31

Source: Expenditure Reviews (budgets), Statistics South Africa (population) *Oversight only

The PES, the largest component, is primarily determined by the key mandates of the provinces, namely education and health, and thus depends on factors such as the number of school enrolments and the proportion of the population without medical aid support. The PES is notionally unconditional,⁶⁹ but in education, for example, national policy on educator-to-learner ratios and centrally determined salaries determine the amount spent by provinces on education. The funds for safety departments come after these constrained priorities are funded, while conditional grants are specific and must be spent as per their conditions. Provincial own revenue on average forms only 3 per cent of provincial revenue but is double that in Gauteng and Western Cape.

Provinces thus have comparatively limited resources to spend on policing engagement. Northern Cape, Gauteng and Western Cape spend proportionally more of their total budgets on their safety departments, suggesting that in those provinces it is prioritised relative to other key needs. The relative spending must also be seen in the light of the capacity and development of the provinces, which varies considerably (see Table 1 above).

⁶⁸ Steytler N and Powell D) 'The impact of the global financial crisis on decentralized government in South Africa' (2010) 4(358) *L'Europe en Formation* 149.

⁶⁹ Western Cape Treasury (2005) *Medium Term Budget Statement 2005-2008* available at https://www.westerncape.gov.za/text/2006/1/mtbps_chapter5_127_155_optimised.pdf accessed 5 November 2018.

5.3.3 Provincial development and capacity

An indicator of capacity is the extent to which the provinces are able to record clean audits. The Auditor-General consistently reports that the Western Cape and Gauteng have the best overall audit outcomes for the country.⁷⁰ In turn, an indicator of development is the United Nations' Human Development Index (HDI), which combines measurable indicators on health, education and the economy.⁷¹ All the provinces have an HDI score above the threshold level of 0.6 associated with the emergence of subnational police, but only the Western Cape and Gauteng are approaching the HDI associated with improved trust (0.8) in subnational policing (see Chapter 2.)

The three largest (that is, most populous) provinces – Gauteng, KwaZulu-Natal and Western Cape – are also the ones with most political contestation, and have made a variety of attempts to engage with policing. Northern Cape, which has the third-best audit outcomes, has also been robust, if less various, in its policing engagement. Some of the major provincial engagements are explored below.

5.4 Directing policing in Gauteng

5.4.1 Introduction

Centrally located and the country's economic heartland, Gauteng is home to a quarter of all people in South Africa,⁷² with a population that has more than doubled since 1995 to over 14 million.⁷³ Three of South Africa's eight metropolitan municipalities lie within its borders, as well as an additional six local municipalities. The province has the second highest HDI of 0.735 in 2017.⁷⁴ Although Gauteng has been under the ruling party since 1994, in the 2019 provincial election the ANC received just 50 per cent of the vote, down from 68 per cent in 1999.⁷⁵ Two of the metropolitan municipalities have been under opposition control since 2016.

The province has a disproportionate share of reported aggravated robbery,⁷⁶ and its 'GP' acronym results in it often being referred to as the 'Gangsta's Paradise'.⁷⁷ Gauteng has sought more control over policing of all kinds, despite the fact that its safety department's budget comprises only a little more than half a per cent of the total provincial budget (see Table 1).

⁷⁰ Auditor-General of South Africa *Provincial Overviews* 2016/17 available at <https://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/16%20provincial%20overviews.pdf> accessed 9 November 2019.

⁷¹ The HDI is the geometric mean of normalised indices for each of the three dimensions. The health dimension is assessed by life expectancy at birth, while the education dimension is measured by mean of years of schooling for adults aged 25 years and more and expected years of schooling for children of school-entering age. The standard of living dimension is measured by gross national income per capita. The HDI uses the logarithm of income to reflect the diminishing importance of income with increasing GNI. The scores for the three HDI dimension indices are aggregated into a composite index using a geometric mean.

⁷² Statistics South Africa Population Estimates, 2017.

⁷³ Statistics South Africa Population Estimates, 2018, Tables 7, 8 and 9. The province experiences net internal in-migration of around 1 million from all provinces, plus about 300000 from outside South Africa, every five years.

⁷⁴ See Table 1.

⁷⁵ Independent Electoral Commission 'National and Provincial Election Results' 1994-2019 (2019) available at <https://www.elections.org.za/IECOnline/Reports/National-and-Provincial-reports> accessed 13 August 2019.

⁷⁶ SAPS Provincial Statistics 2005-2015; SAPS Provincial Statistics 2008-2018; SAPS Crime Data 1997-2000.

⁷⁷ The song 'Gangsta's Paradise', by the American rapper, Coolio, was released in 1995, around the same time that Gauteng introduced its 'GP' motor vehicle number plates; 74 per cent of hijackings occurred in Gauteng in 1994.

5.4.2 Municipal policing

Gauteng was initially aggressive in its promotion of municipal policing (see Chapter 7), commencing with a Green Paper on Metropolitan and Municipal Policing in March 1996. Among the proposals were those for a provincial inspectorate⁷⁸ and an incremental process of provincial accreditation to certify a municipal police service.⁷⁹ The Green Paper was followed by a Gauteng Standing Committee on Safety and Security Report on the capabilities of various local governments at the time.⁸⁰ Ultimately Gauteng's ambitions were dashed, although Gauteng did retain the obligation through the legislative framework to monitor the three metropolitan police agencies established under its jurisdiction, which it struggled adequately to do in the period to 2006.⁸¹

5.4.3 The Gauteng Aggravated Robbery Strategy

The looming 2010 World Cup Soccer event, high levels of crime, and the failure of the SAPS led to a policing intervention directed by the Gauteng Provincial Department of Community Safety (GPDCS). This involved direct control over the SAPS through stretching the provincial mandate; control through political influence; supporting the national police through the provision of resources; and supporting other forms of law enforcement by taking on policing roles.

Prior to the World Cup, concern had been voiced about the extremely high level of crime,⁸² particularly 'trio crimes' – motor vehicle hijacking, house and business robberies – which are all sub-categories of robbery⁸³ in aggravating circumstances⁸⁴ (colloquially termed aggravated robbery). In 2006/7, Gauteng recorded 44 per cent of all trio crimes.⁸⁵ Three of the 19 World Cup venues – Johannesburg, Soccer City and Tshwane – were located in Gauteng.

Pursuant to its mandate to determine 'provincial policing needs and priorities' and 'monitor police performance', the GPDCS developed the 'Gauteng Information on Police Performance System' (GIPPS),⁸⁶ which enabled it to monitor crime information more regularly than the official crime data by the SAPS permitted. The GPDCS identified a steep increase in aggravated robbery in the first half of 2006.⁸⁷ Gauteng's then MEC for Community Safety, Firoz Cachalia, requested that the provincial SAPS develop a stabilising strategy.⁸⁸ The SAPS in Gauteng devised and implemented 'Operation Iron Fist' in the second half of 2006.⁸⁹ The MEC reported that it would involve:

- more police on roads and streets in the province;

⁷⁸ Ministry of Safety and Security, Gauteng Province (1996) 9.

⁷⁹ Ministry of Safety and Security, Gauteng Province (1996) 11.

⁸⁰ Standing Committee on Safety and Security, Gauteng Legislature 'The Case for City Police Services in Gauteng' in Shaw M (ed) (1997) *Towards Safer Cities: The South African Debate on Options for Urban Safety* Monograph 11, Institute for Security Studies (1997) 12.

⁸¹ Newham G *Towards a New Approach: Monitoring Metropolitan Police Departments by the Gauteng Department for Community Safety* Research Report (2006) Centre for the Study of Violence and Reconciliation.

⁸² See, for example, Flak A (2009) 'Crime is central problem for 2010 World Cup' *Independent Online* available at <https://www.iol.co.za/sport/world-cup/crime-is-central-problem-for-2010-world-cup-602667> accessed 30 October 2018.

⁸³ Robbery is the unlawful intentional and violent removal and appropriation of moveable corporeal property belonging to another. See Snyman CR *Criminal Law* 491.

⁸⁴ 'Aggravating circumstances' is defined in section 1 of Criminal Procedure Act, and requires the wielding of a firearm or other dangerous weapon; the infliction of grievous bodily harm or a threat to inflict grievous bodily harm by the offender or accomplice, before during or after the robbery.

⁸⁵ SAPS Crime Statistics available on saps.gov.za.

⁸⁶ Newham G 'Cops and Robbers: a new approach: The Gauteng Aggravated Robbery Strategy' *SA Crime Quarterly* (2009) 29 Institute for Security Studies 3.

⁸⁷ Newham (2009) 4.

⁸⁸ Newham (2009) 4.

⁸⁹ Newham (2009) 4.

- more roadblocks;
- increased efforts to track ‘the most wanted’ criminals;
- focus of deployment on serious crimes;
- focus on removing and destroying illegal firearms;
- improvements to the service delivery from 10111 call centres;
- improvements to safety on trains; and
- increasing community mobilisation against crime.⁹⁰

MEC Cachalia reported that although there was a decrease in crime rates,⁹¹ levels of violent crime remained high, including those for house robberies and business robberies.⁹² The SAPS at national level also launched a national ‘Operation Trio’, but in 2008 it conceded that these crimes remained a significant challenge.⁹³ The policing operations in both 2006 and 2007 relied heavily on deploying additional SAPS personnel in ‘hot-spots’ for high-visibility activities such as road-blocks, stop-and-searches and patrols.⁹⁴ The data suggested that they had only a limited and temporary effect.⁹⁵

Gareth Newham records that GPDCS-mandated research identified possible strategies with lasting impact.⁹⁶ What was found to be key is subjecting police managers to higher levels of accountability for identifying and arresting perpetrators and ensuring that incontrovertible court evidence leads to conviction and sentence.⁹⁷ This incapacitates prolific perpetrators while increasing the perceived risk for others.⁹⁸ The GPDCS worked with the SAPS to develop a strategy for taking this forward, with the largest challenge being to coordinate intelligence and investigations across the province.⁹⁹ The strategy involved more agencies than the SAPS, and included:

- a SAPS Crime Management Centre carrying out daily tracking of robbery incidents, linking cases to suspects operating across precinct boundaries, and coordinating intelligence, forensic and technical support to identify gangs and their larger networks;¹⁰⁰
- interrogation of arrested suspects by crime intelligence to locate crime networks;¹⁰¹
- specialised trio crime investigating units in all 22 SAPS clusters, which were responsible for identifying and tracing trio crime suspects;¹⁰²
- prioritisation of trio crime scenes by SAPS forensic services;¹⁰³

⁹⁰ Cachalia F ‘Operation Iron Fist after six months: Provincial police strategy under review’ (2007) *SA Crime Quarterly* 19 Institute for Security Studies 21.

⁹¹ Cachalia (2007) 26.

⁹² Cachalia (2007) 26.

⁹³ Newham (2009) 4.

⁹⁴ Newham (2009) 4.

⁹⁵ Newham (2009) 4.

⁹⁶ Newham (2009) 6.

⁹⁷ Newham (2009) 6.

⁹⁸ Newham (2009) 6.

⁹⁹ Newham (2009) 6.

¹⁰⁰ Newham G ‘The not-so-secret solution to fighting SA’s most feared crime’ Institute for Security Studies 6 October 2015 available at <http://www.polity.org.za/article/the-not-so-secret-solution-to-fighting-sas-most-feared-crime-2015-10-06> accessed 13 August 2018.

¹⁰¹ Newham (2009) 6.

¹⁰² Newham (2009) 6.

- requiring improved response times to 10111 calls;¹⁰⁴
- intelligence-led (rather than random) roadblocks and saturated policing in partnership with provincial traffic officers and metropolitan police;¹⁰⁵ and
- tasking experienced prosecutors with ensuring that trio cases were ready to be prosecuted before enrolment to minimise postponements and withdrawals.¹⁰⁶

Although some of these elements were remarkably similar to those in Operation Iron Fist, here the provincial government played a central role and was also involved in resourcing the SAPS, harnessing the involvement of other law enforcement agencies, ensuring inter-agency cooperation, and providing additional quasi-policing patrolling resources.¹⁰⁷ The province:

- bought and allocated 42 high-speed vehicles to the SAPS provincial rapid response unit tasked with responding to robbery incidents;
- established an anti-truck hijacking unit within the Gauteng Traffic Police to respond to truck hijackings on provincial roads;
- coordinated joint roadblocks between Gauteng Traffic Law Enforcement and the SAPS;
- ‘built’ a community patroller programme with screened, trained and equipped community volunteers deployed in 71 policing precincts;
- provided counselling and support services to victims of trio crimes through provincial services;
- tracked implementation of the strategy through a monthly joint steering committee meeting co-chaired by the SAPS Provincial Commissioner and the head of the Department of Community Safety; and
- monitored each of the 22 monthly cluster meetings held by the SAPS Cluster Commanders.¹⁰⁸

The provinces have no constitutional role in the procurement of vehicles for the SAPS, yet Gauteng purchased these for the SAPS. Responding to truck-hijackings in progress might fall within the crime prevention mandate of the metropolitan police, but not within that of provincial traffic police – nevertheless, such a unit was established within the provincial traffic enforcement. Trained and equipped (volunteer) community patrollers were an example of quasi-policing. Moreover, coordinating joint road-blocks, tracking strategy implementation and monitoring cluster meetings are all activities that come very close to actual direction and control.

¹⁰³ Newham (2009) 6.

¹⁰⁴ Newham (2009) 7.

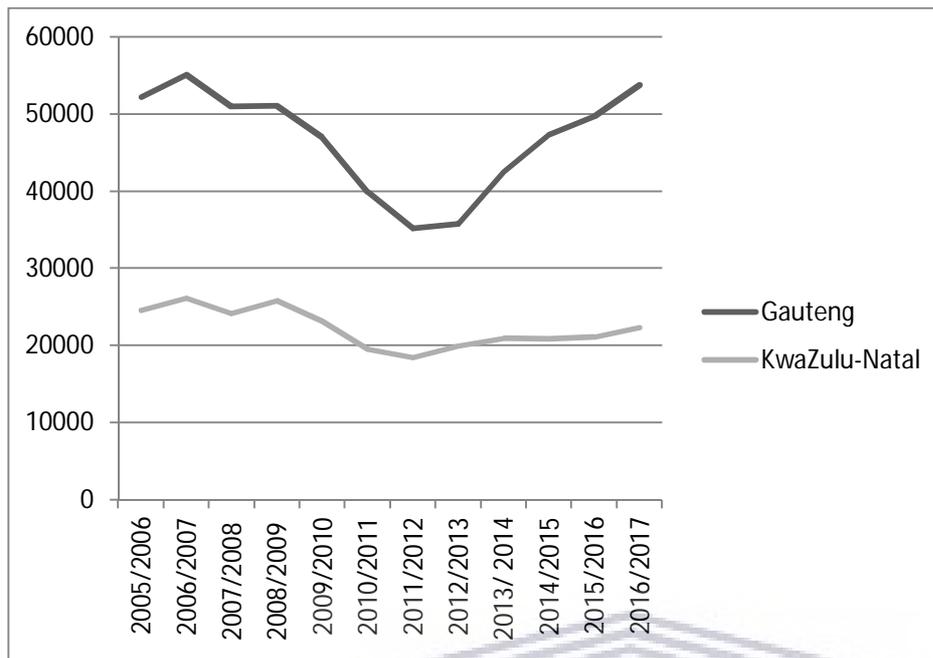
¹⁰⁵ Newham (2015).

¹⁰⁶ Newham (2009) 7.

¹⁰⁷ Newham (2009) 7-8.

¹⁰⁸ Newham (2009) 7-8.

Figure 11: Aggravated robbery in Gauteng and KwaZulu-Natal (2005/6-2016/17)



Source: SAPS Crime Statistics

Within nine months, arrest rates for robbery doubled, cases withdrawn from court due to insufficient evidence dropped by a fifth, and conviction rates increased by 14 per cent.¹⁰⁹ Aggravated robbery dropped by 36 per cent by 2011/2012 compared to 2006/2007 (Figure 11).¹¹⁰ Gauteng's share of the national total of aggravated robbery reduced to 35 per cent, and the national total itself dropped by 20 per cent. The strategy seemed to impact on KwaZulu-Natal, with trends in that province mirroring those in Gauteng (see Figure 11).¹¹¹ Finally, because aggravated robbery strongly predicts murder (see Figure 12)¹¹², there was an associated 22 per cent drop in murder compared 2006/2007 to 2011/2012 – or, put differently, the equivalent of 2,400 fewer murders over four years.

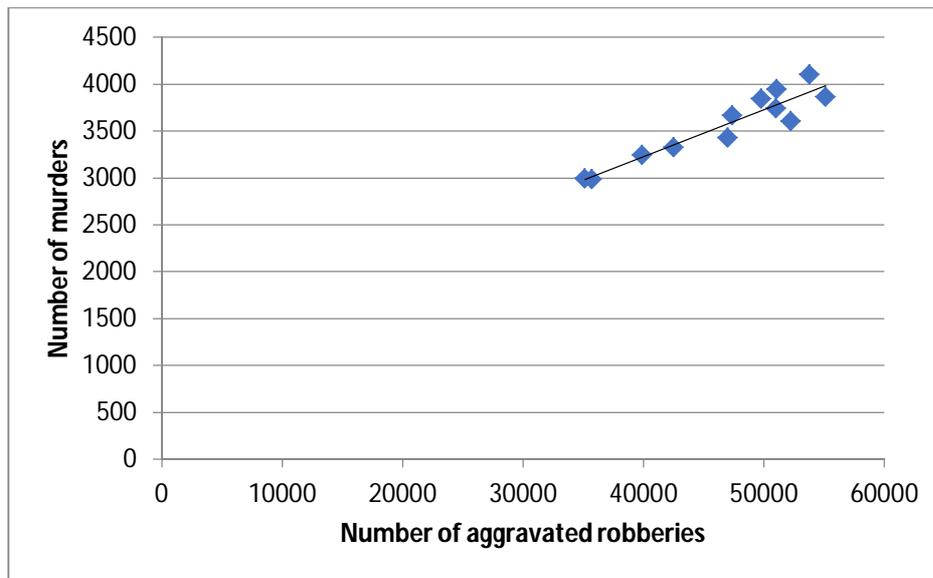
¹⁰⁹ Newham (2015).

¹¹⁰ Contemporaneity does not imply causation, however. The possibility remains that the reductions were a result of the diversion of criminal attention to state capture at the national level which occurred in this period. Be that as it may, the fact that the trend was strongest in Gauteng suggests the provincial strategy did play a role in the observed reductions in aggravated robbery.

¹¹¹ The smaller increase in population in KwaZulu-Natal accounts for some of the divergence in later years.

¹¹² $R^2=0.8891$.

Figure 12: Relationship between aggravated robbery and murder in Gauteng (2005-2016)



Source: SAPS Crime Statistics

The provincial strategy remained in place until Provincial Commissioner Petros was removed in 2012.¹¹³ Even if she so desired, the then Gauteng provincial MEC, Nonhlanhla Mazibuko, had no constitutional power to veto the removal. Comments from the GPDCS suggest that the province felt the decision was entirely in the hands of the National Commissioner.¹¹⁴

This intervention demonstrated a province's intergovernmental cooperation, political direction and direct involvement in regard to policing. It was an intervention that appeared to have a real and measurable impact on crime, particularly in that trends abruptly worsened after its cessation. The strategy depended on the SAPS being willing to subject itself to provincial political direction. This willingness depended in turn partly on political homogeneity between the province and national government.

5.4.4 Further resourcing of SAPS

After the 2014 national and provincial election, a new ANC premier, amidst a situation of rising crime, adopted a cautiously interventionist approach: Premier Makhura said the people of Gauteng needed to 'wage war on crime', and in October 2017, it was reported, inter alia, that the province would buy 875 high-performance vehicles and 75 motorcycles for the SAPS.¹¹⁵ The premier said the purchase was part of the province's attempt to increase police resources. It is unclear from which budget the purchases were made or, again, under what mandate a province might purchase vehicles for the SAPS.¹¹⁶

¹¹³ Newham (2015). In March 2012, the compromised Richard Mdluli was implicated in corruption within the SAPS (see Wiener M *Ministry of Crime* (2018)). In August 2019 he was convicted of kidnapping and assault. Gauteng SAPS Provincial Commissioner Mzwandile Petros, under whose leadership the provincial strategy had succeeded, did not have his contract renewed by the SAPS. See Grootes S (2013) 'Why is Mzwandile Petros leaving? A conspiracy view' *Daily Maverick* 15 August 2013.

¹¹⁴ Radebe H 'South African Police Service denies Petros has resigned' *Business Live* 2 August 2013.

¹¹⁵ Nkosi N 'High-performance police vehicles to combat crime' *New Age* 23 October 2017.

¹¹⁶ The author's email enquiry in this regard went unanswered.

5.4.5 Traffic police against crime

Gauteng Traffic Police's 'Saturation Unit' was deployed in 2013, combining specialised provincial traffic units that had been deployed previously to assist the SAPS to combat crime, among them the Anti-truck Hijacking Unit, Special Law Enforcement Unit and Taxi Conflict Unit.¹¹⁷ The unit 'targets criminal elements that utilise our roads to access certain areas in order to commit crime and as escape routes after the commission of such acts'.¹¹⁸ The relatively small area of Gauteng means such a unit may cover the province without the need to employ large numbers of officials; some 5,000 km of Gauteng's roads are provincial.¹¹⁹

The unit has been involved in apprehension of suspects of serious violent crime.¹²⁰ In 2014/15, the provincial department reported that it made 33 arrests for possession of illegal firearms, 21 for car hijacking, 619 for truck hijacking, 25 for cash-in-transit heists, eight for bank robberies, and 20 for business robbery; in addition, 102 stolen and 143 hijacked vehicles were recovered.¹²¹ Given that a total of 804 truck hijackings were reported by the SAPS in 2015/16 for Gauteng,¹²² the unit's arrests are equivalent to 77 per cent of truck hijackings. Similarly, its arrests equalled 64 per cent of cash-in-transit heists; there were only nine bank robberies that year.

5.4.6 Conclusion

In Gauteng, it has been possible for the province to be directly involved in direction of the SAPS and in policing itself. This is so because of the political homogeneity between the province and national government, as well as the political will created, inter alia, by the 2010 Soccer World Cup. The Gauteng Aggravated Robbery Strategy is remarkable not only for its success but for the fact that its success drew on a plan not markedly different from what had first been adopted by the SAPS – except insofar as there was coordination by the province and daily (rather than annual) SAPS accountability to the province in regard to the crimes of interest. The indications, hence, are that it was the latter that made the difference. Ultimately, however, the strategy was contingent on the political will created by external circumstances (the World Cup) as well as the attitude of the respective MEC and Provincial Commissioner, as influenced by the politics of the day. Once these conditions changed, the strategy could no longer persist.

A mere three years later, strong and direct policing – in the form of the Gauteng Traffic Police's Saturation Unit and targeted at very similar crimes – had emerged instead from the province, an initiative with which the SAPS appears to be prepared to cooperate due to the persisting political homogeneity and the continued demands of crime in the province.

¹¹⁷ Mazibuko FN *Budget Speech by the Gauteng MEC for Community Safety, 2013/14* (2013) available at <https://www.gov.za/budget-speech-gauteng-mec-community-safety-faith-nonhlanhla-mazibuko-budget-vote-1-201314> accessed 7 August 2019.

¹¹⁸ Mazibuko (2013).

¹¹⁹ Myburgh P *SABITA Roads Review (2018)* 18 available at <http://www.sabita.co.za/wp-content/uploads/2018/09/ROADS-REVIEW-18.pdf> accessed 12 August 2019.

¹²⁰ Staff Writer 'Three suspects wounded in Edenvale shootout' *IOL* 7 July 2017 available at <https://www.iol.co.za/news/three-suspects-wounded-in-edenvale-shootout-10182644> accessed 13 August 2019.

¹²¹ Gauteng Department of Community Safety *Annual Report 2015-2016* (2016) 60 available at https://provincialgovernment.co.za/department_annual/283/2015-gauteng-community-safety-annual-report.pdf accessed 13 August 2019.

¹²² SAPS Crime Statistics 2008-9 to 2017-18 available on https://www.saps.gov.za/services/final2017_18_financial_year_stats_redrawn_unfounded_deducted_release_rsa.xlsx accessed 7 August 2019.

5.5 Reforming policing in KwaZulu-Natal

5.5.1 Introduction

The first provincial government under the Inkatha Freedom Party (IFP) exhibited little intervention in policing, given its apartheid history (see Chapter 3). Subsequently, when the province came under ANC control, reform of the SAPS emerged as a provincial priority, despite the fact that centralised national control of the SAPS was ostensibly designed to address the political partisanship of former KZP officials. Violence remained high in the province, with the SAPS blamed for negligence or complicity in many an incident, including the Shobashobane massacre (1995);¹²³ similarly, the Richmond killings of 1997-1998 led the SAPS to close the Richmond police station.¹²⁴ Provincial government then began to step in, commencing with commissions of inquiry.

KwaZulu-Natal is on the east coast of South Africa and borders Lesotho, Swaziland and Mozambique. Originally the province with the largest population, it was overtaken by Gauteng in 2009.¹²⁵ Some 20 per cent of the population (just more than 11 million people) live in the province,¹²⁶ which had an HDI of 0.668 in 2017, the second lowest in the country.¹²⁷ It has one metropolitan municipality and 43 local ones.

Politically, the province was initially under IFP control but became ANC/IFP-controlled in 1999 through coalition government, which was followed by ANC-minority government in 2004. This changed with the ascendancy of Jacob Zuma, a Zulu, to the presidency in 2009, with the ANC achieving 63 per cent support in the provincial legislature and increasing this to 64 per cent in 2014.¹²⁸ Zuma's departure from the national presidency saw a reduction in ANC support in the provincial legislature to 54 per cent in 2019.¹²⁹ The province is notorious for political violence, as discussed in chapters 3 and 4. This is often associated with the mini-bus taxi industry and its turf wars.

5.5.2 Provincial commissions of inquiry

After a coalition ANC/IFP government took control in 1999, a provincial Commission of Inquiry into Taxi Violence was proclaimed, the terms of which required it to report, *inter alia*, 'on whether there is any improper conduct by any member of the South African Police Service which indirectly or directly fanned or perpetuated taxi violence'.¹³⁰ The proclamation did not reference section 206(5)(1) of the Constitution but referred to the KwaZulu-Natal Commissions Act of 1999. Allegations were heard of SAPS involvement in activities in the taxi industry, from owning mini-bus taxis to being employed as

¹²³ See Taylor R 'Justice Denied: Political Violence in KwaZulu-Natal after 1994' *Violence and Transition Series 6* (2002) Centre for the Study of Violence and Reconciliation.

¹²⁴ Staff Reporter 'Richmond police station to be shut down' *Mail & Guardian* 13 August 1998 available at <https://mg.co.za/article/1998-08-13-richmond-police-station-to-be-shut-down> accessed 13 August 2019.

¹²⁵ Statistics South Africa *Population estimates* (2009).

¹²⁶ Statistics South Africa *Population estimates* (2017).

¹²⁷ See Table 1.

¹²⁸ IEC 'Election Results Dashboard Provincial Legislatures' (2019) available at <https://www.elections.org.za/NPEDashboard/app/dashboard.html#> accessed 10 November 2019.

¹²⁹ IEC (2019).

¹³⁰ Proc 15 KwaZulu-Natal Provincial Gazette 5477 Notice 148 of 19 May 2000.

hit men.¹³¹ The oblique focus on the police meant the Commission's recommendations focused on matters outside the SAPS.¹³²

Provincial political control shifted to the ANC in a minority government in 2004. The new ANC premier established a Commission of Inquiry into Policing in 2005,¹³³ at the instigation of the then provincial MEC, Bheki Cele, after a government *imbizo* (meeting) in October 2004 in Nongoma in northern KwaZulu-Natal was disrupted by IFP supporters brandishing traditional weapons; SAPS members allegedly stood by and failed to stop the fracas.¹³⁴ When the Commission was promulgated in March 2005, its brief extended to investigating police conduct at more than 10 police stations in the province.¹³⁵ Rather than challenging the legalities, the SAPS simply refused to cooperate: although the Commission started sitting in April 2005, almost no-one attended and it was hamstrung by non-

¹³¹ Goodenough C 'The Taxi Commission of Inquiry: Cleaning up the taxi industry in KwaZulu-Natal' *Perspectives on KwaZulu-Natal* (2001) 1 available at <http://www.cherylgoodenough.com/docs/taxicommissionofinquirycleaningup.pdf> accessed 13 August 2019.

¹³² SAPA 'KZN declares war on taxi violence' *News24* 25 February 2001 available at <https://www.news24.com/xArchive/Archive/KZN-declares-war-on-taxi-violence-20010225> accessed 26 September 2019.

¹³³ 'Commission of Enquiry into Alleged Police Inefficiency and Ineffectiveness in KwaZulu-Natal in terms of sections 127(2)(e) and 206(5)(a) of the Constitution of the Republic of South Africa read with s2(1) of the KwaZulu-Natal Commissions Act, 1999, Proclamation No 1 2005, 4 March 2005'.

¹³⁴ Kockott F 'KZN's costly, futile exercise' *Independent Online* 27 September 2009 available at <https://www.iol.co.za/news/politics/kzns-costly-futile-exercise-459754> accessed 13 August 2019.

¹³⁵ The terms of reference: "(i) generally, to investigate police conduct, efficiency, effectiveness and service delivery in KwaZulu-Natal with reference to —

- (aa) the number, substance and degree of allegations, complaints and reported incidents of alleged police inefficiency and ineffectiveness in the Province received by the KwaZulu-Natal Provincial Government over the past two years;
- (bb) the perceptions of the public and members of communities served about policing and the police service in the Province (it is alleged that certain communities and even members of the police service have engaged in protest action against their stations and station commanders);
- (cc) the competence, ability, will and attitude of members of the police service at all levels to deal with policing functions (it is alleged that the police service is, in certain instances, failing to protect communities and leaders of government); and
- (dd) the extent of transformation of the police service in the Province, including allegations of racism and/ or sexism;

(ii) specifically, to investigate the state of policing and service delivery in the following stations —

- (aa) Esikhaweni; (bb) KwaDabeke; (cc) Ladysmith; (dd) Loop Street, Pietermaritzburg; (ee) Mpumalanga; (ff) Nongoma; (gg) Phoenix; (hh) Stanger; (ii) Ulundi; (jj) Umbumbulu; (kk) Umlazi; and (ll) any other station the Commission may deem necessary; and

(iii) specifically, to investigate the particular reported incident of alleged police inefficiency and ineffectiveness at a certain event arranged by the Provincial Government and held at KwaNongoma on 23 October 2004, where the safety and security of the community and government leaders were allegedly compromised, with reference to —

- (aa) the adequacy of policing and the protection of the public at the event;
- (bb) the appropriateness and quality of police operational plans for public safety and crowd control at the event;
- (cc) the alleged non-attendance of the senior police officers at this event, despite the written commitment allegedly given;
- (dd) the police service response to various threats and possibilities for disruption of the event, raised in the Ulundi Area Joint Operational Plan, dated 23 October 2004;
- (ee) whether detective and intelligence capabilities before, during and after the event were adequate;
- (ff) whether access control at the entrance to the venue to prevent the participants from entering with firearms or other weapons before, during or after the event, did exist; and
- (gg) whether any persons, particularly those allegedly carrying or brandishing firearms or other weapons, were arrested and/or prosecuted ..."

cooperation from police.¹³⁶ The Commission's report was delayed and eventually released in February 2013, when it detailed the extreme measures the SAPS took to resist the Commission.¹³⁷

The report confirms that the Commission's chairperson, Advocate Sthembiso 'Stix' Mdladla, was summoned to Pretoria by the then National Commissioner, Jackie Selebi, who viewed the Commission as a personal attack, as policing was a national rather than provincial competence.¹³⁸ Selebi said he intended to hold discussions with the Premier and MEC.¹³⁹ It is possible that the report was suppressed by Cele himself, first as MEC and later as national Police Commissioner from 2009-2012, given that it emerged only after he was dismissed by President Zuma (as Police Commissioner) in June 2012. The report detailed criminal and unprofessional conduct by SAPS members in the province.¹⁴⁰

The fate of the Commission demonstrates the power of the SAPS to foil provincial oversight interventions; it shows, too, that party-political homogeneity is not the determinant of the response to interventions. A factor complicating this analysis would be the factionalism within the ANC during this time and MEC Cele's apparently shifting position within that factionalism.

5.5.3 Political influence

After the failed Mdlala Commission, the opposition IFP accused MEC Cele of treating the SAPS as his 'personal fiefdom',¹⁴¹ alleging that at his instruction IFP supporters were summarily tear-gassed and shot at with rubber bullets without provocation in an incident in Nongoma in 2009.¹⁴² Certainly, the language used by the MEC at the time bespeaks control over the SAPS. His Budget Speech Review of 2004/5 listed an increase in SAPS personnel strength as one of the achievements of the department,¹⁴³ as did the review of 2005/6, which cited the establishment of the SAPS Protection and Security Division as a provincial department achievement, along with the closure of the commando units¹⁴⁴ and progress in the transformation of the SAPS.¹⁴⁵ None of these is delivered by provincial government; however, with the ANC as ruling party, delivery by the SAPS was conflated with delivery by the ANC provincial MEC as delivery by the ANC as a party. In mid-2009, Cele was appointed by the then new President Zuma as the SAPS National Commissioner.

5.5.4 Provincial 'force multipliers'

The next provincial MEC, Willis Mchunu, consolidated an intervention begun under Cele. The Volunteer Social Crime Prevention Project (VSCPP) mirrors the Gauteng pre-World Cup intervention of volunteer patrols, but in KwaZulu-Natal was accompanied by the province's investing in

¹³⁶ Kockott (2009).

¹³⁷ Mchunu S 'KZN Commission of Inquiry into alleged policy inefficiency and ineffectiveness exposes SAPS as clueless' KZN Democratic Alliance press release 4 February 2013 available at <http://www.dakzn.org.za/kzn-commission-of-enquiry-into-alleged-police-inefficiency-and-ineffectiveness-exposes-saps-as-clueless/> accessed 15 August 2019.

¹³⁸ Mchunu (2013).

¹³⁹ Mchunu (2013).

¹⁴⁰ Mchunu (2013).

¹⁴¹ Buthelezi PM 'Statement by Prince Mangosuthu Buthelezi, President of the Inkatha Freedom Party' 2 February 2009 available at <http://politicsweb.co.za/politics/bheki-cele-to-blame-for-nongoma-violence--buthelezi> accessed 15 August 2019.

¹⁴² Buthelezi (2009).

¹⁴³ KZN Department of Community Safety and Liaison 'Review of Commitments in Budget Speech 2004-2005, 2005-6 and 2006-7' (2007) 4 available at <http://www.kzncomsafety.gov.za/Portals/0/budget%20review.pdf> accessed 15 August 2019.

¹⁴⁴ KZN Department of Community Safety and Liaison (2007) 6.

¹⁴⁵ KZN Department of Community Safety and Liaison (2007) 12.

technology to allow volunteers to transfer 'data'.¹⁴⁶ This is close to the function of gathering crime intelligence, which is a SAPS function.

The VSCPP, launched in 2008, sees volunteers patrolling neighbourhoods to discourage anti-social behaviour and empower victims of crime with advice and guidance; it also holds awareness sessions and workshops at schools, provides marshalling at anti-crime events of the department, distributes departmental educational material, participates in festive season campaigns, and conducts door-to-door campaigns on crime-related issues.

In view of the link to the call centre and the data-transfer introduced in 2009, MEC Mchunu said the technology enabled a 'central command to manage volunteers in the field' and permitted 'detailed reporting at an incident level with the ability to track statistics and evaluate crime trends'.¹⁴⁷ This makes the intervention less about patrolling for prevention and more about gathering crime intelligence, thus representing a significant departure from the mandate of the province.

At the time of the launch, the device covered 1,100 volunteers in Durban and the Jozini area up to the border with Mozambique.¹⁴⁸ By 2018, the project had approximately 1,500 volunteers.

5.5.5 Resourcing of SAPS

Despite the meagre resources of the Department of Community Safety and Liaison, which is among the lowest of the provinces, the province has paid funds over to the SAPS to secure additional policing during the domestic tourism season. The 2016 Budget Vote records that the department paid funds to the national SAPS to secure additional visible policing.¹⁴⁹ The figures listed in the relevant table¹⁵⁰ suggest that the provincial department paid over an amount of at least R9 million to the SAPS for 'additional visible policing' over the festive season.¹⁵¹ The SAPS as a national police service is obliged to provide appropriate policing responsive to changing crime trends. KwaZulu-Natal as a domestic holiday destination requires additional festive season policing, and it is unclear under what mandate the department 'purchases' visible policing services from the SAPS.

5.5.6 Provincial Commission of Inquiry into political killings

KwaZulu-Natal's political violence has continued but in different guise. After a spate of killings of politicians, in 2016 a Provincial Commission of Inquiry into the causes of the murder of politicians in KwaZulu-Natal was gazetted by Premier Mchunu with the support of all parties, to be chaired by

¹⁴⁶ Mchunu TW 'Speech notes by the KwaZulu-Natal MEC for Transport, Community Safety and Liaison, Mr TW Mchunu on occasion of launching call centre to aid social crime volunteers to transfer data' 2 December 2009 KZN Department of Community Safety and Liaison available at <https://www.gov.za/speech-notes-kwazulu-natal-mec-transport-community-safety-and-liaison-mr-tw-mchunu-occasion> accessed 30 October 2018.

¹⁴⁷ Mchunu (2009).

¹⁴⁸ Mchunu (2009).

¹⁴⁹ 'The substantial increase in 2013/14 against the Community Police Relations (a sub-programme of Civilian Oversight) was largely due to the increased demand for crime awareness campaigns, and a once-off payment to SAPS for increased visible policing over the festive season (which account for the drop in 2014/15)'. See KwaZulu-Natal Treasury *Estimates of Provincial Revenue and Expenditure Vote 9 Community Safety 2016/17* (2016) 457 available at <http://www.treasury.gov.za/documents/provincial%20budget/2016/4.%20Estimates%20of%20Prov%20Rev%20and%20Exp/KZN/2.%20Estimates%20of%20Prov%20Rev%20and%20Exp/KZN%20-%20Vote%2009%20-%20Community%20Safety.pdf> accessed 5 November 2018.

¹⁵⁰ KwaZulu-Natal Treasury (2016) 455.

¹⁵¹ KwaZulu-Natal Treasury (2016) 455. The budget vote goes on to say: 'The significant increase in goods and services in 2013/14 is largely due to increased demand for crime awareness campaigns, and additional funding allocated for payment to SAPS for increased visible policing over the festive season'. See KwaZulu-Natal Treasury (2016) 457.

Advocate Marumo Moerane SC.¹⁵² The majority were apparently killings by ANC-aligned elements of ANC politicians,¹⁵³ that is, instances of factional hostility.

The proclamation did not reference section 206(5)(1) of the Constitution, yet policing by the SAPS and its effectiveness was a key focus of the Commission. The terms of reference involved identifying all murders of politicians since 2011; investigating their causes; investigating the outcomes of police investigations and prosecutions; and investigating community perceptions, inter alia, on the effectiveness of policing of murders of politicians. The Commission was required to make recommendations on the 'the roles and responsibilities of all spheres of government (national, provincial and local) in the planning and coordination of their responses in respect of such incidents'.

Unlike with the Mdladla Commission, SAPS leadership attended the hearings albeit with varying degrees of assiduity, possibly because the Western Cape's Khayelitsha Commission had by then established the right of provinces to issue subpoenas to SAPS members (see section 5.6 below); furthermore, political will at national level was evident.

On 21 February 2018, the Commission presented six members of the SAPS provincial management with Exhibit DD – 31 pages of allegations against its members made by those who had testified since 16 August 2017.¹⁵⁴ Placed before the police were allegations of tampering with evidence, failure to call witnesses, suspects' inexplicable release, poor communication, intimidation, political interference, fabricated charges, torture, harassment, obfuscation, denials and lies.¹⁵⁵ Allegations were also made that 'police only act if the ANC tells them to'.¹⁵⁶

The final report, released only later in 2018, recorded in a section headed 'Findings' that '[e]vidence that senior political functionaries in the province employed private and out-of-province police to resolve criminal incidents, involving them personally, in the province does not give much confidence in the ability of the local security establishment'.¹⁵⁷ This suggests there has been direction of police members by the provincial political leadership outside of the powers of the MEC or the department.

In relation to the SAPS, the Commission called for the 'de-politicisation' of the criminal justice system, 'particularly [of] the police service',¹⁵⁸ as well as for improved recruitment into the police,¹⁵⁹ neither of which is for the province to do. Prior to the release of the findings, provincial Premier Mchunu sought to establish provincial interventions – which brought the Premier to the centre of policing in the province.

5.5.7 Community Complaints and Instability Response Unit

Former Safety and Security MEC and then Premier Mchunu announced in his February 2018 State of the Province address, mere days after Zuma was recalled as president, that a new provincial unit, the

¹⁵² KwaZulu-Natal GN 1 GG 1748 28 October 2016.

¹⁵³ Mchunu, W 'Media statement announcing the commission of inquiry into underlying causes of political related killings' KZN Office of the Premier 31 October 2016 available at <https://www.gov.za/speeches/commission-inquiry-political-related-killings-31-oct-2016-0000> accessed 1 July 2018.

¹⁵⁴ Burger V 'Moerane inquiry hears litany of claims of intimidation, torture, tampering with evidence by police – all denied' *Daily Maverick* 15 March 2018 available at <https://www.dailymaverick.co.za/article/2018-03-15-op-ed-moerane-inquiry-hears-litany-of-claims-of-intimidation-torture-tampering-with-evidence-by-police-all-denied/#.Wz40BNlzaUk> accessed 1 July 2018.

¹⁵⁵ Burger (2018).

¹⁵⁶ Burger (2018).

¹⁵⁷ Moerane Commission Report (2018) para 1180 available at <http://www.kznonline.gov.za/images/Downloads/Publications/MOERANE%20COMMISSION%20OF%20INQU%20IRY%20REPORT.pdf> accessed 30 November 2019.

¹⁵⁸ Moerane Commission (2018) para 1193.

¹⁵⁹ Moerane Commission (2018) para 1195.

‘Community Complaints and Instability Response Unit’, was to be established to address the intractable crime problems of the province. This unit, to be located in the Office of the Premier, would be tasked with the responsibility of receiving complaints related to political murders, taxi violence, murders in hostels, farm murders, faction fights in traditional communities, and public violence. According to the Premier, the unit ‘does not infringe on the roles and responsibilities, powers or functions, of any state entity’ but would provide for ‘improved coordination and collaboration’.¹⁶⁰

The intervention at first blush echoes the Gauteng Aggravated Robbery Strategy, in that it seeks to monitor directly certain kinds of investigations; however, the unit would report directly to the Premier, ‘receive and collect information relating to crime and conflict situations’; facilitate a process of ‘scanning, investigating and interrogating’ such information; recommend ‘appropriate intervention measures to attend to such crime and conflict situations, which may include referring any matter to other appropriate law enforcement agencies’; and ‘implement intervention measures as approved by the Premier, in consultation with relevant state security agencies’.¹⁶¹

This is, at the same time, broader and vaguer than the Gauteng intervention, while its location in the Office of the Premier suggests an attempt by the Premier to take political control of the police. The unit was to be resourced through existing funded vacancies in the Department of the Premier and through ‘the secondment of existing specialist resources from relevant state security and law enforcement agencies’.¹⁶² This latter secondment would amount to the provincial government’s exercising direct control over policing employees, a step much further than that taken by Gauteng. It is unclear whether these plans have remained in place following the Premier’s departure from office in May 2019 due to ill-health.

In addition to this intervention by the Premier, the provincial Safety MEC also sought to address the failure by the SAPS to control the proliferation of firearms.

5.5.8 Provincial firearms control

The high rate of violent crime strongly indicates that province has a problem with the proliferation of illegal firearms.¹⁶³ A key aspect of the problem is the loss of more than 500 SAPS firearms per year in KwaZulu-Natal.¹⁶⁴ MEC Kaunda in 2018 said the provincial department would embark on ‘an intensive programme aimed at confiscating more illegal firearms in the province’.¹⁶⁵ Yet the Firearms Control Act does not confer any such powers on the provinces, a fact recognised by Western Cape Premier Zille when she too was faced with firearm proliferation (see below).

The MEC’s firearm proposal includes, in partnership with the Department of Home Affairs, a provincial firearm register against the population register ‘to ascertain how many people are in possession of licensed firearms and who have lost them’. He said, furthermore, that the department,

¹⁶⁰ Mchunu S State of the Province Address (2018a) available at <http://www.kznonline.gov.za/images/Downloads/Publications/SOPA%202018.pdf> accessed 1 July 2018.

¹⁶¹ Mchunu Budget Vote Province of KwaZulu-Natal (2018b) 13 available at <http://www.kznonline.gov.za/images/Downloads/Publications/Budget%202018%20OTP.pdf> accessed 30 October 2018.

¹⁶² Mchunu (2018b) 14.

¹⁶³ News 24 Correspondent ‘KZN a haven for gun-toting assassins –IFP’ *News24* 20 April 2017 available at <https://www.news24.com/SouthAfrica/News/kzn-a-haven-for-gun-toting-assassins-ifp-20170420> accessed 5 November 2018.

¹⁶⁴ Venter J (2018) ‘Umkomaas SAPS ‘lost’ most guns in KZN’ *South Coast Herald* 12 February 2018 available at <https://southcoastherald.co.za/264978/umkomaas-saps-lost-guns-kzn/> accessed 5 November 2018.

¹⁶⁵ Kaunda M (2018) ‘Budget Speech 2018-2019 KwaZulu-Natal Department of Community Safety and Liaison’ 8 available at <http://www.kzntransport.gov.za/speeches/2018/ComSafety%20Budget%20Speech%202018.pdf> accessed 5 November 2018.

‘in partnership with other law enforcement agencies’, would trace firearms of the deceased, conduct workshops with license-holders on safeguarding their firearms, trace those in possession of hunting licenses and firearms in their possession, carry out regular inspections in security companies, and form partnerships with the media, including community radio stations, to encourage communities to report illegal firearms.¹⁶⁶ It is unclear whether departmental officials, rather than law enforcement agencies, would be directly responsible for these processes.

5.5.9 Conclusion

KwaZulu-Natal demonstrates that provinces can and do have policing issues that are highly specific to them and that are not adequately dealt with through central control of the policing service – indeed, which may arise from within that very service itself. The province demonstrates that central control has been insufficient to ensure effective transformation of the SAPS, resulting in attempts by the province to correct the situation. These attempts were initially treated with disdain by the SAPS, but shifts in political control of the province have seen greater cooperation from the SAPS in recent years. The establishment of the principle in law that the SAPS is answerable to subpoenas issued by provincial commissions of inquiry – this, through litigation by the Western Cape government (see below) – has also played a role in the SAPS’ response to such commissions.

5.6 Changing political dynamics in the Western Cape

5.6.1 Introduction

The nature of provincial policing engagement in the Western Cape has mirrored the changing provincial political landscape. As in KwaZulu-Natal, the initial non-ANC-government period reflected little provincial intervention. Later ANC governance resulted in political direction of policing, including conflation of delivery by national government and the direct resourcing of the national SAPS by the province. After the opposition Democratic Alliance (DA) won the province in 2009, this political direction falls away, and the constitutional oversight mandate is stretched, through a commission of inquiry, the passage of provincial legislation, and the creation of the office of a police ombudsman. Extension of mandates in other sectors have occurred, for example, resourcing by the provincial education department of the Cape Town metropolitan police for safety in schools.

In 1994, the Western Cape had the fifth-largest provincial population in South Africa, but now has the third largest, with 6.5 million inhabitants – a 75 per cent increase. Net in-migration of about 300,000 occurs every five years from all provinces, led by the Eastern Cape.¹⁶⁷ The province has the highest provincial HDI of 0.764.¹⁶⁸ The ANC was in government from 1999, but, as noted, in 2009 the opposition DA won the province and has governed since then.¹⁶⁹ The province suffers from gangsterism and organised crime, with firearm and knife violence leading to a high murder rate.¹⁷⁰

5.6.2 Political direction and support

When the ANC was in control of the Western Cape (broadly over the period 1999 to 2009),¹⁷¹ the provincial government sought to conflate national activities with those of the province. With the ANC

¹⁶⁶ Kaunda (2018) 8.

¹⁶⁷ Statistics South Africa Population Estimates 2018, Tables 7, 8 and 9.

¹⁶⁸ See Table 1.

¹⁶⁹ IEC (2019).

¹⁷⁰ See, inter alia, Pinnock D *The Brotherhoods: Street Gangs and State Control in Cape Town* (1984) David Philip: Cape Town.

¹⁷¹ The first democratic election saw the National Party win the Western Cape with a clear majority and govern as the New National Party (NNP) until 1999. In June 1999 no party succeeded in obtaining a clear majority and

in government nationally, the provincial ANC MEC used language and behaviour that implied direction and control of the SAPS – which politically it may well have had. For example, when police recruits graduated in 2004, Safety MEC Ramatlakane remarked, ‘Your graduation pushes our police contingent to well over 18,000 in this province. Next year this number will reach 20,000 – the highest number of police intake ever achieved.’¹⁷² This suggests that resourcing, a function of the SAPS, is in the gift of the provincial MEC, which it is not. Nevertheless, it is possible that a request from an ANC provincial MEC may be better received by the SAPS than one from a non-ANC MEC, and indeed the fixed establishment of officers in the province has not reached these heights again.

Similarly, in his 2005/6 Budget Vote speech, MEC Ramatlakane counted five new police stations as a provincial department achievement,¹⁷³ despite the determination of policing areas in a province being a function of the SAPS Provincial Commissioner¹⁷⁴ and the building of facilities for national entities falling under the national Department of Public Works.¹⁷⁵ Likewise, increased opening hours at three police stations were claimed as an achievement¹⁷⁶ even though it is the National Commissioner who determines the opening and closing times.¹⁷⁷ The MEC also made claims for the province in relation to arrests, convictions and forfeitures.

- ‘We arrested at least 10 high flyers and successfully convicted Mr Rashied Staggie. This once again [sic] for the theft of arms at the Faure Arms base was as a result of a joint investigation by the SAPS, the DPP [Director of Public Prosecutions] and the Scorpions. Staggie was sentenced to an effective 13 years imprisonment.’ It is to be noted that the SAPS, DPP and Scorpions are all national entities over which the province has no direct control.
- ‘In the past year we have had numerous successes in respect of seizure of assets by the Asset Forfeiture Unit which includes the entire estate of Kiyaam Rinquest a major drug dealer and abalone smuggler, worth more than a million rand. We have also presently restrained all the assets of 15 of the accused in the Quinton Marinus “Mr Big” case.’ The Asset Forfeiture Unit is a unit of the NPA.¹⁷⁸

These latter claims do have some substance as regards the province’s role. The province spent R1 million in 2005 on training members of the police and others in the criminal justice system, and

a coalition government between the NNP and ANC was formed, with the NNP retaining the premiership. In April 2003, controversial ‘floor-crossing’ legislation saw sufficient members of the NNP cross the floor to become members of the ANC, such that the ANC could govern outright until 2004. After the April 2004 election, the ANC’s share of the vote remained the largest, but it still required a coalition with the NNP to govern. Floor-crossing in September 2005 saw the ANC again achieve an outright majority, which was strengthened in September 2007 by further floor-crossing. In April 2009, the DA won a clear majority, which was strengthened after the election in May 2014. In 2019 the DA retained its power with a narrow win.

¹⁷² Ramatlakane L ‘Media Statement: Arrival of New Police Constables’ Western Cape Government 15 November 2004a available at <https://www.westerncape.gov.za/news/arrival-new-police-constables> accessed 13 August 2019.

¹⁷³ Philippi East, Klein Vlei, Mbkweni, Harare and Lingulethu West in Khayelitsha. Ramatlakane L ‘Western Cape Community Safety Provincial Budget Vote Speech 2005/2006 Western Cape Provincial Government 15 April 2005’ available at <http://www.polity.org.za/article/ramatlakane-western-cape-community-safety-prov-budget-vote-20052006-15042005-2005-04-15> accessed 13 August 2019.

¹⁷⁴ Section 12(2)(b) SAPS Act.

¹⁷⁵ Schedule 4, Constitution 1996 provides that public works is a concurrent competence ‘only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law’.

¹⁷⁶ Contact point service centres were increased to 24 hour services in the communities of Zoar, Gouda, Slangrivier and Haarlem.

¹⁷⁷ Regulation 31(b) GNR.389 of 14 April 2000: South African Police Service Employment Regulations.

¹⁷⁸ Ramatlakane (2005).

spearheaded a combined project to arrest and convict the 200 top gangsters in the Western Cape.¹⁷⁹ All the trainees were members of national government agencies, but the project was under provincial leadership. The MEC remarked that training specialist investigators and prosecutors was ‘an integral part of the province’s broader strategy to reduce the general level of criminal activity’.¹⁸⁰ Similarly, in 2003 MEC Ramatlakane announced that Standard Bank would bankroll the training of 25 specialist investigators and prosecutors in all aspects of money laundering and the new legislation governing financial transactions, through the province.¹⁸¹

The SAPS Act and Regulations explicitly make training a national function.¹⁸² However, the Commissioner may permit members to attend training not provided by the SAPS itself.¹⁸³ Presumably, the provincial training was permitted by the National Commissioner. The Provincial Commissioner cooperating with the province at the time, Mzwandile Petros,¹⁸⁴ was later key to SAPS cooperation in the Gauteng Aggravated Robbery Strategy discussed above.

This record suggests the provincial and national government under homogenous ANC control considered themselves to be a ‘team’; furthermore, the extremely limited mandate left the province with very little else of import to report upon. The MEC’s degree of leadership in addressing crime in the province was such that he received death threats, allegedly from Chinese Triads, after key organised crime arrests in the province, as he was viewed as the driving force behind the arrests.¹⁸⁵ This suggests that strong provincial political leadership may exert influence over the SAPS in the combating of crime to positive effect where this is politically feasible due to political homogeneity. The decade of provincial direction of the SAPS saw a 23 per cent drop in number of murders recorded in the province,¹⁸⁶ echoing the 22 per cent drop in respect of the Gauteng Aggravated Robbery Strategy.

5.6.3 ‘Force multipliers’: Quasi-policing

The problem of insufficient visible policing frequently sees provinces attempt to boost this through alternative ‘force multiplier’ programmes. During the period of ANC government, the Bamabani programme saw ‘volunteers’ paid a stipend through the provincial government, funded by the Expanded Public Works Programme (EPWP), to carry out ‘patrols’ on farms, on trains, in schools and in high-crime areas.¹⁸⁷ This was adopted in 2004 after the disbandment of the commando units in 2003 (see Chapter 3). The Safer Trains project, also under the EPWP, employed 692 people, with 400 receiving Grade E Security training (entry level), deployed at 42 hot-spot railway stations across the Western Cape.¹⁸⁸

¹⁷⁹ Smith A & Morris M ‘New elite force set to hit Cape gangs’ *Independent Online* 24 August 2005 available at <https://www.iol.co.za/news/south-africa/new-elite-force-set-to-hit-cape-gangs-251627> accessed 5 August 2018.

¹⁸⁰ Smith A & Morris M (2005).

¹⁸¹ Aranes J & Kemp Y ‘Cops and bank unite to fight money laundering’ *Independent Online* 5 September 2003 available at <https://www.iol.co.za/news/south-africa/cops-and-bank-unite-to-fight-money-laundering-112345> accessed 5 August 2019.

¹⁸² Section 11(2)(d) SAPS Act; Regulation 14(1) and (2) GNR.203 of 14 February 1964: Regulations for the South African Police.

¹⁸³ Regulation 14(2)(c) and (d) GNR.203 of 14 February 1964: Regulations for the South African Police.

¹⁸⁴ Smith A & Morris M (2005).

¹⁸⁵ Joubert P ‘Cape gangs: Targeting the untouchables’ *Mail & Guardian* 28 August 2007.

¹⁸⁶ In 2000, 2,963 murders versus 2,271 murders in 2009/10, according to SAPS Crime Statistics (2000 and 2009/10).

¹⁸⁷ Provincial Government of Western Cape *Department of Community Safety Vote 4 Annual Report 2004/5* (2005) 12.

¹⁸⁸ Provincial Government of Western Cape (2005) 12.

In 2004 the MEC addressed complaints that the Bambanani programme had resulted in a 'private army'.¹⁸⁹ The Bambanani 'volunteers' in 2009 marched to the provincial legislature to protest at poor 'working conditions' and inadequate stipends.¹⁹⁰ They said there were no managers and there was a communication breakdown between them and the police; volunteers also had to operate without radios, uniforms or batons.¹⁹¹ Conflict was reported between community neighbourhood watches, CPF volunteers, and the Bambanani 'volunteers'.¹⁹² This mirrored the complaints raised in a march in September 2008, in which the programme was labelled 'a tool of exploitation'.¹⁹³

While the intervention illustrates the necessity for the provinces to provide more forms of visible quasi-policing, particularly where the SAPS is lacking on trains and on farms and in schools, the constraints of provincial funding means problems are inevitable if the province agrees to pay such volunteers, as employment-type relationships are created. Similar interventions under DA political control took lessons from this experience (see below).

5.6.4 Stretching the oversight mandate

With the shift of political control in April 2009 came a review of the province's role in policing. The new DA premier, Helen Zille, records that on taking office the provincial Cabinet considered not establishing a provincial Department of Community Safety (DOCS), given that the provincial mandate on policing was so limited.¹⁹⁴ She observes: 'There seemed little point in having a Department of Community Safety and a Provincial Minister of Community Safety, without operational control over the SAPS, or any effective way of establishing systems of accountability.'¹⁹⁵ In the event, the Premier was persuaded to use the department to test the limits of the constitutional oversight mandate – including through a commission of inquiry.

5.6.5 Khayelitsha Commission

Some three years into opposition control of the province, the trends, particularly in poorer black areas of the province, began to worsen: in Khayelitsha, the number of murders leapt up by 27 per cent.¹⁹⁶ Civil society organisations complained to the Premier of the Western Cape in November 2011, alleging 'widespread inefficiencies, apathy, incompetence and systemic failures of policing routinely experienced by Khayelitsha residents'.¹⁹⁷

The Premier forwarded the complaint to the Provincial Commissioner and copied the correspondence to the minister and Acting National Commission. For nine months, correspondence was exchanged.¹⁹⁸ When no substantive response was forthcoming, the Premier approached the provincial cabinet to

¹⁸⁹ Ramatlakane L 'Statement by Western Cape Minister for Community Safety Leonard Ramatlakane' Western Cape Provincial Government 2 August 2004b available at <https://www.westerncape.gov.za/news/statement-western-cape-minister-community-safety-leonard-ramatlakane> accessed 5 August 2018.

¹⁹⁰ Paliso S (2009) Bambanani anti-crime volunteers march over low pay, working conditions *West Cape News* 27 November 2009.

¹⁹¹ Paliso S (2009).

¹⁹² Paliso S (2009).

¹⁹³ Barnes C 'Bambanani project slammed by marchers' *IOL* available at <https://www.iol.co.za/news/south-africa/bambanani-project-slammed-by-marchers-416256> accessed 31 October 2018.

¹⁹⁴ Zille H (2017) 'Western Cape should be given the power to combat violent crime and gangs effectively' *Daily Maverick* 9 October 2017 available at <https://www.dailymaverick.co.za/opinionista/2017-10-09-from-the-inside-western-cape-should-be-given-the-power-to-combat-violent-crime-and-gangs-effectively/> accessed 31 October 2018.

¹⁹⁵ Zille H (2017).

¹⁹⁶ In 2009, the three policing areas reported 283 murders while in 2012 they reported 360.

¹⁹⁷ *Minister of Police and others v Premier of the Western Cape and others* 2013 (12) BCLR 1405 (CC) (*Minister of Police* 2013 CC) 3.

¹⁹⁸ *Minister of Police* 2013 CC 5.

approve a commission of inquiry, duly appointed in August 2012, into ‘allegations of police inefficiency in Khayelitsha and of a breakdown in relations between the community and police in Khayelitsha’, the wording clearly reflecting section 206(5) of the Constitution.¹⁹⁹ The Commission was mandated to investigate complaints received by the Premier relating to allegations of inefficiency of the SAPS at three police stations in Khayelitsha and other units of the SAPS operating there.²⁰⁰ It was also mandated to investigate a breakdown in relations between the Khayelitsha community and members of the SAPS.²⁰¹

The terms closely reference the constitutional mandate of the provinces²⁰² – but the Commission was strongly resisted by both the SAPS and the minister. The issuing of subpoenas to the Provincial Commissioner and three station commanders at the end of October 2012 resulted in an urgent application in the Western Cape High Court for an order restraining the Commission from issuing and giving effect to the subpoenas, and directing it to suspend its activities pending a review decision to set aside the Premier’s decision to appoint the Commission.²⁰³ The appointment of the Commission was challenged on the basis that it was inconsistent with the Constitution, invalid, irrational or unlawful.²⁰⁴ The majority of the Court dismissed the contention that the Premier had violated the principles of cooperative governance and intergovernmental relations in section 41 of the Constitution, and concluded that the Premier did not act irrationally or unlawfully.²⁰⁵

The minister and the National Commissioner approached the Constitutional Court.²⁰⁶ They argued that sections 206(3) and (5) read with section 127(2)(e) of the Constitution does not authorise the Premier to appoint a commission with coercive powers against members of the police service, that is, with powers of subpoena. The applicants accepted that the Premier had the power to appoint a commission with subpoena powers over members of the public, but not members of the SAPS, because compelling members of the SAPS to abandon their normal duties in order to appear and testify or produce documents before the commission amounts to an exercise of control over the SAPS, which power, they argued, neither the province nor the Commission has.²⁰⁷ The applicants were emphatic that the power to control and manage the SAPS resides with the Commissioner and that this power is subject only to national policing policy under the direction of the minister.²⁰⁸ The Premier and provincial executive and, by extension, a commission appointed by the Premier, they argued, are excluded from exercising this control.²⁰⁹

The Court agreed that the scheme of Chapter 11 and the First and Second Certification Cases make it plain that the role of a provincial executive in relation to policing has been diminished and is now limited to the monitoring, overseeing and liaising functions set out in section 206(3).²¹⁰ But, in the

¹⁹⁹ Proc 9 (Western Cape) Provincial Gazette 7026 24 August 2012.

²⁰⁰ Proc 9 (2012).

²⁰¹ Proc 9 (2012).

²⁰² The Commission was appointed in terms of sections 206(3) and 206(5) of the Constitution read with section 127(2)(e) of the Constitution and section 1(1) of the Western Cape Provincial Commissions Act 10 (WCCA) of 1998. Section 127(2)(e) provides for the constitutional power of a premier to appoint a commission of inquiry, while the WCCA gives effect to that power and the similar power contained in section 37(2)(e) of the Western Cape Constitution, itself passed in terms of the provincial power to legislate a constitution contained in section 104(1)(a) of the Constitution.

²⁰³ *Minister of Police 2013 CC 5*.

²⁰⁴ *Minister of Police 2013 CC 5*.

²⁰⁵ *Minister of Police 2012 WC 85*.

²⁰⁶ They approached the Court for leave to appeal and for direct access on additional grounds, but conceded in oral argument that it would be neither necessary nor in the interests of justice to deal with the application for leave to appeal if their direct-access application were granted. *Minister of Police 2013 CC 13*.

²⁰⁷ *Minister of Police 2013 CC 27*.

²⁰⁸ *Minister of Police 2013 CC 28*.

²⁰⁹ *Minister of Police 2013 CC 28*.

²¹⁰ *Minister of Police 2013 CC 36*.

words of the Second Certification Case, the power to appoint a commission of inquiry gives ‘more teeth’ to the monitoring and overseeing functions the province enjoys by virtue of section 206(3).²¹¹ The Court concluded that the competence to appoint a provincial commission of inquiry into police inefficiency and its alleged dysfunctional relations with any community was part of a constitutionally mandated scheme through which provinces are entitled to monitor and oversee the police function within their area of remit, with a commission of inquiry as one of the mechanisms of accountability and oversight available to a province.²¹² Such a commission must be effective and capable of giving reasonable effect to the entitlements of a province over the policing function,²¹³ and a commission without coercive powers would be unable to fulfil its mandate:

When the target of the investigation is the police and how they fulfil their duties in relation to a particular community, they are obliged to account to a lawfully appointed commission as envisaged by section 206(5). If they were to be shielded from the coercive power of subpoena, the effectiveness of the Commission would falter. The entitlements in section 206(3) would be rendered nugatory as they would depend on whether members of the Police Service are willing to cooperate with the Commission.²¹⁴

Coercive powers are also necessary for the Premier and the province to fulfil the duty to respect, protect and promote the fundamental rights of people within the province, as the Premier is obliged to take reasonable steps to shield the residents of Khayelitsha from an unrelenting invasion of their fundamental rights because of continued police inefficiency in combating crime and the breakdown of relations between the police and the community.²¹⁵

The Commission eventually commenced its work in late 2013. It compiled a written report on the findings and recommendations, including recommendations for the province to submit to the minister in terms of section 206(5)(b) of the Constitution. The Commission handed over its report on 25 August 2014, making 20 key recommendations, most related directly to shortcomings in the operation of the SAPS but many relevant to the province as a whole. At the time of writing, none of the national police ministers in office since 2012 had signed the memorandum of agreement to jointly implement the Commission’s recommendations.

Thus, although the province won the litigation, the Commission led to recommendations which the SAPS has felt free to ignore. Although some aspects were implemented by the relevant SAPS cluster commander, there has been no acknowledgment from national level. This illustrates that the ‘constitutional scheme’ which requires provinces to oversee a national department is unworkable in practice where there is political heterogeneity or any other reason for the SAPS to be unwilling to cooperate. The number of murders in the three areas abated slightly during the years the Commission was in place, but accelerated sharply as soon as it was over, suggesting that the brief spotlight improved matters yet left no lasting impact (see Figure 3).

²¹¹ *Minister of Police 2013 CC 39.*

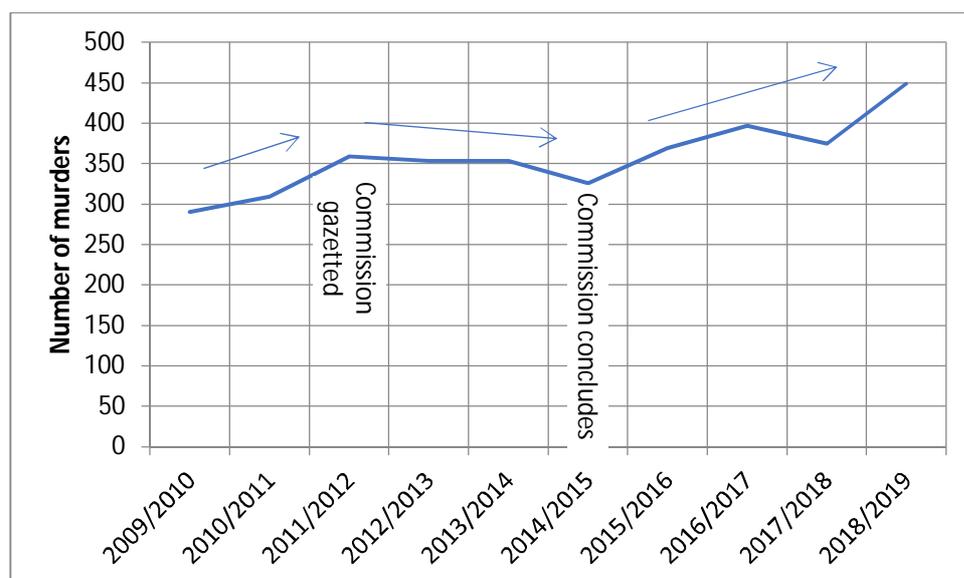
²¹² *Minister of Police 2013 CC 41.*

²¹³ *Minister of Police 2013 CC 41.*

²¹⁴ *Minister of Police 2013 CC 50.*

²¹⁵ *Minister of Police 2013 CC 51.*

Figure 13: Number of murders in the three policing areas of Khayelitsha (2009/10-2018/19)



Source: Own calculations using SAPS Crime Statistics

The Commission did lead, however, to one of the most thorough collections of information there is on the SAPS' mode of operation,²¹⁶ as a result of which it exposed ongoing inequality in the distribution of policing resources – a matter which has been the subject of further provincial engagement.

5.6.6 Dispute over police resources

Recommendation 7 of the Commission's report said the SAPS should revise the system for determining the human resource requirement at police stations and urgently allocate additional human resources to the three police stations in Khayelitsha. This arose out of evidence provided by the SAPS, which when analysed showed that the apparently objective system used by the SAPS had the result that informal township areas such as Khayelitsha tended to have the lowest per capita allocations in the province despite their very high rates of violent crime, as indicated by the murder rate.²¹⁷ Three years later, after no substantial change occurred, the Social Justice Coalition took the SAPS to the Equality Court to force this recommendation to be carried out. The SAPS made some perfunctory adjustments, but the overall system remained unchanged. The evidence provided by the SAPS in the litigation suggested the problem was widespread across the country.

The Western Cape MEC and provincial portfolio committee both have claimed repeatedly that the province receives a disproportionately small share of police human resources, taking violent crime into account.²¹⁸ Recruitment is nationally controlled by the SAPS.²¹⁹ In 2015, the then MEC Dan Plato pointed out that in 2009, the last year of ANC political control in the province, there were 1,967 new recruits but substantially fewer subsequently, down to only 234 in 2012, such that the number leaving

²¹⁶ See 'Khayelitsha Commission' available at <https://www.khayelitshacommission.org.za/> accessed 11 November 2019.

²¹⁷ See Redpath J and Nagia-Luddy F 'Unconscionable and irrational: SAPS human resource allocation' 53 *SA Crime Quarterly* 15 (2015) 25.

²¹⁸ On a per capita basis, the province is in fact the third best-resourced at local police station level; however, it has the highest murder rate, with the distribution of specialist units complicating the analysis.

²¹⁹ Sections 11(2)(b) and (c) SAPS Act.

exceeded the number recruited.²²⁰ In 2017 the chairperson of the Standing Committee on Community Safety lamented that posts allocated by the SAPS (or ‘fixed establishments’) in the Western Cape decreased from 22,653 in 2013 to 21,367 in 2016, a reduction of almost 6 per cent, with approximately 1,000 posts not filled.²²¹ This is despite the population growth of the province, and the total number of SAPS employees over the period 2013 to 2016 decreasing by only 2 per cent.

A partisan provincial police service was a concern in the drafting of the Constitution: a partisan national police was not imagined. The decline in numbers is exacerbated by the moratorium on reservists in 2009 and a change in policy in 2013 that restricts those who may be reservists – among those excluded are the unemployed, those over 40, and journalists and politicians.²²² In 2008, the Western Cape had 5,059 active reservists; this dropped to only 829 in 2017;²²³ over that time murders increased by 45 per cent.²²⁴ In mid-2019, the new DA premier, Alan Winde, declared an intergovernmental dispute in relation to police human resources.²²⁵ The dispute illustrates the weakness of a constitutional framework that does not permit the province itself to choose to allocate more resources to a provincial priority, with the result that it has to rely on national government to make rational choices.

5.6.7 Western Cape Community Safety Act

Success in the Constitutional Court for the Western Cape’s Khayelitsha Commission in October 2013 was contemporaneous with contested legislation passed by the Western Cape legislature, which seeks to give more specificity to the generalised but limited powers accord to provinces. The Western Cape Community Safety Act (WCCSA) is the only provincial legislation passed. It defines oversight and SAPS obligations under this oversight. The Act enables access to places, information and statistics that were previously ‘off limits’.²²⁶ Information regarding police action, from crime scenes to individual police stations, crime statistics and other documents, including dockets presented as evidence in courts of law, are tracked. This enables evaluation of police action and is used to formulate the annual ‘policing needs and priorities’.

The Act also establishes the office of the Police Ombudsman, to which members of the public can submit complaints about the efficiency and effectiveness of policing and demand follow-up. Then Premier Zille reported that SAPS Provincial Commissioner Jula had cooperated with the provincial interventions but that this has cooperation had not been mirrored at national level.²²⁷ Jula was transferred to KwaZulu-Natal in mid-2019, leaving the province without a provincial commissioner, suggesting this may have been a move by the SAPS to reduce provincial control of the SAPS in the province.

²²⁰ Plato D ‘Media Release by Dan Plato, Western Cape Minister of Community Safety 3 February 2014’ available at <https://www.westerncape.gov.za/news/police-staff-shortages-negatively-affecting-crime-levels> accessed 15 August 2019.

²²¹ Wimberly L ‘Number of police in Western Cape declining’ Groundup available at <https://www.groundup.org.za/article/less-not-more-police-crime-hit-areas/> accessed 15 August 2018.

²²² SAPS ‘National Instruction 3 of 2014: The Reserve Police Service’ (2014) available at <https://www.agrisa.co.za/wp-content/uploads/2014/08/Police-Instruction-on-Reservist.pdf> accessed 15 August 2018.

²²³ Wenger M ‘DA WC: Dive in number of active police reservists due to exclusionary criteria’ Cape Talk 11 October 2017 available at <http://www.capetalk.co.za/articles/275971/da-wc-dive-in-number-of-active-police-reservists-due-to-exclusionary-criteria> accessed 15 August 2019.

²²⁴ SAPS Crime statistics 2016/2017. The number of murders in the Western Cape, comparing 2009/10 to 2016/17, increased by 45 per cent, which equates to an increase in the murder rate from 42 to 51 per 100,000.

²²⁵ Staff Reporter ‘Winde escalates resource dispute with police minister’ *Cape Argus* 10 June 2019.

²²⁶ Zille (2017).

²²⁷ Zille (2017).

5.6.8 Neighbourhood watches: Force multipliers

Like all the other provinces and the ANC before it in the province, the DA-controlled province has also sought to boost ‘force-multipliers’, in this case through neighbourhood watches. Accreditation of neighbourhood watch structures forms part of the WCCSA.²²⁸ The provincial department provides training and equipment to accredited neighbourhood watches, with more than 200 having been accredited.²²⁹ Crucially, unlike in Bambanani, volunteers are not paid, albeit that the province pays for training and equipment. Similar to the KwaZulu-Natal VCPPS, the intervention tries to collect crime intelligence, but not in the same centralised fashion: ‘Project Backbone’ uses technology (particularly WhatsApp groups) to enable ‘residents to stay in close contact with each other, share intelligence and link all local stakeholders in the “safety chain” from individual citizens, families, neighbours, streets, blocks – right through to the police station commander’.²³⁰

5.6.9 Monitoring

Echoing aspects of the Gauteng Aggravated Robbery Strategy, the DOCS has a ‘watching brief’ programme that monitors significant court cases, particularly those involving gangs, and reports back on the police’s role in court. As a result, disciplinary cases have arisen from the programme and the quality of the dockets submitted to court has reportedly improved. The DOCS has also established a multisectoral team, which includes the NPA, to monitor murder prosecutions. These arrangements are cooperative in nature and do not permit the DOCS to take any direct disciplinary action.

5.6.10 Firearms

The role of firearms in worsening trends has been recorded in Chapter 4. Premier Zille also records, in an echo of developments in KwaZulu-Natal, that at the time of the worsening trends she attempted

to establish a commission of inquiry (with powers of subpoena) to investigate the seemingly limitless flow of guns into the hands of gangsters, but lawyers advised her that “firearms control (which includes illegal firearm transit) is a national competency and it is not open to the Premier to establish a commission of inquiry to investigate a matter that relates to an area of exclusive national competency”.²³¹

5.6.11 Cooperation with metropolitan police

Cape Town, the metropolitan municipality located in the Western Cape, has had opposition government since 2000 – longer than the province.²³² The political homogeneity between the province and metro has facilitated cooperation in relation to school safety, as the administration of schools is under provincial government. While provinces are not empowered to ‘police’, municipalities, by contrast, are so to a limited degree (see Chapter 6), and thus cooperation between the city and the province sees municipal police officers policing within provincial schools. A ‘School Resource Officer’ (SRO) is a sworn metropolitan police officer assigned to a school on a long-term basis. SROs are specifically trained for the school environment and receive full salaries – unlike a comparable intervention in Gauteng, where 1,500 school volunteer patrollers were paid a stipend of R1,500 per month²³³ and problems arose when patrollers themselves became involved in criminal activities,

²²⁸ Section 6 Western Cape Community Safety Act 3 of 2013.

²²⁹ Botha E ‘MEC Dan Plato accredits 7 new Neighbourhood Watch structures’ Western Cape government Media Release available at <https://www.gov.za/ss/node/777964> accessed 15 August 2015.

²³⁰ Zille (2017).

²³¹ Zille (2017).

²³² Since 2000 in coalition government.

²³³ Mkhulisi M ‘Patrollers to help schools in danger’ *Sowetan* 21 October 2011.

including rape and sexual assault.²³⁴ Assigned to specified schools through a memorandum of understanding between the Western Cape Education Department, the Western Cape DOCS, and the City of Cape Town, by 2015 the SRO intervention, supported financially by the US government, had seen SROs receive training from the (US) National Association of School Resource Officers, with two SROs based at each of 18 high-risk schools.²³⁵

5.6.12 Alcohol policing

Alcohol use is implicated in the majority of homicides in Cape Town.²³⁶ Liquor licensing is an exclusive provincial competence.²³⁷ Recognising the role of alcohol in crime, the Premier in 2016 transferred the administration of the Western Cape Liquor Act of 2008 and its regulations to the DOCS (this was previously under the Western Cape Department of Economic Development and Tourism).²³⁸ The provincial alcohol-related harms-reduction police White Paper in 2017 proposes increasing the number of trained liquor law enforcement officers.²³⁹ The Western Cape Liquor Authority (WCLA) in 2016 had posts for only 12 liquor inspectors that visit liquor-licensed premises to monitor and enforce compliance with the provisions of the Western Cape Liquor Act,²⁴⁰ the Western Cape Liquor Regulations, and liquor license conditions.²⁴¹ According to the strategic plan for 2015-2020, '[p]rovision for additional staffing capacity has also been made' in respect of enforcement, but the lack of significant budgetary increases suggests this may not be the case;²⁴² it is unclear whether the more recent White Paper will see further increases in alcohol policing by the WCLA. Liquor inspectors in both Western Cape and KwaZulu-Natal have been accorded peace officer powers in respect of enforcement of their provincial liquor legislation.²⁴³ Although not currently carrying firearms, accreditation as an official institution in terms of the Firearms Control Act is possible, which would facilitate the carrying of arms.²⁴⁴

5.6.13 Provincial police service?

Ahead of the 2019 national and provincial election, the DA's candidate for the premiership, Alan Winde, made it a campaign promise that – in the face of a range of disputes with the national SAPS, including the SAPS' apparent failure to prioritise the province – a provincial police service would be delivered in the Western Cape. After the election, the national Minister of Police rejected the idea of any devolution of policing powers to the province.²⁴⁵ In July of the same year, the national government deployed the South African National Defence Force in the Western Cape to support the

²³⁴ Makheta T 'Lesufi to formalise school patrollers contracts' *Sowetan* 23 October 2017.

²³⁵ Frederikse E 'Cops deployed at W Cape schools' *Cape Argus* 2 October 2015 available at <https://www.iol.co.za/news/south-africa/western-cape/cops-deployed-at-wcape-schools-1924431> accessed 3 August 2017.

²³⁶ See, for example, Dlamini P 'Reduce booze and crime will fall, researchers say' *TimesLive* 23 August 2017 available at <https://www.timeslive.co.za/news/south-africa/2017-08-23-reduce-booze-and-crime-will-fall-researchers-say/> accessed 11 November 2019.

²³⁷ Schedule 5A, Constitution, 1996.

²³⁸ Proclamation 3/2016 published in Provincial Gazette 7564 of 12 February 2016.

²³⁹ Department of the Premier, Western Cape *Western Cape Alcohol-related Harms Reduction Policy White Paper* available at https://www.westerncape.gov.za/text/2017/September/white_paper_alcohol-related_harms_reduction.pdf accessed 15 August 2019.

²⁴⁰ Western Cape Liquor Act 4 of 2008, as amended.

²⁴¹ Western Cape Liquor Authority *Annual Report 2016/17* (2017) 47.

²⁴² Western Cape Liquor Authority (2017) 24.

²⁴³ GNR 691 GG 37968 of 2 September 2014.

²⁴⁴ Firearms Control Act 60 of 2000.

²⁴⁵ Staff reporter 'Cele has no plans to introduce bill for provincial police unit' *News24* 2 August 2019 available at <https://www.news24.com/SouthAfrica/News/cele-has-no-plans-to-introduce-bill-for-provincial-police-unit-20190802> accessed 8 August 2019.

SAPS in areas especially prone to gang violence.²⁴⁶ Such deployment had been an explicit request by the province for some years.²⁴⁷

In September 2019, the Premier released an ambitious plan, costing R1 billion, to address violent crime, a plan that includes training and deploying investigators and hiring additional policing at the municipal level.²⁴⁸ The amount involved is three times the current Safety Department budget and represents almost 2 per cent of the entire provincial budget. The province is essentially paying the city to employ additional law enforcement – which it may do in respect of law enforcement but not in respect of the metro police.

Hiring investigators to prepare dockets did not appear to elicit comment from either the SAPS or national government, but it draws precedent from a similar initiative of the Cape Town Metro government (see Chapter 7). It is unclear whether the investigators, if challenged, will be argued to be carrying out a form of ‘oversight’ and therefore be employed by the province, or whether they will form part of the Metro’s unit. Under the province, such investigations would have to be carried out without any policing powers of arrest, search or seizure, but as law enforcement officers under the city, officers will have the powers as described in Chapter 6. Investigation is not explicitly accorded to metro police but in relation to law enforcement it may be argued that investigation is incidental to the power of law enforcement, which in turn is incidental to the power to make by-laws. It remains open to the city – and indeed any municipalities in the province that wish to do so – to delegate its law enforcement powers to the province.²⁴⁹

5.6.14 Conclusion

The Western Cape in more recent years demonstrates the limits of the provincial mandate in the absence of intergovernmental cooperation and political influence. Oversight is largely toothless, and recommendations by the province can simply be ignored with impunity by national government and by the national SAPS. The province’s experience demonstrates an unforeseen danger of the constitutional framework: that a national government, deliberately or as a result of disinterest or incompetence, might ignore the needs of a province under opposition control.²⁵⁰ The earlier years – coupled with the experience of Gauteng (see above) and Northern Cape (see below) in directing policing – suggest that direct provincial control of policing, which was possible only because of political homogeneity, that is, control by consent, is likely to be effective in controlling crime trends in the province.

5.7 Politics and force multipliers in the half-dozen

The three largest provinces cover more than half (56 per cent) of the South African population. The remaining six provinces demonstrate robust if limited engagement with policing. While the provinces

²⁴⁶ ‘Bheki Cele announces army will be deployed to Western Cape hotspots’ *African News Agency* 11 July 2019 available at <https://www.iol.co.za/news/south-africa/western-cape/bheki-cele-announces-army-will-be-deployed-to-western-cape-hotspots-29061436> accessed 30 November 2019.

²⁴⁷ Hlati O ‘#GangWars: Zille calls on the army’s help’ *Cape Argus* 10 October 2017.

²⁴⁸ Somdya K ‘Winde’s R1bn safety plan: 3 000 new law enforcement officers, 150 investigators’ *News24* 19 September 2019.

²⁴⁹ Section 238(b) of the Constitution provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, subject to the condition that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed.

²⁵⁰ The available data suggest that the province is somewhat better off in terms of total police allocations to police stations than the Eastern Cape and Limpopo, which are strongholds of ruling-party support. Nevertheless, compared to allocations made during ANC provincial rule, allocations during DA provincial rule appear to show a failure to prioritise serious violent crime in the province.

have their differences, factors common to all six of them are uncontested ANC control (although diminishing) and similar HDI scores; common to five provinces are large areas under traditional leadership, low per capita budgets, and very poor audit results. The Northern Cape, the exception to the latter, covers a very large, mostly desert, area with a small population, which accounts for much of the apparently higher per capita trends.

Table 5: Characteristics of the six smaller provinces

	E. Cape	Limpopo	Mpumalanga	North-West	Free State	N. Cape
Population (millions)	6.5	5.8	4.5	3.9	2.9	1.2
Area (km²)	169	126	76	105	130	373
Population growth since 1994²⁵¹	Stagnant	Slight increase	Doubling	Slight increase	Stagnant	Large increase
Metros²⁵²	Two	None	None	None	One	None
Local Municipalities²⁵³	31	22	17	18	18	26
Human Development	0.649	0.673	0.678	0.688	0.711	0.682
Former Bantustan	Transkei and Ciskei	Venda, Gazankulu, Lebowa	KwaNdebele, KaNgwane	Bophuthatswana	Owa-Qwa	-
ANC support 1999 (%)	74	89	85	79	81	64
ANC support 2019 (%)	69	75	71	62	61	58
Crime	Murder	Ritual mutilations	Household crime ²⁵⁴	Public violence	Stock theft	Assault
Budget per cap.	R13	R17	(R435) R12*	R11	R7	R173

Source: See footnotes per row

Prior to the promulgation of CSPS Act in 2012, the activities of these six provinces did not focus on oversight, whereas subsequent to 2012, the provinces bemoan the obligations imposed by the CSPS Act. The six provinces have smaller populations than the three already considered, are less urban, less wealthy, less vigorous in their policing interventions – and mostly have smaller budgets allocated to safety. Yet they show some policing actions:

- quasi-policing formations;
- their political homogeneity with the national government enables a degree of political direction and conflation of delivery;
- despite extreme financial constraints, they provide the SAPS with specific resources to address provincial concerns;
- they have provided visible policing ‘force multipliers’;

²⁵¹ Statistic South Africa Mid-year Population Estimates.

²⁵² *The Local Government Handbook: South Africa* (2019).

²⁵³ *The Local Government Handbook: South Africa* (2019).

²⁵⁴ The 2017/18 Victims of Crime Survey records that the province had the highest percentage of households experiencing crime in that year, at 8.9 per cent, compared to the national average of 7.5 per cent. See Statistics South Africa *Victims of Crime Survey 2017/18* (2018) Table 4 available at <http://www.statssa.gov.za/publications/P0341/P03412018.pdf> accessed 8 August 2019.

- reluctant engagement in mandatory oversight;
- co-option of traditional leaders;
- protection of provincial politicians and assets; and
- as in Gauteng, there is repurposing of traffic policing.

5.7.1 Quasi-policing formations

At the time of the transition, existing ‘self-defence units’ (SDUs)²⁵⁵ in some poorly policed areas more or less usurped policing functions from the SAPS or other political stakeholders – including provincial leaders.²⁵⁶ For example, shortly after taking office, the provincial MEC in the Eastern Cape set up his own ‘volunteer’ armed unit of former MK²⁵⁷ and SDU members to recover stolen government vehicles, in response to a lack of cooperation from the former ‘Transkei’ police.²⁵⁸ By 1995, members of the unit had been implicated in a series of violent crimes, had allegedly taken over a range of policing functions in certain districts, and were accused of launching attacks on opponents; the unit was disbanded and the official suspended when a hit-list targeting senior policemen was uncovered during an investigation into its operations.²⁵⁹

5.7.2 Political control

As observed in the Western Cape under ANC government, there is conflation in these provinces of delivery by national and provincial governments: with very small budgets and a limited mandate, the departments must associate themselves with the SAPS to justify their existence. For example, the Eastern Cape ANC MEC in the pre-2012 period conflated delivery by the SAPS of personnel, infrastructure and vehicles²⁶⁰ with that of the provincial department.²⁶¹ Before 2012, the activities of this department strayed from the oversight mandate towards direction of the SAPS. For example, in the 2006 Budget Vote, there is reference to the department’s having guided ‘Equity Forum Meetings’ at which ‘equity targets’ were set for gender and race in SAPS recruitment.²⁶²

The Northern Cape is different in that, rather than conflating delivery, it is explicit about exerting political influence. Its 2011/2012 Expenditure Review notes:

In an effort to monitor the relocation of Police Services within the Province, in order to respond adequately to the service delivery needs, especially of rural communities, the Directorate had regular meetings with the top management of

²⁵⁵ Armed entities associated with political entities.

²⁵⁶ Gear S ‘Now that the War is Over: Ex-combatants Transition and the Question of Violence: A literature review’ CSVR *Violence and Transition Series* (2002) 50.

²⁵⁷ Umkhonto we Sizwe (MK) was launched as an armed wing of the ANC in 1960.

²⁵⁸ Gear (2002) 50.

²⁵⁹ Gear (2002) 50.

²⁶⁰ In 2008 the enlistment of 1,018 entry-level constables and 283 Public Service Act Personnel, the purchase of 951 vehicles at a total value of R115m, and continuous improvement in SAPS infrastructure amounting to R65m, were referred to: ‘In supporting our police service we have seen the strengthening of the police service through ...’. These were clearly not delivered by the provincial department, as the entire ‘Safety and Liaison’ budget vote for 2008/9 was only R41 million.

²⁶¹ Nel WH ‘Province of the Eastern Cape 2008 Budget Speech and Policy Statement’ (2008) available at <http://www.treasury.gov.za/documents/provincial%20budget/2008/Budget%20Speeches/Eastern%20Cape%20-%20Budget%20Speech%20-%2029%20February%202008.pdf> accessed 30 November 2019.

²⁶² Strategic goal 2’ of the 2006 Budget Vote: ‘Ensure Transformation of the SAPS’: Strategic Objective 3: Transforming policies and guidelines implemented within SAPS’. See Eastern Cape Provincial Budget Vote (2006) available at <http://www.treasury.gov.za/publications/annual%20reports/provincial/2006/EC/EC%20-%20Vote%2015%20-%20Safety%20&%20Liaison.pdf> accessed 30 November 2019.

the SAPS, in this regard. This has resulted into the SAPS' procurement of vehicles and the appointment of new recruits during the 2011/2012 financial year.²⁶³

This type of political pressure has been resisted in respect of the Western Cape. Indeed, the Northern Cape is the province best-resourced per capita by the SAPS (see Chapter 3). Although this is partly a function of the vast area that has to be served, well-received lobbying by the provincial government is also likely to have played a role. Moreover, it is the only province to have experienced a persistent downward trend in number of murders in spite of population growth, to the extent that since 1997, the number of murders recorded by the SAPS has dropped 62 per cent.²⁶⁴ The homogenous, relatively capable political control of the province, which has seen robust engagement with the SAPS, is likely to have played a role in this improvement.

5.7.3 Resourcing of SAPS

The provinces have made specific resource interventions that meet needs unmet by the SAPS. For instance, in 2008, the Eastern Cape provincial department spent R33 million on a 'custom-built mobile police station focusing on service delivery to the deep rural areas' for the SAPS – a feat achieved through funding from the European Union.²⁶⁵ Specialised training was also provided to 446 SAPS members through the provincial department,²⁶⁶ which sought to provide facilities and training in deep rural areas where these were lacking.

Similarly, in the Free State an *imbizo* was held in former Qwa-Qwa in June 2016 to address rural safety, especially so stock-theft, a notable problem in areas bordering Lesotho; in this regard, a 4x4 vehicle suitable for the harsh mountainous terrain was donated by the department to the anti-stock theft unit.²⁶⁷ The donation suggests that the response of the SAPS to the provincial priority was inadequate. In the 2018/19 financial year, Limpopo allocated R2 million through the Expanded Public Works Programme (EPWP) to enable the department to clean 'hotspot' police stations in each of six clusters, with the money being used to pay 'participants' stipends and buy gardening tools.²⁶⁸

5.7.4 Force multipliers

Community patrolling, which gives provinces a marginal policing footprint, is a popular intervention in the three larger provinces and is seen too in the other 'half-dozen' provinces. Funds from EPWP Incentive Grants are frequently used by provinces to fund stipends for 'volunteers' carrying out patrolling (see below) – but the allocations are small.²⁶⁹ For the social sector of the EPWP (there are

²⁶³ 'Northern Cape Estimate of Provincial Expenditure: Vote 3 Department of Transport, Safety and Liaison 2012/2013' (2012) available at <http://www.treasury.gov.za/documents/provincial%20budget/2012/4.%20Estimates%20of%20Prov%20Rev%20and%20Exp/NC/2.%20Estimates%20of%20Prov%20Rev%20and%20Exp/NC%20-%20Vote%2003%20-%20Transport,%20Safety%20and%20Liaison.pdf> accessed 15 August 2019.

²⁶⁴ From 847 in 1997 to 322 in 2018/19. SAPS Crime Statistics.

²⁶⁵ Mhlahlo T 'Eastern Cape Safety and liaison policy speech' (2008) available at <http://www.polity.org.za/article/sa-mhlahlo-eastern-cape-safety-and-liaison-policy-speech-13032008-2008-03-13> accessed 30 November 2019.

²⁶⁶ Mhlahlo T (2008).

²⁶⁷ Mashini S 'Free State Police, Roads and Transport Budget Vote Speech 23 March 2017' available at <https://www.gov.za/speeches/mec-sam-mashinini-free-state-police-roads-and-transport-budget-vote-20172018-23-mar-2017> accessed 15 August 2019.

²⁶⁸ Limpopo Treasury Budget Vote (2018) 333.

²⁶⁹ The EPWP aims to incentivise part-time or temporary employment. The minimum allocation to a province in terms of the EPWP in 2017/2018 was R2 million or 13.4 'full time equivalents' (FTEs) – see National Department of Public Works *EPWP Integrated Grant Manual 2017/2018* (2017) 18 available at http://www.epwp.gov.za/documents/Infrastructure/Infrastructure%20incentive%20manual/EPWP_IntegratedGrantManual_2017to18_Version_9April2017.pdf accessed 30 November 2019.

four sectors), community safety is a focus area, but is not applicable to provincial departments, according to the 2017/18 EPWP manual.²⁷⁰ Hence, it is unclear through which EPWP mechanism EPWP funds are accessed by provincial departments.

The need to have more visible policing via such patrolling was felt in the North West. Its 2012/13 annual report notes an unsuccessful attempt to issue a bid for the training of ‘community patrollers’.²⁷¹ In the following year, the department reports that 180 community patrollers were trained,²⁷² but notes, ‘[The] Community Patrollers Programme planned for the AFCON (Africa Cup of Nations football event) could not take off due to delays in vetting of people to be appointed as patrollers.’²⁷³ In 2014/15 it was reported that ‘[t]he Community Patrollers Programme continues to be implemented mainly in the Rustenburg area as the main contributory town in all categories of crime’. By 2015/16 the department reported that 226 community patrollers had been ‘appointed’.²⁷⁴ There is no mention of this in the following year, but the budget vote for 2017/18 refers to the ‘establishment’ of the Community Patrollers Programme.²⁷⁵

Similarly, in 2014 the Free State Department of Police, Roads and Transport ‘identified the need to expedite the recruitment of Community Safety Patrollers who will create additional capacity to the SAPS resources in conducting visible and focused patrols at hotspot crime areas in conjunction with the SAPS at local level’.²⁷⁶ The Department envisaged appointing a service provider to facilitate, launch and formally administer the programme, which was to be supported by insurance companies and run as a three-year pilot initiative. The intervention again demonstrates the need for patrolling to supplement the SAPS.

5.7.5 Mandatory oversight

Although it was part of their explicit mandate, in the earlier years oversight was not a popular activity among these departments, possibly because of the difficulty and cost associated with it and their greater interest anyway in ‘hard’ policing. Subsequent to the CSPS Act in 2012, the Eastern Cape department notes the ‘unfunded mandate’ imposed on the province: ‘The new Civilian Secretariat for Police Service Act 2 of 2011 is an unfunded mandate giving the department additional responsibilities.’²⁷⁷ It goes on to comment:

The meagre budget that the Department receives makes it difficult to cover the vast geographical area of the province, the high number of SAPS members and large number of police stations. Failure by the SAPS to implement some of the recommendations that the Department makes is still a challenge.²⁷⁸

²⁷⁰ National Department of Public Works (2017) 21: Table 5: EPWP Grant Focus Areas.

²⁷¹ North West Provincial Government *Vote 5 Annual Report 2013/14* (2013) 53.

²⁷² North West Provincial Government Department of Human Settlement, Public Safety & Liaison (Public Safety & Liaison Branch) *Vote 5 Annual Report 2013/14* (2014) 68.

²⁷³ North West Provincial Government (2014) 70.

²⁷⁴ North West Provincial Government Department of Community Safety and Transport Management *Vote 5 Annual Report for 2015/16* (2016) 56.

²⁷⁵ North West Provincial Government (2016) 207.

²⁷⁶ Komphela B ‘Free State Police, Roads and Transport Budget Vote Speech 9 July 2014’ available at <https://www.arrivealive.co.za/news.aspx?s=2&i=12832&page=MEC-Butana-Komphela-Free-State-Police-Roads-and-Transport-Prov-Budget-Vote> accessed 15 August 2019.

²⁷⁷ Eastern Cape Department of Safety and Liaison *Annual Report 2012/13* (2013) 17 available at https://provincialgovernment.co.za/department_annual/11/2013-eastern-cape-safety-and-liaison-annual-report.pdf accessed 15 August 2019.

²⁷⁸ Eastern Cape Department of Safety and Liaison *Annual Report 2012/2013* (2013) 22.

By 2017 the department was still only spending R87 million, amounting to R13 per inhabitant.²⁷⁹ The activities of the department were limited to the programmes entitled ‘Administration’ and ‘Provincial Civilian Secretariat’. Thus, the CSPS Act’s functions now comprise the bulk of the department’s work, which it appears to find difficult to carry out within its budget – and which oversight fails to elicit response from the SAPS.

Similarly, in 2016/17 Limpopo expended R96 million, or R17 per inhabitant, on the safety department. As in the Eastern Cape, Administration and CSPS Act functions now comprise almost the entirety of the activities of the department; previously, social crime prevention had more prominence. Like the Eastern Cape, Limpopo finds the CSPS Act a burden:

The biggest challenge of 2012/2013 financial year has been that the implementation of the full powers and functions of the Provincial Secretariat for Police as contained in Section 17(1) and (2) of the Civilian Secretariat for the Police Act could not all be implemented due to the budgetary constraints. The new mandates were unfunded and the Department had to make do with what was available in terms of resources and phased in some of the functions in the year under review.²⁸⁰

Again like the Eastern Cape, Limpopo laments that the findings from oversight activities are ignored: ‘The main challenge the Department is facing in executing its mandates is the non-implementation of recommendations by the SAPS. However, the Department is continually exploring ways to ensure that recommendations made are implemented.’²⁸¹

Similarly, in the North-West, the 2012/13 annual report of the department²⁸² refers to challenges experienced with the obligations imposed by the CSPS Act.²⁸³ These challenges are reiterated in subsequent reports.

5.7.6 Traditional leaders

Chapters 8 and 9 of this thesis discuss the national government’s reliance on traditional leaders. Provincial departments also demonstrate reliance on traditional leaders. In Limpopo, policing outside of formal urban areas is sparse and there is reliance on traditional leaders to provide dispute resolution in terms of customary law.²⁸⁴ Extremely low policing ratios persist, and the MEC has lamented that the pattern has not changed (‘in the past most of the police stations in the province were located strategically to serve the interests of the minority ... our communities continue to be disadvantaged in terms of safety and security and deprived of effective service delivery’).²⁸⁵ The Limpopo MEC in 2007 engaged directly with traditional leaders to garner their assistance in maintaining order: ‘[A]ll

²⁷⁹ Eastern Cape Provincial Legislature *Expenditure Review 2017*.

²⁸⁰ Ndou S (2004).

²⁸¹ Limpopo Treasury (2018) *Estimates of Provincial Revenue and Expenditure 2018/19* 333.

²⁸² Prior to May 2014, the safety component of the provincial department formed part of the Department of Human Settlement, Public Safety and Liaison. Earlier still, it formed part of the Department of Transport, Roads and Community Safety.

²⁸³ North West Provincial Government Department of Human Settlement, Public Safety & Liaison (Public Safety and Liaison Branch) *Vote 5 Annual Report 2012/13* (2013) 50.

²⁸⁴ See Aiyedun A & Odor A ‘Integrating the traditional with the contemporary in dispute resolution in Africa’ (2016) 20 *Law Democracy and Development* 169.

²⁸⁵ Ndou S (2007) ‘Limpopo Safety, Security and Liaison Provincial Budget Vote 2007/08’ 15 May 2007 available at <http://www.polity.org.za/article/ndou-limpopo-safety-security-and-liaison-prov-budget-vote-200708-15052007-2007-05-15> accessed 15 August 2019.

traditional leaders we met pledged their support in terms of crime prevention in their respective areas.²⁸⁶

Although the province has a reputation as a low-crime province, it is possible the low SAPS murder rate is a function of a low rate of detection of murders by the sparsely distributed SAPS (see Chapter 3). The province suffers from ritual killings, and, ironically, traditional leaders are sometimes implicated in them.²⁸⁷ In 2014 the MEC held a ‘summit’ on ritual killings, bringing together police and traditional leaders and calling on members of the public to expose the ‘syndicates’ responsible.²⁸⁸

5.7.7 Guarding their own in Mpumalanga

Mpumalanga is something of an outlier among these six provinces. The budget of the Mpumalanga Department of Community Safety, Security and Liaison exceeded R1.2 billion in 2017/18.²⁸⁹ The budget is large because Mpumalanga in 2012 centralised the budget and management of security for the 707 provincial government sites in the province, inclusive of provision, and monitoring and evaluation, within the department.²⁹⁰ The programme entails the placement of private security officers at state institutions and the deployment of private guards to the premier and his cabinet’s residences.²⁹¹

Given that the entire Mpumalanga budget in 2018 was only R45 billion, this means that slightly more than R1 in every R100 spent by Mpumalanga is spent on securing provincial politicians and officials and provincial buildings. This is addition to the protection provided by the national SAPS ‘Protection and Security Services’, which in 2011/12 provided VIP protection to 119 provincial dignitaries, presumably including those from Mpumalanga, while in transit.²⁹² Considering only its oversight mandate, the province spends only R12 per capita on this programme.

Little Mpumalanga intervention is notable from the record until 2012, when the department centralised security provision. This occurred at the same time that the CSPA obligations came into effect: the oversight programme (which in the majority of provinces accounts for most of their safety departments’ budgets) comprised only R54 million (4.5 per cent) in 2018. Mpumalanga’s Administration budget of this department is larger than that of other provinces, comprising R121 million.²⁹³ Security management is the largest item, comprising R475 million, or 40 per cent of the total safety budget.²⁹⁴ Through this centralisation, the department effectively wields a large centrally controlled security force, doing so through a single private service provider rather than insourced security per department.

In 2013 the HOD of the Department was arrested, but ultimately acquitted, for corruption in the award of the three-year tender for security management; the successful tenderers, GNT Security, had submitted a false tax clearance certificate. It was reported in June 2018 that the department would deploy armed guards in provincial hospitals and clinics due to incidents that occurred in these facilities; it is unclear whether guards previously employed under this contract had been unarmed.²⁹⁵

²⁸⁶ Ndou S (2007).

²⁸⁷ De Jong W (2015) 18.

²⁸⁸ Nduvheni S (2014) “Expose body parts syndicates” – MEC’ *Limpopo Mirror* 1 August 2014.

²⁸⁹ Mpumalanga Treasury (2018) *Estimates of Provincial Revenue and Expenditure 2018/19* 351.

²⁹⁰ Shongwe B ‘Private security gets 42% of department’s budget’ *The Write News Agency* 7 November 2013 available at <https://showme.co.za/nelspruit/news/private-security-gets-42-of-departments-budget/> accessed 15 August 2019.

²⁹¹ Shongwe B (2013).

²⁹² SAPS *Annual Report 2011/12* (2012) 122.

²⁹³ Mpumalanga Treasury (2018) 353.

²⁹⁴ Mpumalanga Treasury (2018) 356.

²⁹⁵ Shange N ‘Armed guards for crime-ridden hospitals in Mpumalanga’ *TimesLive* 5 June 2018 available at

The approach taken in Mpumalanga is reminiscent of that in the Nigerian comparative example, where resources are used to protect the government and its politicians, and is suggestive of a broader environment where crime is not under control, given the extent to which households experience household crime.²⁹⁶ Available resources are then employed to protect the state itself rather than the people. The centralisation under a single provider also raises the question of the extent to which this may in fact constitute a large provincial quasi-policing force.

5.7.8 Harnessing of traffic policing

A further development in these provinces is the growing perception that, drawing on the example of Gauteng, provincial traffic police have an ostensible role to play in crime prevention. For instance, in February 2018 the North West MEC announced the handover of 20 vehicles to provincial traffic officials. Although the vehicles were for traffic officials, the MEC made remarks which signalled that the intention was to use traffic officials for broader policing:

We endeavour to intensify our efforts in maintaining a high level of safety, with a specific focus on identified priority crimes such as human trafficking, drug trafficking, crimes against women, children and elderly people, gender-based violence, sexual offences and other contact crimes.²⁹⁷

All provinces deploy traffic police, but they have not expressly indicated that they will be used for crime control.

5.8 Conclusion

All the provinces have demonstrated some attempt to intervene in policing. This occurs primarily in relation to identified failures of the SAPS, as outlined in Chapter 4, particularly failures which are province-specific.

The primary legislative role is one of oversight. This is politically difficult in practice, not least because of the lack of powers accorded in order to do so; provincial politicians also tend to be less politically powerful than national politicians and national public servants, even those within the same political party as them. While some degree of moral political authority is exercised by ruling-party provincial politicians over national functionaries, this is not the case in relation to opposition politicians. Where provinces attempt to exert oversight, they are rebuffed, or their recommendations ignored. The inevitable conclusion is that overseeing a higher level of government is simply not a viable constitutional scheme, as such measures are not accompanied by actual means of implementation. An example is KwaZulu-Natal after political control shifted to the ruling party: there was strong engagement toward reform of the police, but was strongly rebuffed – again illustrating the limits of oversight.

The limited budgets available for safety departments further constrain the role of the provinces. In spite of these limitations, the ‘big three’ provinces in particular have demonstrated significant attempts to intervene. The interventions occur particularly where the SAPS has failed to respond to

<https://www.timeslive.co.za/news/south-africa/2018-06-05-armed-guardes-for-crime-ridden-hospitals-in-mpumalanga/> accessed 15 August 2019.

²⁹⁶ In the first Victims of Crime Survey conducted in 1997, Mpumalanga’s results were similar to those of Gauteng in terms of the percentage of households experiencing crime. The 2017/18 Victims of Crime Survey records that the province had the highest percentage of households experiencing crime in that year, at 8.9 per cent, compared to the national average of 7.5 per cent.

²⁹⁷ ‘North West government hands over 20 new cars to traffic officials’ *African News Agency* 13 February 2018 available at <http://www.africanews24-7.co.za/index.php/southafricaforever/north-west-government-hands-20-new-cars-traffic-officials/> 15 August 2019.

the specificities of policing in the province, such as seasonal demand, a problem crime-type, a call for police reform, firearms proliferation, stock theft, or the needs of rural communities.

Although provincial engagement occurs regardless of political control of the province, the manner in which provinces attempt to engage appears to depend to some degree on whether there is political homogeneity or heterogeneity between national and provincial government. The most favourable arrangement for cooperative interaction appears to be homogeneity between national and provincial government, where electoral support at provincial level for the ruling party is nevertheless credibly contested.

Examples include Gauteng and the Northern Cape, where there has been strong provincial engagement that has been broadly tolerated by the SAPS – and which has had positive effects. Both provinces are controlled politically by the ANC, as they have been for some time, but their electoral support is reasonably contested by opposition parties. Similarly, the Western Cape under homogenous political control in the 2000s saw strong interaction between national and provincial government on policing. This suggests that engagement in policing at provincial level is seen by political parties as important when success at the polls is not a foregone conclusion.

Heterogeneous provincial political control, by contrast, has seen two opposing approaches. In the early years of opposition control in KwaZulu-Natal, there appears to have been some disinterest in policing and a lack of engagement. By contrast, when heterogeneous political control returned to the Western Cape, a conscious decision was taken to engage in policing within the oversight mandate, engagement which has been resisted by the centre.

Finally, there are the provinces in which there is homogeneity and there is overwhelming electoral support for the ruling party. These tend to be smaller provinces and include most of them in which large areas are located in the former homelands. Financial constraints in these provinces are associated with limited attempts to intervene in policing and less urgency of engagement. Their audit results suggests less capacity, too. Yet even in these provinces, availing support to the SAPS by providing vehicles and additional patrolling where this is perceived to be lacking has emerged among the interventions. The lack of political contestation, however, suggests that it is less than urgent for these provinces to ensure that the SAPS ‘delivers’.

Thus, the typical interventions or approaches by the provinces include one or more of the following:

1. seeking to exert direct control over the national police;
2. control of the national police through political influence;
3. stretching the boundaries of oversight;
4. supporting the national police by providing it with policing resources such as training and vehicles;
5. providing for additional forms of quasi-policing patrolling;
6. seeking to harness the authority of traditional leaders;
7. ensuring the guarding of provincial assets;
8. supporting other forms of law enforcement in taking over certain policing roles; and
9. directly taking on quasi-policing functions by extending other provincial mandates.

This is despite small budgets in comparison to the expenditure of the SAPS. The record suggests that with larger budgets, the ability to control those budgets, and a less limited constitutional framework,

provinces would seek to play a much larger role in addressing the failures of the SAPS, which often relate to province-specific circumstances.

The extent of provincial power over policing remains a battleground. In other power struggles over provincial powers, the courts have tended to adopt what Jaap de Visser refers to as a ‘parsimonious approach’ to attempts by the provinces to stretch the limits of their mandate.²⁹⁸ Will the courts’ approach be different in the case of policing, given that, by the Constitutional Court’s own admission, the powers actually accorded to the provinces by the Constitution in relation to policing, fell short of the requirements of the Constitutional Principles? Will this encourage a broader interpretation?

Both Gauteng and Western Cape leaders, ANC and DA, have at different times expressed frustration with the limited provincial mandate. The evidence in this chapter suggests that under the direction of capable provincial government, political direction by a province vastly improves performance of the SAPS, as evidenced by the pre-World Cup era. In the current legislative framework, a minister might delegate his or her powers of political control to provincial. The Constitution provides that a provincial executive “is responsible for” policing functions vested in it in terms of the Constitution, assigned to in terms of national legislation, or allocated to it in terms of national policing policy.²⁹⁹ The wording “responsible for” suggests political direction, as it echoes the wording used in relation to the Minister, who is “responsible for” policing. Thus it would be possible for national policy, determined by the Minister, to allocate political direction of some or all policing functions in a province, to a province.³⁰⁰

The allocation functions to a province described above would not however permit a fully-fledged provincial police service. Should such an aspiration – for a fully-fledged provincial police service – be met, and if so, is it possible in terms of the constitutional framework?

Chapter 2 suggests that a degree of development is required before subnational policing is associated with increased trust in policing – a key indicator. The level at which this is observed to occur is around the 0.8 level on the Human Development Index (HDI). At the current rate of improvement in the Western Cape, this level should be reached in 2035³⁰¹ and in other provinces later, which suggests moving to provincial polices service may be premature.

Furthermore, the question of constitutionality remains. Section 199(1) of the Constitution which provides for ‘a single police service’ is often cited. A similar provision was dealt with in the Constitution Court in *Potsane*³⁰² in relation to section 179(1) of the Constitution, which provides that ‘[t]here is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament’. The question in *Potsane* was whether legislation³⁰³ conferring prosecuting authority on military prosecutors in military courts is inconsistent with section 179(1). The unanimous court per Kriegler J, found it was not, relying partly on an historical contextual reading which suggested the provision was to effect the unifying of the various prosecuting services at the time, but did not rule out the existence of lesser services.³⁰⁴

²⁹⁸ De Visser J ‘Is Premier Zille Taking Chances with the Western Cape Community Safety Act?’ *Sangonet Pulse* 11 June 2013 available at <http://www.ngopulse.org/article/premier-zille-taking-chances-western-cape-community-safety-act> accessed 18 April 2018.

²⁹⁹ Section 206(4) Constitution.

³⁰⁰ Section 206(1) Constitution.

³⁰¹ Own calculations based on longitudinal UN HDI subnational data available at <https://globaldatalab.org/shdi/> accessed 30 November 2019.

³⁰² *Minister of Defence v Potsane and Another, Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2001 (11) BCLR 1137.

³⁰³ The Military Discipline Supplementary Measures Act 16 of 1999.

³⁰⁴ *Potsane* para 26.

The difficulty with using the *Potsane* judgment in support of a provincial police service is that an historical contextual reading as laid in Chapter 3 shows it was precisely provincial policing which the Constitution sought to rule out. An assignment of the executive function of policing by way of section 99 of the Constitution is only permissible in relation to functions ‘exercised or performed in terms of an Act of Parliament’ – but policing is exercised not only through the SAPS Act but also in terms of the Constitution, which is a higher order law than an Act of Parliament.³⁰⁵ Finally, delegation via section 228 is only possible between organs of state, the definition of which as a ‘department of state or administration’³⁰⁶ would seem to exclude Ministers and MECs. Thus, the provincial MEC would have no power over the policing function delegated to a provincial Department of Safety, which would be subject to the National Commissioner, and the national Minister. Thus a provincial police service as such is not possible in the current Constitutional framework and constitutional amendment would be required.

The situation in relation to municipalities, however, is significantly different. This is the subject of the next two chapters.



³⁰⁵ Section 2 Constitution 1996.

³⁰⁶ Section 239 Constitution “organ of state” means— (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution— (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

Chapter 6:

Municipal policing: On a national leash

6.1 Introduction

Local policing has important precedent in South Africa, dating as far back as the Durban City Police established in 1854, and the role of municipal police country-wide as a crime-prevention force multiplier was evident during the transition to democracy. An opportunity to build on local precedent in favour of municipal policing was, however, ensnared in political resistance at the time, owing to apartheid history and the inevitability of a lack of across-the-board ruling-party control at the local level. Yet, since then, significant obligations have been appended incrementally to municipal policing by ministerial fiat. The notion of local policing under local control continues to be contested as political control of municipalities in turn becomes increasingly contested, with plans in the offing to subsume municipal police under the national police even while additional obligations are placed on municipal policing.

6.2 Municipal policing before 1993

Before the transition, three types of municipal police existed. First, there was the Durban City Police, which constituted a modern and effective city police service – and an alternative source of policing authority to the SAP. Secondly, there were the security departments and ‘protection services’ associated with ‘white’ municipalities, which, although focused on protecting the interests of municipalities, had taken on some crime prevention functions. Thirdly, there existed ‘municipal police’ associated with propping up Black Local Authorities (BLAs) – structures created by the apartheid government to ‘govern’ black municipal areas. These three types of policing influenced the constitutional and legislative framework for local government policing.

6.2.1 Durban City Police

In Durban (now contained in the eThekweni Metropolitan Municipality), the history of local government policing took a trajectory with important implications for the debate on municipal policing at the transition.¹ Modelled on the British constabulary, the municipal ordinances establishing the Durban Police in 1854 were similar to the 1835 Act of the British parliament that established borough and county police in Britain.² In 1854 Durban attained³ the status of a borough; policing was placed under the control of a police board which comprised the mayor, a councillor and the resident magistrate.⁴ The passing of the Municipal Amendment Law No. 21 of 1861 enabled the Durban Corporation to take over the police force on 1 October 1861.⁵

¹ Rauch J & Shaw M *Municipal Policing in South Africa: Development and Challenges* Monograph 67 (2001) Institute for Security Studies 6.

² Rauch and Shaw (2001) 6.

³ Under the Municipal Ordinance of 1854.

⁴ Poodhun EE (1987) *A long tradition of service – the Durban City Police* University of Durban Westville 174 available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1031.2730&rep=rep1&type=pdf> accessed 4 September 2018.

⁵ Poodhun (1987) 174.

After the establishment of the Union of South Africa in 1910, the South African Police (SAP) force was created in 1913.⁶ The various colonial police forces⁷ and the several urban police forces initially continued to exist independently after Union, but with the establishment of the SAP, all members of the pre-Union police forces (except the Borough Police of Durban and Pietermaritzburg) were either absorbed into the South African Mounted Riflemen (SAMR) or assigned to the SAP on condition that they accepted, in writing, the new service conditions.⁸ Out of approximately 9,500 men, only 95 refused to serve either in the SAP or the SAMR.⁹

The Durban Borough Police, however, continued to grow, and by the 1920s, it had, in addition to its large 'European' establishment of foot and mounted policemen, its own Criminal Investigation Department and an 'African Corps'.¹⁰ In 1935 Durban became a city and the city government took over the force, which became the Durban City Police (DCP).¹¹

In 1936 the SAP began negotiating to take over the DCP; however, the city council refused to sell the SAP its police stations in an attempt to resist the take-over.¹² In response, the SAP purchased large homes across the city, and the SAP's Colonel de Villiers arrived with a large contingent of SAP members, horses and rations, at which point the city agreed that some functions be taken over by the SAP but that the DCP be entrusted with the administration of municipal by-laws and traffic control while retaining full legal powers for its force.¹³

Thus, a distinct municipal police continued to persist in parallel with the SAP. Shaw records that in 1990 it was decided to double the size of the DCP over three years and to give the force a higher profile in policing crime.¹⁴ The immediate effect was that the DCP became more visible – perhaps inviting comparison with the SAP. During the early 1990s, instances of the DCP intervening in the SAP, particularly against its notorious Security Branch, were recorded.¹⁵

According to Rauch and Shaw, at the time of transition the DCP generally had a good public image, its members were well-trained and well-paid, and the force maintained a high level of uniformed presence in selected areas.¹⁶ The council had built DCP police stations in both townships and tourist areas such as the beachfront.¹⁷ The DCP was directly engaged in crime prevention and considered itself a police agency (although it also engaged in traffic policing) rather than a traffic department as in other cities.¹⁸ Durban thus set a precedent for other cities.¹⁹ However, its record of resistance to central control likely provided as much a warning as a positive example to the governing party in waiting, in the light of the record of BLA municipal police and the various municipal police associated with 'white' local government: an effective municipal police, that is to say, might undermine a national police service.

⁶ Police Act 14 of 1912.

⁷ Such as the Cape Mounted Riflemen, Cape Mounted Police, the Transvaal Police, the Natal Police, and the Orange River Colony Police.

⁸ Heymans, H (undated) 'History of the South African Police Force' *South African Mirror* available at <http://www.samirror.com/sapolice-history.html> accessed 5 September 2018.

⁹ Heymans, H (undated).

¹⁰ Poodhun (1987) 175.

¹¹ Poodhun (1987) 176.

¹² Poodhun (1987) 176.

¹³ Poodhun (1987) 176.

¹⁴ Shaw (1996) (30).

¹⁵ Poodhun (1987) 176.

¹⁶ Rauch & Shaw (2001) 7.

¹⁷ Rauch & Shaw (2001) 7.

¹⁸ Rauch & Shaw (2001) 7.

¹⁹ Rauch & Shaw (2001) 7.

6.2.2 Black Local Authority ‘municipal police’ in the 1980s

The state of emergency period of the 1980s saw the apartheid state appoint a large number of ‘municipal police’ in support of BLAs to crack down on political opponents; these police were notorious for their brutality and operated more like vigilante groups than policing agencies.²⁰ The Truth and Reconciliation Commission (TRC)²¹ records that the collapse of BLAs and the climate of ‘ungovernability’ from 1985 onwards saw the introduction of auxiliary forces, black municipal police and special constables into black townships.²² Special constables, or *kitskonstabels* (‘instant constables’), were usually unemployed African men with few educational qualifications who were trained for six weeks.²³ Municipal police were attached to BLAs and trained for three months by the SAP and paid by the SAP.²⁴

Transgressions by special constables and municipal police were conflated in the public mind, and ‘municipal police’ came to refer to any of these police.²⁵ Although municipal police were primarily used to guard government installations in townships, they gained a reputation for lawlessness and violence: in the eight months preceding April 1980, some 349 were charged with serious offences such as murder, robbery assault and rape.²⁶ By the late 1980s, there were 14,000 municipal police.²⁷ The TRC concluded that special constables and municipal police ‘served to provide an armed capacity to those pro-government individuals or groupings that the state sought to defend and promote, particularly Inkatha’.²⁸

Owing to the negative connotations of the term ‘municipal policing’, many proponents of local policing began using designations such as ‘city police’ or ‘metropolitan police’ to escape comparison with apartheid municipal police. But the aspersions did not disappear, and even after the issue was legislatively relatively moot, negative comparisons with apartheid municipal policing were still drawn in the media.²⁹ This was at the same time that ‘white’ local government made widespread use of municipal policing, a practice that embodied different concerns.

6.2.3 Paramilitary municipal security departments and traffic policing in the 1980s

The expansion of the DCP in the 1990s echoed the earlier trend at the beginning of the 1980s for municipalities to engage more seriously in crime prevention independently of the SAP. Shaw argues that in the late 1980s, the tendency of the SAP to focus on political unrest resulted in municipal traffic

²⁰ Shaw (1996) (30).

²¹ The TRC legislation is based on the final clause of the Interim Constitution of 1993 and was passed in Parliament as the Promotion of National Unity and Reconciliation Act 34 of 1995.

²² Truth and Reconciliation Commission (TRC) (1998) Truth and Reconciliation Commission of South Africa Report 2 182.

²³ TRC (1998) 183.

²⁴ Rauch (2001) 4.

²⁵ Rauch (2001) 4.

²⁶ TRC (1998) 184.

²⁷ Rauch (2001)

²⁸ TRC (1998) 187.

²⁹ See McKenzie K ‘Municipal policing: Is this a core local government function?’ *Engineering News* 3 October 2003.

departments, which had been established in the 1930s,³⁰ becoming more like the SAP in that they were armed, and often pursued criminals, in an attempt to address crime.³¹

Shaw records that resolutions passed by white municipal councils increased the powers of traffic officers and expanded their function to include not only policing traffic regulations but also fighting crime, with the result that some traffic agencies began to resemble paramilitary policing forces, with traffic officers increasingly carrying side-arms and wearing military-type uniforms and combat boots.³² Shaw further records that many such municipal police resembled small-town American sheriffs' departments in make-up and organisation, with many traffic and security managers of the richer local authorities visiting police departments in the United States and elsewhere, as well as attending management training at overseas police training institutions.³³

In addition to traffic police, in some instances municipalities created separate security departments which operated independently of traffic enforcement.³⁴ The many municipal authorities that established substantial security departments sought to protect council property from the effects of political conflict, with the result that over time many of these were used to act as a counter to crime generally, such that municipal security officials patrolled certain city areas and moved beyond a brief originally confining them to the protection of council property.³⁵

In a 2001 paper, Rauch and Shaw argue that the establishment of municipal security departments may have served in some instances to isolate the relevant traffic police from becoming overly paramilitary.³⁶ However, they conclude that traffic police officers did not entirely avoid the trend toward paramilitarism characteristic of almost all security formations in the last decade of white rule.³⁷

As a consequence, post-1994 South Africa inherited, with few exceptions, municipal traffic and security departments that engaged in crime prevention as a central pillar of their work.³⁸ The extent to which local agencies were involved in crime prevention, and the nature of specific activities, varied, with some municipal security departments or traffic police recording responses to crisis calls from members of the public, which in some cases comprised more than 50 per cent of their work.³⁹

Thus, municipal police engaged in daily crime prevention already existed at the time of the transition. Their record of serving 'white interests' and paramilitary demeanour would lead ANC negotiators to seek to limit their power, given that it was at local government level that the ANC was unlikely to have hegemonic political control. This influenced the content of the Interim Constitution.

6.3 Interim Constitution of 1993

The negotiations for the Interim Constitution took place while municipal police were already operating to address crime – in 'white' towns with paramilitary demeanour. This needed to be

³⁰ After the traffic function was transferred from the South African Police (SAP) to local authorities.

³¹ Shaw, M (1996) 'Metropolitan and Municipal Policing' in *Policing the Transformation: New issues in South Africa's crime debate* Monograph 3 Institute for Security Studies 30.

³² Shaw (1996) 30

³³ Shaw (1996) 30.

³⁴ Rauch and Shaw (2001) 5.

³⁵ Shaw (1996) 30.

³⁶ Rauch & Shaw (2001) 5.

³⁷ Rauch & Shaw (2001) 5.

³⁸ Besdziek, D (1996) *Options for City Police Services* Occasional Paper 4 (1996) Institute for Security Studies

2.

³⁹ Besdziek (1996) 2.

curtailed, and thus the Interim Constitution sought a veto and level of control from a higher level of government, as well as limiting the ambit of their powers.

The Interim Constitution provided that the Act establishing the SAPS should make provision for the establishment by any local government of a municipal or metropolitan police service, provided that such a police service may be established only with the consent of the relevant MEC of the province.⁴⁰ The MEC was to determine the powers and functions of such a police service, subject to national legislation and constitutional limitation.⁴¹ The constitutional limitation was that the powers of any such municipal police were to be limited to crime prevention and the enforcement of local by-laws.⁴² Given that the Constitution referred to 'investigation of crime' as a SAPS function, the omission of this function made it clear that this was not to be a municipal policing function. Traffic policing was also omitted from the ambit of municipal police. The Interim Constitution thus explicitly rejected the independent model of the DCP, with its threat of an alternate locus of policing control, by placing some degree of control over municipal police in the hands of provincial government and limiting its role to crime prevention and by-law enforcement.

However, the SAPS Act, passed in 1995, ignored much of the 1993 Constitution, in particular those provisions which sought to empower the provinces.

6.4 SAPS Act of 1995

The SAPS Act preceded the Constitution of 1996 and cemented the SAPS' central control over policing (see Chapter 3). While the Interim Constitution opened the door to a degree of provincial control over local police services, the original 1995 SAPS Act placed as much control as then constitutionally permissible in the hands of the national minister. The 1995 provisions provided that any local government may establish a municipal or metropolitan police service,⁴³ but that the national minister was to prescribe which provisions of the SAPS Act should apply *mutatis mutandis* to any local police service.⁴⁴ The national minister was also empowered to make regulations regarding their establishment, including which categories of local governments may establish municipal and which may establish metropolitan police services.⁴⁵ He or she was required to determine the minimum standards of training members of local police services should undergo.⁴⁶ Only the constitutional veto over establishment of local police services was accorded to provincial government. The legislation also sought to insulate the national government from civil claims⁴⁷ and to require the participation of municipal police in SAPS policing forums.⁴⁸

The limited role for provinces clashed with the aspirations of Gauteng, the most populous and powerful as well as crime-ridden province, as embodied in the 1996 Gauteng Green Paper.

⁴⁰ Section 221(3)(1) Interim Constitution.

⁴¹ Section 221(1)(c) Interim Constitution.

⁴² Section 221(3)(b) Interim Constitution.

⁴³ Section 64(1) SAPS Act (repealed).

⁴⁴ Section 64(2)(a) SAPS Act (repealed).

⁴⁵ Section 64(2)(b) SAPS Act (repealed).

⁴⁶ Section 64(3) SAPS Act (repealed).

⁴⁷ Claims for damages in relation to the actions of local police services were to be for the account of the local government concerned (s 64(4) SAPS Act (repealed)).

⁴⁸ At least one member of any local police services established should represent the local service on every relevant community police forum or sub-forum (s 64(6) SAPS Act (repealed)).

6.5 Gauteng Green Paper of 1996

Gauteng province published a Green Paper on Metropolitan and Municipal Policing in March 1996, in the light of the Interim Constitution provision empowering provincial governments to determine the powers and functions of local police services. The ANC premier of Gauteng at the time, Tokyo Sexwale, sought to make an impact on crime. The Green Paper proposed that any local police service established in Gauteng should have officers empowered as peace officers⁴⁹, most of whom should be drawn from existing traffic services; there should be a provincial inspectorate to ensure maintenance of standards and service; a process of accreditation should apply to proposed police services; and such police services should not be funded by either provincial or national government.⁵⁰ While the passage of the Constitution rendered provincial competence to legislate on municipal policing moot, many of the Green Paper proposals found their way into national amendments to the SAPS Act in 1998. The principle regarding financing has served as an effective constraint on the establishment of municipal police, except by the wealthiest of metropolitan municipalities. Ironically, the ostensible reason for the provision was to prevent municipal police from being harnessed to protect the wealthy.⁵¹

The Green Paper was followed by a Gauteng Standing Committee on Safety and Security Report on the capabilities of various local governments at the time, which found that most traffic police had been drawn into functions outside their traffic enforcement mandate and acquired the relevant equipment and structured themselves accordingly.⁵² Despite the championing of local police by the Gauteng ANC, the attitude of national government was, according to Rauch, unclear.⁵³ Dirk Besdziek records that the SAPS ‘vigorously opposed’ city police services, supposedly because it would lead to ‘unnecessary fragmentation’.⁵⁴ Thus is it that the Constitution of 1996 provides sparsely for municipal police.

Consequently, while the Gauteng ANC sought more policing at local level, the national ANC resisted it; thus, within the ANC itself, the issue of centralised policing remained contested. The 1996 Constitution reflects this – by leaving the issue to be resolved in national legislation.

6.6 Constitution of 1996

The Constitution of 1996 provides simply that ‘[n]ational legislation must provide a framework for the establishment, powers, functions and control of municipal police services’.⁵⁵ Indeed, even this sparse provision was almost omitted from the final Constitution and inserted at the last minute on the insistence of the Democratic Party (DP).⁵⁶ The ANC’s Policy Proposals for the Final Constitution⁵⁷

⁴⁹ In terms of s334(1) of the Criminal Procedure Act 51 of 1997, the Minister may empower any category of persons to be peace officers for particular purposes, such as powers of arrest in relation to particular offences.

⁵⁰ Rauch (2001) 10. Given that the Interim Constitution empowered provinces to legislate on structure and functioning only, it is unclear whether the latter financially limiting proposal would have been within the power of the provincial government to legislate. The financial limitation had appeared in the draft SAPS Act published in 1994, but was not retained in the 1995 version of the SAPS Act, according to Besdziek (1996) 7.

⁵¹ Rauch (2001) 10.

⁵² Besdziek (1996) 7.

⁵³ Rauch (2001) 10.

⁵⁴ Besdziek, D (1996) 2.

⁵⁵ Section 207(7) Constitution, 1996.

⁵⁶ Rauch J & Shaw (2001) 8.

⁵⁷ ANC African National Congress (1995) ‘ANC Policy Proposals for the Final Constitution 15 June 1995’ available at <http://www.anc.org.za/content/anc-policy-proposals-final-constitution> (accessed 10 September 2018).

(dated June 1995) did refer to municipal policing and sought not to rule out municipal police but to ensure that the powers accorded would be in the hands of the national legislature, which it controlled.⁵⁸ The proposals make oblique reference to ‘current problems experienced regarding dual authority over policing agencies’ and the ANC ‘s commitment to the creation of a ‘single police service’.⁵⁹ The national legislation ultimately enacted in 1998 constrains the establishment of municipal police, reflecting the ongoing debate.

6.7 Debate on amendments to SAPS Act of 1998

According to Rauch and Shaw, there was little debate on the future structure and function of municipal police services, as there was opposition in principle to the establishment of municipal police services.⁶⁰ Ultimately, the SAPS Act amendments of 1998 created a plethora of national obligations and requirements. The Constitution obliges national government to pass legislation but provides no guidance as to its content. Effectively the national legislation disempowers municipalities which seek to harness their own police services against crime. The reasons for this lie partly in the history described above, but also relate to political considerations.

6.7.1 Tarnished history of ‘municipal police’

Opponents of municipal policing used the record of the relatively untrained BLA municipal police against the establishment of municipal police. At a workshop on metropolitan policing held by the Gauteng Ministry for Safety and Security in February 1996, numerous delegates said city policing could be perceived by some communities as regression to that form of policing.⁶¹ Rauch points out that comparing apartheid municipal police to municipal policing in post-apartheid South Africa was ‘disingenuous as no one contemplated building on this old system of apartheid control’.⁶² Indeed, BLA municipal police were administered through Pretoria, not local (white) municipal authorities or even the BLAs themselves. This did not stop some SAPS managers from making these ‘disingenuous’ comparisons and warning that ‘reintroducing’ municipal police would lead to a ‘second-class police agency’.⁶³ Rauch notes the irony that these undesirable members of apartheid municipal police were absorbed into the SAP in 1989.⁶⁴

The argument resulted in national legislation that required uniform national standards for municipal police and imposed obligations on provincial government to exercise oversight of (but not directly control) municipal police. The Portfolio Committee in August 1998 rejected DP member Douglas Gibson’s concern that a requirement imposing ‘national standards’ would make it impossible for some towns to maintain standards; he argued that different towns would have different needs and budgets and what was needed for a big city would not be necessary in a small town.⁶⁵ Members rebutted his

⁵⁸ African National Congress (1995) paragraph 6.44: ‘The establishment of municipal or metropolitan police, and the resolution of the question of tribal police, should be left to national legislation, which should not be precluded by the constitution.’

⁵⁹ African National Congress (1995) paragraph 6.30.

⁶⁰ Rauch & Shaw (2001) 8.

⁶¹ Besdziek (1996) 2.

⁶² Rauch (2001) 4.

⁶³ Rauch (2001) 5.

⁶⁴ Police Third Amendment Act 76 of 1989.

⁶⁵ Parliamentary Monitoring Group (1998b) ‘Safety and Security Portfolio Committee and Security and Justice Select Committee Joint Meeting 19 August 1998 South African Police Service Amendment Bill [B39-98]: Finalisation and Voting’ available at <https://pmg.org.za/committee-meeting/6293/> accessed 10 September 2018.

concern by saying that standards were indeed necessary ‘to maintain certainty’ and ‘avoid past abuses’, presumably again a reference to the apartheid history of ‘municipal police’.

6.7.2 Political control of municipalities

The question of the political allegiance of municipal police also played a role. In the Portfolio Committee discussion in May 1998, the primary question asked by the Portfolio Committee was ‘Where does municipal police’s allegiance lie?’⁶⁶ The question reveals that issues of political allegiance were uppermost in legislators’ minds. The question was a reflection of the inevitability that some municipalities would fall under political control different from that of national government. Persisting apartheid spatial effects, despite demarcation efforts, meant the ANC did not have political control of all local councils and therefore not of all municipal police. In the first local government elections of November 1995 (postponed to 1996 in parts of the Western Cape and KwaZulu-Natal due to demarcation disputes, registration problems and political violence), the ANC, according to its own press statement, won an outright majority of seats in only 56 per cent of councils (387 of 686 councils).⁶⁷ The November 1995 result was worsened by the July 1996 results of postponed elections in Kwazulu-Natal that saw the ANC earning fewer seats than the IFP in the province.⁶⁸ These were the results in mind during the parliamentary deliberations in 1998.

The SAPS itself, furthermore, was determined to maintain hegemony.

6.7.3 Preserving SAP hegemony

From the point of view of the SAPS, the priority was to establish and clarify the nature of the national police force and to ensure its democratic transformation, not to create any competitors. Rauch suggests that there was concern that new municipal police agencies ‘would undercut the functions of, and cause conflict with, the SAPS and that all available resources should be directed at the national police’.⁶⁹ Gauteng provincial legislature researcher Dirk Beszdiak was somewhat more jaundiced, arguing that it was rather the case that SAPS felt supporting the establishment of municipal police would be an admission of failure by the SAPS.⁷⁰

6.7.4 Lack of lobbying by local governments

Rauch argues furthermore that no local government consistently pushed municipal policing.⁷¹ Municipal officials were more concerned with restructuring municipal authorities and the immediate challenges of providing services to those excluded under apartheid.⁷² Although individual officials

⁶⁶ Parliamentary Monitoring Group ‘Joint Meeting between the Portfolio Committee on Safety and Security and Select Committee on Security and Justice: South African Police Amendment Bill [B39-98] Discussion 20 May 1998’ available at <https://pmg.org.za/committee-meeting/6285/> accessed 18 September 2018.

⁶⁷ ANC ‘1995 Local Government Elections’ (1995) available at <http://www.anc.org.za/content/1995-local-government-elections> (accessed 4 September 2018). Data on the 1995/1996 local election are not readily available to confirm the accuracy of the ANC press statement; nevertheless, if the ANC believed the statement to be correct, it would have informed approaches to the debate on municipal policing.

⁶⁸ SA History Online (2014) ‘Timeline 20 years of Democracy 1994 to 2014’ available at <https://www.sahistory.org.za/article/timeline-20-years-democracy-1994-2014> accessed 10 September 2018.

⁶⁹ Rauch & Shaw (2001) 8.

⁷⁰ Beszdiak (1996) 2.

⁷¹ Rauch & Shaw (2001) 8.

⁷² Rauch & Shaw (2001) 8.

and councillors as well as the Local Authority Security Association⁷³ lobbied for the establishment of municipal police services, these were never concerted campaigns driven by public opinion.

This may be because they already had some policing powers. Municipalities were engaged in crime prevention activities and did not need new legislation to do so, as all traffic officers had been accorded 'peace officer' status in 1989.⁷⁴ Various 'security departments' such as the Johannesburg Security Department, initially established to protect council property against crime and political unrest, had already moved into active anti-crime operations outside council property and even pursued 'intelligence' activities.⁷⁵

Besdziek maintained that 'with few exceptions, municipal traffic and security departments are at present engaged in crime prevention as a central pillar of their work'.⁷⁶ He saw the Interim Constitution provisions as simply reflecting the status quo at the time. The forms of policing recorded by Besdziek have persisted, in tandem with metropolitan policing. Such policing was embraced with particular fervour by opposition politicians.

6.7.5 Distancing from opposition policy

Rauch argues that opposition from national government stemmed from the fact that municipal policing was associated with the small opposition DP, which had included it in the party's anti-crime policy.⁷⁷ This, she argues, raised the suspicion that municipal policing was 'only for the wealthy'.⁷⁸ She claims the view changed over time after local government elections reflected the degree to which crime was a point of political pressure at local level.⁷⁹ The redesign of local government boundaries ensuring cross-subsidisation between rich and poor areas undercut fears that municipal police would be available only to those who could afford to pay for their services. The resultant national legislation was a compromise, limiting the powers of the municipal police and ensuring that only local (and by definition more restricted) resources could be used to fund their establishment – effectively, and ironically, ensuring that only the wealthiest municipalities could afford it.

6.7.6 Concerns about undermining traffic policing

Existing traffic services officials raised concerns that traffic services would be undermined.⁸⁰ This led to the recommendation that the Bill include, amongst the functions of the executive head of a municipal police service, the responsibility to ensure that traffic policing services not be prejudicially affected by the establishment of a municipal police service and that regulations include the requirement that the application for municipal policing, to be submitted to the MEC, satisfy the MEC that traffic policing services would not be prejudicially affected.⁸¹ The national legislation passed on municipal policing reflects all these issues.

⁷³ Besdziek (1996) 1.

⁷⁴ In terms of the Road Traffic Act 29 of 1989.

⁷⁵ Besdziek (1996) 1.

⁷⁶ Besdziek (1996) 2.

⁷⁷ Rauch & Shaw (2001) 9.

⁷⁸ Rauch & Shaw (2001) 9.

⁷⁹ Rauch & Shaw (2001) 9.

⁸⁰ The National Task Group on Municipal Police Services: Public Hearing on the South African Police Service Amendment Bill 20 May 1998.

⁸¹ Parliamentary Monitoring Group (1998a) 'South African Police Amendment Bill: Discussion' available at <https://pmg.org.za/committee-meeting/6285/> accessed 10 September 2018.

6.8 National legislation on municipal policing

Five main points reflect the issues in the resultant amendments to the SAPS Act in 1998.⁸² First, the traffic services are preserved. Secondly, the conditions for establishment are onerous and include the requirement that a 24-hour service be offered. Thirdly, training standards exceed those applicable to SAPS recruits. Fourth, while there is provision for local control and local civilian oversight of municipal police, the MEC and the minister have powers to intervene whenever national standards or conditions for establishment fail to be met. Fifth, it is mandatory for municipal police to cooperate with SAPS and participate on all relevant forums.

To elaborate on these points in order, it is the case, first, that traffic services are protected. The legislation limits the functions of a municipal police service to three categories:

- traffic policing, subject to any legislation relating to road traffic;
- the policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and
- the prevention of crime.⁸³

Thus, municipal police services are accorded traffic policing powers. Municipalities already have traffic policing powers;⁸⁴ an interpretative section ensures the persistence of these existing powers.⁸⁵ However, no municipal service may include the word 'police' in its name unless the service has been established as a municipal police service under section 64A.⁸⁶ Thus today there exist 'traffic services' and 'law enforcement', neither of which have the word 'police' in their names. Special provision is made for the Durban City Police to be deemed to be so established.⁸⁷

Secondly, the establishment process and requirements are onerous. Any municipality⁸⁸ – metropolitan, district or local⁸⁹ – may apply to the provincial MEC for the establishment of a municipal police

⁸² South African Police Service Amendment Act 83 of 1998. The provisions replaced the existing provisions regarding the powers and functions of municipal police services.

⁸³ Section 64E(a)-(c) SAPS Act.

⁸⁴ Municipalities already had traffic policing powers in terms of the constitutional provisions on local government – see section 156(1) Constitution, 1996 read with Part B of Schedule 5, Constitution 1996.

⁸⁵ Section 64 SAPS Act. The section provides that 'nothing in the chapter should be interpreted so as to derogate from the powers of the Minister of Transport or the member of the Executive Council responsible for transport and traffic matters, nor shall it be interpreted as conferring any power on any functionary to interfere with the exercise of their powers by the Minister of Transport or the member of the Executive Council responsible for transport and traffic matters.'

⁸⁶ Section 64Q(3)(a) SAPS Act. Any municipal police service already in existence with 'police' in its name was required to change its name before 1 January 1999, although the National Commissioner was entitled to extend the deadline (s 64Q(3)(b) SAPS Act).

⁸⁷ Special provision is made for the Durban City Police (DCP) to be deemed to be established under section 64A and to continue to exist as such until 30 September 1999 (s 64Q(1)(a) SAPS Act). If an application is lodged under section 64A for the DCP on or before 30 September 1999, then the DCP continues to exist until the application is approved or not (s 64Q(1)(b) SAPS Act).

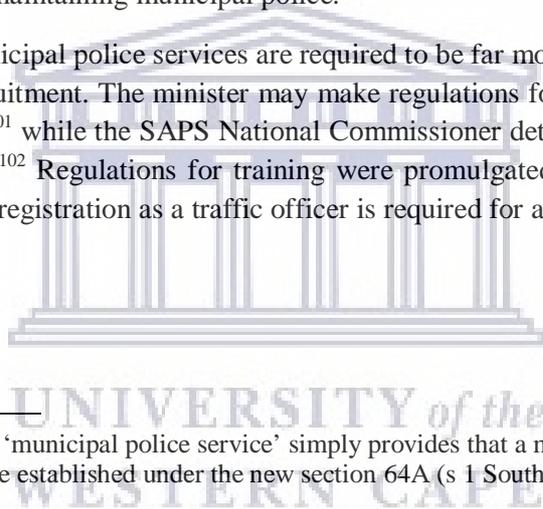
⁸⁸ Municipalities are defined in the Constitution, which provides that the local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic (s 151(1)).

⁸⁹ There are three types of municipalities: Category A municipalities, which have exclusive municipal executive and legislative authority in their area (metropolitan municipalities); Category B municipalities, which share such authority with the Category C municipality into which area it falls (local municipalities); and Category C municipalities, which have such authority in an area that includes more than one municipality (district municipalities). The legislation does not restrict the establishment of municipal police by type of municipality.

service.⁹⁰ The provincial MEC⁹¹ has the power to approve an application only if the municipality meets the nationally legislated and prescribed requirements,⁹² and only after consultation with the National Commissioner, after consultation with any relevant metropolitan council, and with the approval of other provincial MECs, namely those of local government, finance, transport, and traffic.⁹³

Among the requirements is that the municipality must provide a five-year business plan, have the resources at its disposal to provide for a municipal service which complies with national standards on a 24-hour basis,⁹⁴ and must 'make provision for civilian supervision' of the municipal police service.⁹⁵ Furthermore, all expenses by or in connection with the establishment, maintenance and functioning of a municipal police service are for the account of the municipality in question.⁹⁶ That cost is likely to be high, not least because of the onerous 24-hour service requirement. The SAPS itself runs satellite police stations which do not provide 24-hour services.⁹⁷ A 24-hour service has serious cost implications in terms of providing sufficient employees for the necessary shifts. Furthermore, the municipality must show that traffic policing services will not be prejudicially affected by the establishment⁹⁸ and that the establishment of the municipal police service will improve effective policing in that part of the province.⁹⁹ These onerous requirements have ensured that only metropolitan municipalities succeeded in maintaining municipal police.¹⁰⁰

Thirdly, the members of municipal police services are required to be far more qualified than are SAPS members at the point of recruitment. The minister may make regulations for the effective functioning of municipal police service,¹⁰¹ while the SAPS National Commissioner determines national standards including training standards.¹⁰² Regulations for training were promulgated in 1999.¹⁰³ According to these standards, training and registration as a traffic officer is required for appointment.¹⁰⁴



⁹⁰ The SAPS Act definition of a 'municipal police service' simply provides that a municipal police service means a municipal police service established under the new section 64A (s 1 South African Police Service Act 68 of 1995 (SAPS Act)).

⁹¹ A Member of the Executive Council in the SAPS Act is defined as meaning the MEC referred to in section 217 of the Interim Constitution. However, transitional provisions in section 3(1)(e) of Schedule 6 of the Constitution of 1996 provide that this must be construed as a reference to an MEC under the Constitution.

⁹² Section 64A(2) SAPS Act.

⁹³ Section 64A (3) SAPS Act.

⁹⁴ Section 64A(2)(b) SAPS Act.

⁹⁵ Section 64A(2) (d) SAPS Act.

⁹⁶ Section 64A(6) SAPS Act.

⁹⁷ See, for example, Limpopo Mirror (2016) 'Satellite police station opens doors again' available at <https://limpopomirror.co.za/articles/news/37849/2016-07-21/satellite-police-station-opens-doors-again> accessed 10 September 2018; Steelburger News (2016) 'Driekop satellite station still disappoints' available at <https://steelburgernews.co.za/222130/driekop-satellite-station-still-disappoints/> accessed 10 September 2018.

⁹⁸ Section 64A (2)(c) SAPS Act.

⁹⁹ Section 64A(2)(e) SAPS Act.

¹⁰⁰ Swartland Municipality abandoned its police service due to cost.

¹⁰¹ Section 64P(1) SAPS Act. In terms of process, the minister may effect changes to draft regulations published for comment after receiving comment without publishing the amendments (s 64P(2)(a) and (b) SAPS Act).

¹⁰² Section 64L(1) SAPS Act.

¹⁰³ GNR132 of 5 February 1999: 'Determination of National Training Standards in terms of section 64I of the South African Police Service Act 68 of 1995'.

¹⁰⁴ Originally in terms of the Road Traffic Act of 1989 but now in terms of the National Road Traffic Act of 1996.

In 2019, it was reported that the City of Cape Town had lobbied the national Commissioner to remove the requirement, as it hindered efforts to increase the number of metro police.¹⁰⁵ The minimum requirements to become a traffic officer include being in possession of an appropriate diploma at an approved training centre,¹⁰⁶ being a fit and proper person,¹⁰⁷ and having undergone training in the laws applicable to the transportation of dangerous goods.¹⁰⁸ An applicant must have completed training at an institution accredited by the SAPS in modules which must also have been accredited by the SAPS.¹⁰⁹ (Persons appointed through transitional provisions from existing services, may obtain recognition of prior learning for some modules, and must complete the training for those modules for which recognition is not obtained.)¹¹⁰ In practice, municipalities provide the necessary training to candidates and appoint those who qualify.¹¹¹

By comparison, the SAPS regulations prescribe that an applicant to SAPS must be older than 16, be physically and psychologically fit, proficient in English and one other language, have a matric certificate and a drivers' licence, have no tattoos and no criminal convictions.¹¹² Even these requirements may and are regularly waived by the National Commissioner, who is responsible for all SAPS appointments.¹¹³ The regulations require the Commissioner to prescribe basic training for SAPS recruits, but these have not been prescribed formally via regulation or notice; at one point, SAPS recruits received only four months' training (see Chapter 4). According to SAPS officials, the current training involves a period of induction at a police station and then some months at police training college, but the training occurs after the initial recruitment.

Thus it is unsurprising that the average salary of a traffic officer or municipal police officer tends to exceed that of police constable: Faull found in 2007 that a fully qualified Johannesburg Metro Police Department (JMPD) officer, after two years of college and in-service training at various pay scales, earned R8,767 per month, which equated to roughly the same amount as a SAPS sergeant with five to eight years' experience.¹¹⁴ At the Durban City Police (DCP), Faull found in the same year that salaries started at R7,020 per month for the first year as a qualified constable, with constable salaries increasing each year in a band system ranging from R8,842 to R12,323.¹¹⁵ The legislation provides for a grace period for members of the DCP¹¹⁶ and existing traffic officers appointed to meet the new national training standards.¹¹⁷

¹⁰⁵ Thaw R 'City of Cape Town looking to ease metro police recruitment process' *Eyewitness News* 2 June 2019 available at <https://ewn.co.za/2019/06/02/city-of-ct-looking-to-ease-metro-police-recruitment-process> accessed 18 September 2019.

¹⁰⁶ Section 3D(1)(a) National Road Traffic Act 93 of 1996.

¹⁰⁷ Section 3D(1)(b) National Road Traffic Act 93 of 1996.

¹⁰⁸ Section 3D(1)(c) National Road Traffic Act 93 of 1996.

¹⁰⁹ Regulation 1(a) and (b) GNR.132 of 5 February 1999: Determination of National Training Standards in terms of section 64l of the South African Police Service Act 68 of 1995. These include criminal law, law of criminal procedure, law of evidence, human rights, administrative powers, powers derived from specific legislative provisions, labour relations, basic concepts of policing, community policing, relationship between municipal police services and other law enforcement agencies, use of force, selected fire-arm skills, practical survival techniques, prevention of police brutality, physical training, ethical policing, personal ethics, prevention of police corruption, and departmental forms.

¹¹⁰ Regulation 5 G.N.R 132.

¹¹¹ Most metros have Training Colleges or Academies.

¹¹² Regulation 11(1) GNR 203 of 14 February 1964.

¹¹³ Regulation 11(2) GNR 203 of 14 February 1964.

¹¹⁴ Faull A *City Blues: Corruption and Corruption Management in South Africa's Metropolitan Police Departments Paper 170* (2008) Institute for Security Studies 3.

¹¹⁵ Faull A (2008) 12.

¹¹⁶ Section 64Q(1)(c) SAPS Act.

¹¹⁷ Section 64Q(2)(a) and (b) SAPS Act.

Fourth, extensive intervention powers of oversight or intervention are provided for in relation to all three levels of government. At the local level, the municipal CEO is responsible to the municipal council for the functioning of a municipal police service.¹¹⁸ The municipal council appoints the executive head of the service,¹¹⁹ who must exercise direct control over the municipal police service, subject to the SAPS Act, national standards, and the directions of the CEO.¹²⁰ Municipal councils are further required to appoint a committee consisting of members of the council and such other persons determined by the council, to ensure ‘civilian oversight’ of the municipal police service.¹²¹ Thus, at the local level, there is accountability to the municipal council and to the civilian committee.

Provincial powers of intervention for any failure to maintain standards are exerted through the National Commissioner and national minister; failure to act provincially triggers national intervention. The National Commissioner has a range of intrusive investigative oversight powers.¹²² Any failure to maintain standards uncovered by the National Commissioner must be reported to the minister by the National Commissioner.¹²³ On receiving such a report, the minister may request the MEC to intervene in terms of section 139 of the Constitution.¹²⁴ If the MEC fails to intervene, the minister may intervene in terms of section 100 of the Constitution.¹²⁵

Both the MEC and ministers’ powers are extensive.¹²⁶ If the MEC (or minister) is satisfied of a failure to comply with the conditions of establishment or national standards, notice may be given of the failure to comply and a period of time stipulated to rectify the failure,¹²⁷ which period may be extended.¹²⁸ If the municipality fails to comply, the MEC may appoint an official of provincial government (and the minister may appoint an official of national government) as an administrator to ensure compliance with the conditions and standards, and may also take such other steps as may be necessary.¹²⁹ Once compliance is achieved, the MEC (or minister) may (but is not obliged to)

¹¹⁸ Section 64B SAPS Act.

¹¹⁹ Section 64C(1) SAPS Act.

¹²⁰ Section 64C(2) SAPS Act.

¹²¹ Section 64J(1) SAPS Act. The committee must on request of the council advise the council on matters relating to the municipal police service; advise the CEO of the municipality on the performance of his functions in relation to the municipal police service; perform such functions as the MEC, the council, or the CEO consider necessary to ensure civilian oversight; promote accountability and transparency; monitor the implementation of policies and directives issued by the CEO and report to the council and to the CEO; perform functions assigned by the council or the CEO; evaluate the functioning of the municipal police service and report to the CEO and to the council (s 64J(2)(a)-(g) SAPS Act).

¹²² The National Commissioner may request and obtain documents and information under the control of the municipal police service or municipality and has the power to enter any building or premises under the control of the municipal police service or municipality; and is entitled to all reasonable assistance from any member of the municipal police service or employee of the municipality (s 64L(3) SAPS Act)

¹²³ Section 64L(4) SAPS Act. Section 139 of the Constitution provides for provincial supervision of local government when a municipality cannot or does not fulfil an executive obligation.

¹²⁴ Section 64M(1) SAPS Act.

¹²⁵ Section 64M(2)(a) SAPS Act. Section 100 of the Constitution provides for the national executive to intervene when a province cannot or does not fulfil an executive obligation.

¹²⁶ They include the power to request and obtain documents and information from the municipal police service or municipality; enter buildings and premises under the control of the municipal police service or municipality; and is entitled to receive all reasonable assistance from any member of the municipal police service or employee of the municipality (s 64N(1) SAPS Act).

¹²⁷ Section 64N(2) SAPS Act.

¹²⁸ Section 64N(3) SAPS Act.

¹²⁹ Section 64N(4)(a) and (b) SAPS Act. The administrator may exercise all the powers and perform all the duties of the executive head of the municipal police service (s 64N(5) SAPS Act).

terminate the appointment of the administrator.¹³⁰ All expenditure related to the intervention, is for the account of the municipality.¹³¹

Fifth, coordination with SAPS is mandatory, in ways which are likely to be relatively burdensome. All municipal police services must serve both on CPFs¹³² and on 'policing coordinating committees'.¹³³ The municipal police service must serve on every CPF within the area of jurisdiction of the municipal police service; for metropolitan police services, this implies a significant number of police precincts. For example, there are more than 50 precincts in greater Cape Town. In addition to participating on committees, on a practical level, municipal police must bring persons they arrest to a police station under the control of the SAPS, or in the case of a warrant, to the place mentioned in the warrant, as soon as possible, to be dealt with in terms of provisions of the Criminal Procedure Act dealing with arrested persons.¹³⁴ Close cooperation from SAPS is thus required for arrests by municipal police to be adequately processed.

Despite the apparent attempt to limit the proliferation of municipal police, in subsequent years more and more policing powers have been accorded to local municipal police, to local law enforcement, and to local traffic enforcement.

6.9 Municipal police officials' additional powers after 1998

The minister has accorded significant powers and obligations on members of municipal police services.¹³⁵ Additional obligations which are largely within the ambit of the SAPS have been imposed on municipal police – with no funding. These additional functions stretch the boundaries of 'crime prevention' and often stray into the realm of investigation.

Municipal police officers have the powers of peace officers accorded by law, within the area of jurisdiction of the municipality, and also outside that area if in pursuit of a person reasonably suspected of having committed an offence within the jurisdiction of the municipality.¹³⁶ Peace officers have powers of arrest without a warrant in relation to any person committing an offence in their presence, any person reasonably suspected of committing a Schedule 1 offence¹³⁷, any person escaping from lawful custody, any person in possession of stolen property, and in a range of other circumstance, including desertion, failure to pay a fine, and illegal immigration (section 40 CPA) powers).¹³⁸

Many of the powers accorded by regulation in 1999 are usually associated with the investigation of crime.¹³⁹ Thus, municipal police have the Criminal Procedure Act (CPA) powers contained in section 21 (seizure under search warrant), section 22 (seizure without a search warrant), section 26 (entering

¹³⁰ Section 64N(6) SAPS Act.

¹³¹ Section 64N(7) SAPS Act.

¹³² Section 64C(2)(f) SAPS Act.

¹³³ Section 64C(2)(e) SAPS Act.

¹³⁴ Section 64H SAPS Act.

¹³⁵ Section 64F(2) SAPS Act. Under section 64P of the SAPS Act, the minister may 'make regulations regarding the effective functioning of municipal police services' while 64F(2) provides that municipal police officers may be accorded additional powers by the minister.

¹³⁶ Section 64F(3) SAPS Act.

¹³⁷ The more serious offences including murder, public violence, robbery sexual assault, theft, and fraud.

¹³⁸ Section 40(1)(a)-(p) Criminal Procedure Act 51 of 1977 (CPA).

¹³⁹ Regulation 10 GNR.710 of 11 June 1999: Regulations for Municipal Police Services: '10. Powers of a municipal police service.—The powers conferred upon a member of the Service by the legislative provisions referred to in Column 1 of Annexure 6, may, to the extent set out in Column 2 of that Annexure, be exercised by a member of a municipal police service.'

premises to obtain evidence), section 27 (power to use force against resistance to search), section 37 (power to take body-prints) and section 72 (release on warning), with the latter limited in the same way as it for traffic officers (see below).¹⁴⁰ There is no limitation of these powers to any offence type.

Municipal police also have powers in relation to the Stock Theft Act 57 of 1959: the power to demand a stock removal certificate (s8(3) and 8(8)) and power to arrest without a warrant on failure to give a satisfactory account of stock in possession or on reasonable suspicion of entering a place with intention to steal stock.¹⁴¹ Municipal police have powers in terms of s4 of the Tear Gas Act¹⁴² to inspect a factory or place where tear gas is manufactured or stored. They have the powers of police officials in terms of section 11 of the Drugs and Drug Trafficking Act,¹⁴³ on reasonable grounds of suspicion, to search, intercept, question, examine, seize, stop and redirect in relation to drug offences.

Furthermore, municipal police have the SAPS Act powers in section 13(4), (serve summons), (7)(c) (cordon an area for public order), (8) (set up a roadblock on the instructions of the head of the municipal police) and (11) (cordon off a crime scene). They have powers in terms of the Domestic Violence Act, section 2 (duty to assist at scene of domestic violence), section 4 (power to bring an application for a protection order on behalf of complainant) and section 8 (arrest on breach of a protection order), all subject to national instructions by the National Commissioner.

Thus, the empowering regulations seemed to have envisaged a role for municipal police on the scene in dealing with drugs and with domestic violence, as well as stock theft, in addition to municipal law enforcement and traffic policing. More recently, positive obligations are also imposed on municipal police in relation to ‘crowd management’,¹⁴⁴ with mooted legislation suggesting they be ‘first responders’ (see Chapter 7 below). All of this seems to take municipal police some distance away from their initial limited mandate.

In addition to municipal police, local traffic enforcement and local law enforcement also have significant powers.¹⁴⁵



¹⁴⁰ Municipal police, like traffic officers, do not have peace officer powers in terms of sections 25, 43, 59 and 179(1) of the Criminal Procedure Act. However, traffic officers have all CPA powers except those latter powers, while municipal police only have the CPA powers detailed in municipal regulations. It is unclear why the powers were formulated negatively in respect of traffic officer (‘all CPA powers except’ and positively in terms of Municipal Police (only ss21, 22, 26, 27, 37 and 72 of the CAPS). Many of the omitted sections refer to peace officer powers, which municipal police are in any event also accorded in the SAPS Act.

¹⁴¹ Regulation 10 GNR.710 of 11 June 1999

¹⁴² Act 16 of 1964.

¹⁴³ Act 140 of 1992.

¹⁴⁴ GN 307 of 20 March 2008: National Municipal Policing Standard for Crowd Management during Gatherings and Demonstrations (Government Gazette No. 30882). The executive head of a municipal police service is obliged to report any information regarding ‘potential violent disorder’ to the (national) Public Order Policing Unit and the Provincial Commissioner. The executive head ‘must’ also build ‘positive and constructive relationships with event organizers, community leaders and non-governmental organizations; and explore the potential for establishing formal liaison panels, to prevent and defuse community disorder in conjunction with institutions such as local authorities, civic associations, community policing forums and non-governmental organizations’. A local authority may, but is not obliged to, designate responsible officers within the jurisdiction of the municipal police service who will carry out the functions accorded in terms of the Regulation of Gatherings Act of 1993.

¹⁴⁵ It is unclear whether municipal police also have the powers of ‘law enforcement officers appointed by a municipality’, as they are technically ‘law enforcement appointed by a municipality’ (see below); it is possible that they do.

6.10 Local traffic enforcement and law enforcement powers

Traffic enforcement and law enforcement at local level continues to avail municipalities with the legal authority to provide some quasi-policing services. The powers of traffic police and law enforcement officers are subtly different from those available to municipal police. There is nothing preventing a municipality from availing itself of all three types of law enforcement, as has been done by the City of Cape Town.

Local traffic officers, in addition to their specific powers contained in section 3I of the National Road Traffic Act, such as the power to enter a vehicle, require a vehicle to stop, or impound a vehicle, have crime prevention powers. Traffic officers have been accorded the section 40 CPA peace officer powers of arrest, and most of the powers of police officers contained in the CPA, with some exceptions.¹⁴⁶ The section 72 police power to release an accused on warning in lieu of bail may only be exercised by traffic officers in respect of offences relating to failure to appear.¹⁴⁷ These CPA powers accorded to traffic officers are in relation to *any* offence, not only traffic offences.¹⁴⁸

In addition to traffic officers, most municipalities also have law enforcement officers. The declaration of law enforcement officers as peace officers by the minister in terms of the CPA, as per the relevant 2002 notice,¹⁴⁹ gave law enforcement officers powers in relation to by-law offences, as well as offences contained in various local-government related-laws,¹⁵⁰ offences in the Liquor Act of 1989, the Drugs and Drug Trafficking Act of 1992, and the Arms and Ammunition Act of 1969, as well as the serious criminal offences contained in Schedule 1 of the CPA such as murder, rape, robbery and theft.¹⁵¹

Until October 2018, the powers of law enforcement officers in relation to these offences extended to the issuing of written notices in terms of section 341 (non-criminal driving offences¹⁵²) and section 56 (criminal offences) of the CPA; the execution of warrants of arrest in terms of section 44 (general power to execute a warrant) and section 55(2) (warrant for failure to appear) of the CPA; section 41(1) powers (power to call upon a person suspected of an offence or witness to an offence to provide an address); and some section 40 CPA peace officer powers of arrest without a warrant in relation to some circumstances and some offences, including Schedule 1 offences.¹⁵³

¹⁴⁶ GNR.1396 of 22 July 1977 'Declaration of Persons as Peace Officers' Part 5(b) Schedule. Local traffic officers *do not* have the section 25 power to enter a premises in connection with state security or any offence, the section 43 power to request a warrant of arrest from a magistrate or justice, the section 59 power to grant bail before first appearance in respect of certain offences, or the section 179(1) power to issue a subpoena.

¹⁴⁷ Part 5(b), GNR.1396 of 22 July 1977: Regulations under section 334 'Declaration of persons as peace officers in terms of section 334 of the Criminal Procedure Act 51 of 1977 (Government Gazette No. 34583).

¹⁴⁸ Part 5(b) GNR 1396.

¹⁴⁹ G G 23143 Government Notice R209 of 19 February 2002.

¹⁵⁰ The Business Act 1991, the Occupational Health and Safety Act 1991, the National Building Act 1977, the Fire Brigade Services Act 1987, and provincial town planning ordinances.

¹⁵¹ Part 5(a) GNR 1396 of 22 July 1977: Regulations under section 334 Declaration of persons as peace officers in terms of section 334 of the Criminal Procedure Act (as amended).

¹⁵² Schedule 3, CPA: Speeding; driving without lights or licence plate; illegal parking; driving at prohibited times or places; driving a defective vehicle; driving an unlicensed vehicle; driving a vehicle without a driving licence.

¹⁵³ These powers to arrest a person without a warrant are: where the person commits an offence in the presence of the officer; on reasonable suspicion the person has committed a Schedule 1 offence; where the person has escaped from lawful custody; where the person is found at night in circumstances affording reasonable grounds for belief that the person has or is about to commit any offence; on reasonable the person has committed an offence related to liquor or drugs; the person has contravened any gambling laws. See s 40(1)(a)(b)(c)(f)(h) and (j) of the CPA.

Significantly, the power to arrest without a warrant in respect of municipal by-law offences was omitted in the 2002 Notice. Furthermore, law enforcement officers' geographical jurisdiction was limited to the municipality concerned, save in respect of their power, under sections 44 and 55(2), to execute a warrant of arrest (after failure to appear on summons).

After extensive lobbying by the Institute for Municipal Public Safety of Southern Africa (IMPS-SA), a voluntary association of local governments, the powers of municipal law enforcement officers were expanded in significant ways in late 2018 – although explicitly opposed by SAPS and the national Civilian Secretariat in 2017.¹⁵⁴ The change in approach may have been the result of the new presidency of Cyril Ramaphosa and a new national cabinet, appointed at the end of May 2018, which had a new Minister of Police but the same Minister of Justice as before.

The additional powers are extensive. First, the formerly accorded CPA powers of arrest without a warrant (section 40) were expanded slightly¹⁵⁵ and made applicable in respect of all offences for which law enforcement have jurisdiction, including by-law offences. The CPA power to search an arrested person and seize any article used in the commission of an offence (section 23) was appended, as was the power to arrest suspects or witnesses who fail give their name and address (section 41(1)).

Secondly, the range of offences for all these powers was changed to include tampering with or destroying essential infrastructure,¹⁵⁶ failure to give account of possession of goods,¹⁵⁷ and offences relating to the control of access to public premises and vehicles,¹⁵⁸ while treason and sedition were excluded from among the Schedule 1 offences for which jurisdiction was previously accorded.¹⁵⁹

Thirdly, geographical jurisdiction in which these powers may be exercised was extended to the whole of South Africa in relation to a shorter list of offences and a shorter list of powers. The shorter list of offences are tampering with or destroying essential infrastructure; failure to give satisfactory account of possession of housebreaking implement or object; failure to give account of possession of goods; and the Schedule 1 offences (excluding treason and sedition). The shorter list of relevant CPA powers in relation to these offences are the powers of arrest (section 40),¹⁶⁰ power to search an arrested person and seize any article used in the commission of an offence (section 23), and the power to arrest a suspect or witnesses who fails give their name and address (section 41(1)).

Consequently, law enforcement officers now have extensive policing powers, even outside their own municipalities. To be able to exercise these powers, a law enforcement officer may only be appointed if the National Commissioner issues him or her a certificate of competency, taking into account any previous convictions, any declaration of unfitness to possess a firearm, and the training undergone by the applicant in respect of the powers to be exercised.¹⁶¹ There is no change in these criteria compared to the relevant 2002 notice.¹⁶²

¹⁵⁴ PMG Minutes NCOP Committee on Security and Justice *Municipal Law Enforcement Officer powers: IMPS-SA briefing; Criminal Procedure Amendment Bill: briefing, with Deputy Minister of Justice* 7 June 2017 available at <https://pmg.org.za/committee-meeting/24567/> accessed 7 November 2019.

¹⁵⁵ To include the section 40(1)(e) power to arrest without a warrant anyone whom the peace officer reasonably believes to have stolen property.

¹⁵⁶ Section 3 of Criminal Matters Amendment Act of 2015.

¹⁵⁷ Sections 36 and 37 General Law Amendment Act 62 of 1955.

¹⁵⁸ Section 4 Control of Access to Public Premises and Vehicles Act 53 of 1985.

¹⁵⁹ GG 41982 19 October 2018.

¹⁶⁰ Section 40(a)(b)(c)(f)(h) and (j).

¹⁶¹ GG 41982 GN 1114 19 October 2018.

¹⁶² GG 23144 GNR 210 19 February 2002.

This significant extension of policing powers took place against the backdrop of moves toward the centralisation of municipal police under the SAPS.

6.11 Ongoing contestation of local policing

Calls for a 'single police service' re-emerged in 2007. ANC National Conference resolutions in 1997 and 2002 did not address the issue and revolved around concerns relating to transformation of the SAPS and regulation of Community Police Forums.¹⁶³ This changed in the 2007 National Conference, which followed the loss of political control of the metropolitan municipality of Cape Town in 2006 to a coalition government. The infamous 52nd National Conference of the ANC held in Polokwane in December 2007 saw the ANC adopt a number of resolutions, which were broadly in line with the contemporaneous change in the political faction leading the ANC, that is, Jacob Zuma's assumption of the presidency of the ANC. Under the heading 'Peace and Stability' and the sub-heading 'Single Police Service', the ANC at this conference resolved that:

- '6. The constitutional imperative that there be a Single Police Service should be implemented.
7. The municipal, metro and traffic police, be placed under the command and control of the National Commissioner of the South African Police Service, as a force multiplier.
8. The Directorate of Special Operations (Scorpions) be dissolved.
9. Members of the DSO (sic) performing policing functions must fall under the South African Police Services.
10. The relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution.'¹⁶⁴

The political imperative for these resolutions lay mainly in the need to ensure that the SAPS had greater control over the Directorate of Special Operations (DSO or Scorpions), as the DSO was perceived to be targeting political allies of the new ANC president, Jacob Zuma.¹⁶⁵ The DSO was an investigative unit of the National Prosecuting Authority established in 1999 to target organised crime and corruption via 'prosecution-led' investigation.

Five years later, the 2012 'National Development Plan 2030'(NDP), a product of the National Planning Commission in the Department of the Presidency, failed to refer to the issue. Chaired by then Deputy President Cyril Ramaphosa, chapter 12 of the NDP is entitled 'Building Safer Communities' and focuses almost entirely on the SAPS in relation to policing. Reference is made only to 'soft' strategies of local government in improving safety.

By contrast, the ANC Discussion Document on 'Peace and Stability' ahead of the 53rd ANC conference in December 2012 concludes that 'metro police should be part of the single police

¹⁶³ ANC 'Resolutions of 50th Conference' (1997) available at <http://anc.org.za/content/50th-national-conference-resolutions> (accessed 13 September 2018).

¹⁶⁴ ANC 'Resolutions' of 52nd Conference' (2007) available at <http://anc.org.za/content/52nd-national-conference-resolutions> (accessed 13 September 2018).

¹⁶⁵ At the time, the DSO, which had been established under former President Mbeki who was ousted as ANC president at this conference, resided within the NPA. Although the DSO was moved speedily to the SAPS as 'the Hawks', despite litigation requiring further amendments to the legislation, steps toward placing municipal police structures under the 'command and control' of the National Commissioner were not pursued with equal haste.

service'.¹⁶⁶ Although the wording is not clear, it appeared as if the ANC intended to argue a lack of compliance with conditions and standards, with a view to permanently taking over control of the various metropolitan police. Furthermore, it did not intend to stop at metro police, but sought also to incorporate under SAPS the various traffic policing authorities.¹⁶⁷ The 2007 ANC resolution relating to the DSO had already been implemented, but in relation to local municipal police there had been no change.

The 2012 ANC resolution under the heading 'Police' represents a softening of the stance adopted in 2007, but reiterates the call for a single police service evident in the 2012 Discussion Document.¹⁶⁸ While reiterating the call for a single police service, the 2012 ANC Resolution calls for interrogation of the issue rather than for specific implementation measures.¹⁶⁹ This call was relatively speedily acted upon by national government, through the publication of a Green Paper by the Civilian Secretariat in 2013. It follows the approach of the 2007 Polokwane resolution.

The Green Paper makes the claim that 'the Metropolitan Police are less subject to strong accountability measures'.¹⁷⁰ This is despite the legislative provision that local government must 'make provision for civilian supervision' of the municipal police service,¹⁷¹ in other words, that there is a requirement for the equivalent of the Civilian Secretariat providing civilian supervision of a municipal police service.¹⁷² Municipal police must also participate in policing coordinating committee and on relevant CPFs.¹⁷³ Furthermore, the legislative mandate of the Independent Police Investigative Directorate (IPID) clearly covers municipal policing.¹⁷⁴ Municipal police also participate in policing

¹⁶⁶ ANC (2012a) Peace and Stability Discussion Document 20. 'The most expeditious route to implementation would involve a forum/committee/entity. This could even be called e.g. National Committee for Operational Command and Control or The National Standards Committee as per Sect 64 L(1). Such an entity can be established in terms of Ministerial Regulations in conjunction with the National Commissioner's National Standards and legislative amendments if necessary. Whilst Sections 64 L and 64P, together with Sections 199(1), 205(1), 206(7), 207(1) & 207(2) of the Constitution can enable the Metro Police to be "placed under the command and control of the National Commissioner", without any additional primary legislative amendments, this may not be the case with Traffic Police of the different Transport departments. These may require some legislative amendments to comply with the resolution.'

¹⁶⁷ ANC (2012a) 21.

¹⁶⁸ ANC (2012b) Resolutions of the 53rd Conference (no page numbers).

¹⁶⁹ ANC (2012b) Resolutions of the 53rd Conference (no page numbers). 'Noting: [t]hat the ANC resolved in 1994 to establish a single Police Service; [t]hat the resolution relating to a single police service has not been fully implemented; [t]he existence of several police services under different municipalities and entities; [t]he different training, disciplinary standards in these police services as well as the different remuneration levels; [t]he constitutional injunction that there should be a single police service; [t]he constitutional provision that provides that national legislation must provide a framework for the establishment, powers functions and control of municipal police services; [t]he current statutory responsibilities of the different police services[,] [t]herefore resolves that: 1. The newly elected NEC must further interrogate the challenges inherent in the execution of the resolution by the end of 2013. 2. The National Commissioner should ensure the implementation of general, training, operational and discipline standards in relation to policing to foster synergy, uniformity and consistency throughout the Republic.'

¹⁷⁰ Civilian Secretariat for Police (2013) Green Paper on Policing 18: It argues that SAPS 'must act in accordance with the national policing policy and the directions of the Minister of Police and are ultimately accountable to Parliament. In addition the SAPS is subject to civilian oversight mechanisms which have recently been strengthened with the introduction of the Independent Police Investigative Directorate and Civilian Secretariat for Police legislation. Furthermore, the SAPS are also required to engage and participate with CPF established at a local level. The Metropolitan Police on the other hand are less subject to strong accountability measure and this in itself poses serious risks to our democracy. Where you have police unaccountable, situations may arise that require specific interventions from national government.'

¹⁷¹ Section 64A(2) (d) SAPS Act.

¹⁷² Section 64J SAPS Act.

¹⁷³ Section 64C(2)(e) and (f) SAPS Act.

¹⁷⁴ Sections 2, 4(2)(a) and (b), 4(4), and 9(2).

coordinating committees that must be established by the SAPS Provincial Commissioner.¹⁷⁵ Municipal police must comply as well with any standards set by the National Commissioner.¹⁷⁶ They are also accountable to the relevant local councils, given that all expenses by or in connection with the establishment, maintenance and functioning of a municipal police service, are for the account of the municipality in question.¹⁷⁷ The national minister, too, has powers to intervene.¹⁷⁸ Provincial MECs likewise have powers relating to holding municipal police to account.¹⁷⁹

It is clear, then, that, in truth, municipal police may be subject to *more* accountability mechanisms than the SAPS. Thus, the argument in the 2013 Green Paper seems entirely based on the concern that municipal police are not subject to the day-to-day directions of *national* structures. Nevertheless, on the basis of this ‘lack of accountability of municipal police’, the Green Paper argues that ‘it is necessary to investigate the feasibility of implementing the policy resolutions surrounding single policing in the country’.¹⁸⁰

In the 2016 local government elections held on 3 August, the ANC lost outright control of an additional three metropolitan councils, two of which had existing MPS¹⁸¹ and one in which an MPS was planned.¹⁸² The White Paper on Policing 2016, released less than two weeks after the election on 16 August 2016, has a section entitled ‘Single Police Service’¹⁸³ which reiterates many of the arguments used against the concept of regional or local policing during the constitutional negotiations. Yet at the same time it embraces a much more nuanced approach than adopted in the Green Paper, seemingly subtly altering the concept of ‘command and control’. Arguments in the White Paper for a ‘single police service’ assert, *inter alia*, that ‘the available resources in South Africa do not permit the huge duplication of functions’, that ‘policing forces are fragmented the standard of training and other support services are likely to diminish’, and that

[a]rtificial boundaries and barriers (geographical or legal) between police forces makes the task of policing more difficult and raises serious problems with regard to the jurisdiction of one police force over crimes committed in one area and where the suspects have crossed the border into another area.¹⁸⁴

These reasons are provided entirely without reference to any evidence. In both legislation and practice, there is little overlap in functions; the standards at municipal police services are in fact *higher* than they are in the SAPS because of the onerous standards imposed on municipal police; and no evidence is provided of a single case in which a jurisdictional problem has occurred. As the SAPS is the only police service with investigative capacity, jurisdictional issues arise only when there is hot pursuit of a suspect: it does not affect the investigation of crime, which is a SAPS prerogative. In fact, the only jurisdictional problems which have been reported are some SAPS police stations refusing to record crimes occurring outside their geographical jurisdiction.

The White Paper refers both to section 199 of the Constitution which provides for a ‘single police service’ and section 206(7) which provides that national legislation must provide a framework for

¹⁷⁵ Section 64K SAPS Act.

¹⁷⁶ Section 64L SAPS Act.

¹⁷⁷ Section 64A(6) SAPS Act.

¹⁷⁸ Section 64M SAPS Act.

¹⁷⁹ Section 64N SAPS Act.

¹⁸⁰ Civilian Secretariat for Police (2013) *Green Paper on Policing* 20.

¹⁸¹ Johannesburg and Tshwane.

¹⁸² Nelson Mandela Bay.

¹⁸³ Civilian Secretariat for Police (2016) *White Paper on Policing* 29.

¹⁸⁴ Civilian Secretariat for Police (2016) 30.

municipal police services. These provisions, the White Paper says, create a constitutional imperative for an ‘integrated model of policing’ that will see SAPS at national level ‘ensure management and control, and ... enforce uniform professional standards, resourcing and training across the organisation. Equally, ensuring uniform standards with respect to other service agencies such as the Metropolitan Police Services (MPS).’¹⁸⁵ Furthermore, it says:

Streamlining the delivery of essential policing services particularly at a local level hinges on the establishment of an institutionalised structure at a national level that will facilitate collaboration and ensure implementation and compliance with agreed uniform national standards for discipline and training among others.¹⁸⁶

The White Paper claims:

This model of integrated policing does not advocate usurping the powers and functions of municipalities through the wholesale integration of Metropolitan Police Services into the SAPS. Rather, it is geared toward ensuring the overall operational command of the service, deepen effective oversight of the MPS and enable an optimal utilisation of public resources. Ultimately, greater emphasis must be placed on maximising the utilisation of law enforcement resources for effective and efficient policing.¹⁸⁷

The White Paper maintains that the integrated model proposed will ‘clarify the ambiguity’ of the crime prevention mandate of municipal police services.¹⁸⁸ It is unclear what ambiguity is being referenced; however, the White Paper opines that municipal police

are well placed at municipal level to proactively address crimes through the rigorous enforcement of their other two mandates - traffic enforcement and by-law enforcement. By ensuring that traffic laws and by-laws are observed, MPS will contribute to instilling a culture of lawfulness. In this way MPS can effectively contribute to visible policing.¹⁸⁹

Thus, the White Paper appears to seek to limit the mandate of municipal police to traffic and by-law enforcement. However, the White Paper at the same time proposes according *investigatory* powers in terms of that limited mandate:

[A] regulatory framework must be established for conferring of limited investigative competencies for Metropolitan Police to conduct investigations for preparation to submit to court. This is to include particular categories such as traffic related matters, municipal by-laws, as well as crimes committed on and related to municipal assets or environment, such as theft and tender irregularities, amongst others. Municipal police may only detain suspects until the SAPS are able to take custody.

The White Paper consequently envisages national command to ‘ensure uniform standards’, exercise effective oversight over MPS, and ‘enable optimal utilisation of resources’, all of which is suggestive of some degree of control by SAPS over MPS. At the same time, the proposed according of limited investigatory powers would relieve the SAPS of that burden but ensure the MPS would have to expand the skills set and possibly take on additional members – all at the financial cost of the

¹⁸⁵ Civilian Secretariat for Police (2016) 30.

¹⁸⁶ Civilian Secretariat for Police (2016) 30.

¹⁸⁷ Civilian Secretariat for Police (2016) 31.

¹⁸⁸ Civilian Secretariat for Police (2016) 31.

¹⁸⁹ Civilian Secretariat for Police (2016) 31.

municipality concerned. This, inter alia, is likely to constitute a further cost to the establishment of MPS.

Overall, the White Paper of 2016 seems to represent an attempt to acknowledge the call for a 'single police service' by subtly altering the terms of what that would mean and without entirely subverting existing local policing. At the same time, it seeks to offload the responsibility of investigation in cases involving the municipality.

In its 2017 Discussion Document, however, the ANC reads the White Paper as calling for the 'Establishment of a Division: Municipal and Traffic Police in support of the implementation of the single national police service' within the SAPS and '[r]e-organising the role and function of the Civilian Secretariat for Police Service to become the Department of Police'.¹⁹⁰ This seems to suggest a subsuming of municipal police within SAPS. The ANC Resolutions that followed in the December 2017 ANC conference are found in the 'Peace and Stability' resolutions, which refer obliquely to some prior resolutions 'not being fully implemented'.¹⁹¹ In addition, however, the NDP vision for 2030 in regard to the SAPS is quoted verbatim.¹⁹² The NDP mentions metro police only once, in respect of encouraging volunteer patrols.¹⁹³ The ANC resolutions are thus not clear – possibly because of the more momentous developments happening at the same time.

The December 2017 ANC National Conference saw President Zuma ousted as ANC president and then Deputy President Ramaphosa, political champion of the NDP, become president first of the ANC and then of the country. This was accompanied by cabinet changes which included the appointment of former KwaZulu-Natal MEC and SAPS Commissioner Bheki Cele as Minister of Police. In speaking about the Annual Performance Plan (APP) of the SAPS in May 2018, Cele said 'a priority in the forthcoming year' would be '[u]nification of the various national and local metropolitan police agencies in the country into a single police service'.

Consequently, it appears that the issue of the 'single police service' may be one of the political issues forming part of the compromise emerging from the 2017 National Conference. The issue clearly remains a live one, and the possibility exists that the additional powers accorded under the Ramaphosa cabinet to municipal law enforcement in October 2018 are predicated on the ultimate subsuming of municipal police under the SAPS.

A further possibility is that the factional battles in the ANC required the rhetoric of the 'single police service' to be maintained, as Ramaphosa's power was then still politically uncertain, given the narrowness of his win and the compromises it wrought in terms of the party's highest decision-making body, the National Executive Council (NEC), which represented perceived members of both factions. At the time of this writing (2019), the ANC had fared better than anticipated in the 2019 national and provincial election under Ramaphosa, and the priority of the SAPS under its new minister, Cele, appears to have turned to recruiting even greater numbers of SAPS members.

¹⁹⁰ ANC 'Peace and Stability Discussion Document 6' (2017a) available at http://www.anc.org.za/sites/default/files/National%20Policy%20Conference%202017%20Peace%20and%20Stability_0.pdf (accessed 14 September 2018).

¹⁹¹ ANC '54th National Conference Report' (2017) available at http://www.anc.org.za/sites/default/files/54th_National_Conference_Report.pdf accessed 14 September 2018.

¹⁹² ANC (2017b) 70.

¹⁹³ NPC NDP 360.

6.12 Conclusion

The negotiated 1996 Constitution provides merely that national legislation alone must establish the powers and functions of any municipal police services.¹⁹⁴ The ensuing 1998 national legislation places practical impediments on the establishment and functioning of municipal police, which has constrained their proliferation, particularly in smaller municipalities. By contrast, the Interim Constitution had allowed for the establishment of municipal police services under provincial legislation, albeit limiting their functions to crime prevention and the policing of local government by-laws.¹⁹⁵ Why did the constrained legislation for municipal policing, placed under centralised national control, come about?

Primary amongst the stated reasons for resistance was that the term ‘municipal police’ was associated with poorly trained, violent and biased policing in support of the contested BLAs during apartheid.¹⁹⁶ Like the KZP, these ‘municipal police’ were accused of and found to have been acting in favour of the IFP. In addition, municipal police associated with ‘white’ municipal councils had demonstrated paramilitary tendencies: many such municipal councils were likely to be under opposition control in future. These factors, combined with the historical record of municipal police operating independently of central control, made the ruling party loath to accord municipalities significant policing power.

In addition, the SAP itself was reluctant to permit additional policing agencies to proliferate at a time when it was cementing its hegemony over other policing agencies. A desire to prevent the opposition DP from scoring a policy victory also played a role, as did the fact that traffic officials raised concerns that traffic law enforcement would be compromised. However, it seems likely that, these stated reasons aside, the lack of political control of all municipalities by the ruling party was key to the limited provision for municipal policing. As a result, the legislation passed in 1998 operates to constrain rather than encourage the development of municipal police. It imposes accountability structures, coordination mechanisms, national standards and self-funding requirements on municipal police.

Ironically, however, since the transition, the national government has itself obligated municipal police to assist with intractable crime problems such as domestic violence and public order policing. This is explored in more detail in Chapter 7. Furthermore, municipal law enforcement and traffic policing powers are used by municipalities for crime prevention in the absence of the establishment of municipal police. All three forms of law enforcement are available to municipalities, with only municipal police proper attracting significant political policy attention – until recently.

The issue of policing by local government remains politically sensitive. The CSP, which is mandated to develop policy for the national minister, has taken its cue from ANC policy, which calls for a ‘single police service’. The political space for municipal policing remains contested.

Local policing was initially tolerated due to the imperative of crime prevention at the time of the transition. As crime again spirals out of control post-2012, a renewed push for central control of local policing is apparent as the governing party loses political control of more municipalities, even as the crime situation calls once more for crime prevention from more than just the national police service. At the same time, more and more onerous obligations are transferred to local police without the

¹⁹⁴ Municipal policing does not appear in Schedule 4 or 5, while section 206(7) provides that national legislation must provide a framework for municipal police services.

¹⁹⁵ Section 221(1) Interim Constitution of 1993.

¹⁹⁶ The Black Local Authorities Act of 1982 provided for the establishment of local committees, village councils and town councils for ‘Black persons’ in certain areas.

requisite funding for shouldering what is constitutionally a national burden. National government appears to be seeking control over any armed entities, but seeks to jettison politically difficult and intractable forms of policing, such as domestic violence, land invasions and public order policing. The goal seems to be to ensure some form of control, rather than ownership, of all forms of police.

Ultimately, the politics of control of policing is likely to continue to shape the legislative and policy environment for municipal policing. The imperatives of the increasingly precarious crime situation have not yet resulted in an explicit change in approach, while the rhetoric of centralised policing remains unchallenged.



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Chapter 7:

Mind the gap: Municipalities step in

7.1 Introduction

The previous chapter described the limited framework for municipal policing and the governing-party policy for eventually subsuming municipal police within the national SAPS. This chapter describes the developments in practice of policing at municipal level. The evidence indicates that municipalities (primarily metropolitan and local)¹ are policing to meet the inadequacies of the SAPS in their local contexts.

Almost all municipalities have law enforcement or traffic services – but only the metropolitan areas have a ‘municipal police service’ (MPS) (mostly called ‘Departments’, that is, MPD) as defined in the SAPS Act. As described in Chapter 6, law enforcement and traffic services also have policing powers. In 2016/2017 some 90 per cent (190 of 211)² of local municipalities recorded public safety positions (which includes law enforcement, traffic and fire brigades) in their employment reporting,³ with the total number of public safety positions in local and metropolitan municipalities amounting to 30,393⁴ and an additional 1,703 at district municipality level.

By comparison, a parliamentary question in 2018 revealed that 92,000 Police Act employees (those with policing powers) are deployed at the local police station level across the country.⁵ Municipalities consequently increase policing to a significant degree at local level. Analysis of the data suggests that municipal policing is associated with under-policing by the SAPS, high levels of violence, and municipal revenue. Furthermore, the specific contexts in which municipal police and law enforcement have been empowered relate directly to issues affecting the interests of municipalities and in regard to which the SAPS is tardy, unwilling and/or unable to act.

7.1.1 Metropolitan municipalities

Metropolitan municipalities (metros) are the major contributors of municipalities to municipal public safety deployment. Some 24,770 (81 per cent) of public safety positions at local government level are in the eight metropolitan municipalities even though they cover only 22 million (about 40 per cent) of the South African population. In other words, 80 per cent of municipal public safety positions serve 40 per cent of the population.

Six metros operate MPDs, while Buffalo City and Mangaung have Law Enforcement and Traffic Services. Cape Town and Nelson Mandela Bay have relatively small MPDs alongside Law Enforcement and Traffic Services. The metros demonstrate a great deal of variety, illustrating the

¹ Local municipalities that are not metropolitan share authority with the district municipality under which they fall.

² Own analysis of data published by the *Local Government Handbook* available at www.municipalities.co.za accessed 20 September 2019.

³ The category ‘public safety positions’ in employment data on local and metropolitan municipalities provides a strong indicator of the possible extent of municipal policing. Although the category includes fire department and emergency services, as well as law enforcement and traffic services, perusal of randomly selected annual reports suggests that the majority of such positions relate to law enforcement and traffic policing.

⁴ Own calculations.

⁵ ‘Parliamentary Question NW2171 11 July 2018’ available at <https://pmg.org.za/committee-question/9648/> accessed 30 November 2019.

tailored response to local policing needs and priorities. The three MPDs operating in Gauteng increase policing in the province significantly. Tables 1 and 2 shows the policing agencies in order of size. Although Johannesburg MPD (JMPD) has the largest service, taking population into account it is less policed per capita than other cities – by both the SAPS and JMPD.

Table 1: Policing in metropolitan municipalities: the Big Five

'The Big Five'	Johannesburg	Durban	Cape Town	Tshwane	Ekurhuleni
MPD name	JMPD	DMPD	CTMPD	TMPD	EMPD
Metro police and other LE, traffic	3700	3198	3000	2655	2594
Public safety positions	5447	4183	4385	5169	4519
Number of SAPS police stations	44	44	62	37	38
SAPS personnel allocated	10118	7335	10318	6573	6230
Metro population 2016	4 94 9347	3 702 231	4 005 016	3 275 152	3 379 104
Metro policing per 100 000	75	86	75	81	77
Public Safety positions per 100 000	110	113	109	158	134
SAPS per 100 000	204	198	258	201	184
SAP plus Metro per 100 00	279	285	333	282	261
SAPS plus public safety per 100 000	314	311	367	359	318

* Latest available estimate, Annual Reports and various sources

Table 2: Policing in metropolitan municipalities: the Smaller Three

'The Smaller Three'	Buffalo City	Nelson Mandela Bay	Mangaung	All Eight
MPD name		NMB MP		
Metro police and other	710	487	149	16 295
Public safety positions	993	1067	671	26 434
Number of SAPS police stations	22	17	20	284
SAPS personnel allocated local level	2314	3200	2196	48 284
Metro population 2016	834 997	1 263 051	787 803	22 196 701
Metro policing per 100 000	85	39	19	73
Public Safety per 100 000	119	84	85	119
SAPS per 100 000	277	253	279	218
SAP plus Metro per 100 00	362	292	298	291
SAPS plus public safety per 100 000	396	338	364	337

Five of the six existing MPD are well-established in larger metros. Four of these 'Big Five' (all except TMPD) are located in 2010 Soccer World Cup stadium cities. Three showed steady growth in size until 2010, followed by reduction or stabilisation. For example, in 2002 the Durban MPS, the largest at the time, had only 1,240 officers⁶ but by 2010 this number had increased three-fold to 3,770.⁷ The

⁶ Newham G Masuku T & Gomomo L 'Metropolitan Police Services in South Africa' (2002) CSV 4 available at <https://www.csvr.org.za/docs/policing/metropolcicservices.pdf> accessed 2 August 2019.

⁷ 'Portfolio Committee on Police: Provincial Safety Departments and Metro Police operations, & readiness for 2010 World Cup 11 May 2010' available at <https://pmg.org.za/committee-meeting/11578/> accessed 20 February 2019.

JMPD was launched in March 2001 with 2,500 officers, which increased to 4,326 by February 2011,⁸ reducing to 3,700 by 2018.⁹ On establishment, the Ekurhuleni MPD had personnel of only 601 employees,¹⁰ but by 2010 it had 2,134 staff members at 20 precinct stations, with nine specialised units and a fleet of 600;¹¹ by 2016, although the number of posts was 2,273, only 1,842 were filled.¹² Thus, it appears that the political imperative of a safe 2010 World Cup saw an unusually rapid expansion in these MPD, which was allowed to stabilise thereafter. Tshwane, not a stadium city, had its MPD expand more steadily without stabilisation after 2010, such that by 2014 it had 2,655 police officers.¹³

Cape Town, the fourth metro stadium city, showed a different pattern. The Cape Town City Police Service (CPS) was launched in December 2001, with a proposed a force of about 3,000 officers.¹⁴ The CPS started in December 2001 with 700 new recruits.¹⁵ The traffic and city law enforcement staff were not automatically made part of the CPS¹⁶ and this model of three separate services remained in place. By 2010 the CPS was known as the CTMPD and deployed 385 police officers in four regions,¹⁷ with most municipal policing being carried out by the Law Enforcement and Security Department, not the CTMPD. In addition, there is a separate traffic service. The exact number of employees employed in all of these entities is unclear, although the number of 'public safety positions' in the metro is 4385.

Cape Town Metro has also sought to fill the gap left by decimation of the SAPS reservist system (see Chapter 3). The City of Cape Town Auxiliary Law Enforcement Service (Auxiliary LE), established in 2012,¹⁸ gives the Chief of the Metro's Law Enforcement Department the authority to determine who may serve as auxiliary officers. Auxiliary Law Enforcement Officers are regarded as being in the employment of the city when on duty and have full peace officer status in terms of section 334 of the CPA when they are officially on duty.¹⁹ Members of the Auxiliary Law Enforcement Service are required to undergo all training courses prescribed for permanent members.²⁰ Auxiliaries are unpaid volunteers who are drawn predominantly from existing neighbourhood watch structures,²¹ which in the Western Cape are accredited and formalised by the province (see Chapter 5). The only

⁸ Lancaster L 'Tackling denial is the first step in dealing with JMPD corruption' *Engineering News* 25 June 2012 available at <http://engineeringnews.co.za/print-version/tackling-denial-is-the-first-step-in-dealing-with-jmpd-corruption-2012-06-25> accessed 20 February 2019.

⁹ SABC 'City of Joburg introduces new working shifts for metro officers' *SABCNewsOnline* 24 May 2018 available at <http://www.sabcnews.com/sabcnews/city-of-joburg-introduces-new-working-shifts-for-metro-officers/> accessed 20 February 2019.

¹⁰ Newham et al. (2002) 13.

¹¹ 'Portfolio Committee on Police: Provincial Safety Departments and Metro Police operations, & readiness for 2010 World Cup 11 May 2010'.

¹² Ekurhuleni Metropolitan Municipality *Annual Report 2015-2016* (2016) 167.

¹³ Safety and Security SETA (SASSETA) *Policing Sub-Sector: An Overview of Traits, Human Capital, Education and Labour Market* (2016) 8 available at

http://www.sasseta.org.za/content/tinymce/plugins/openfile/uploads/sasseta_publishes_sub_sector/Policing%20Subsector%20Report%202016%20FY.pdf accessed 22 February 2019.

¹⁴ Newham et al. (2002) 6.

¹⁵ Newham et al. (2002) 6.

¹⁶ Newham et al. (2002) 6.

¹⁷ Cape Town Metropolitan Police Department *A brief to Parliament: Portfolio Committee on Police* available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100511wcape-edit.pdf> accessed 20 February 2019.

¹⁸ In terms of City of Cape Town Council Resolution C39/10/12 of 31 October 2012.

¹⁹ City of Cape Town *Policy: Auxiliary Law Enforcement Service of the City of Cape Town* (Policy Number 11171) approved by Council 31 October 2012 (Auxiliary LE Policy).

²⁰ In terms of GN R209.

²¹ City of Cape Town *Auxiliary LE Policy*; Watkins, K 'Auxiliary volunteers help tackle crime' *Constantiaberg Bulletin* 25 October 2018.

requirements to be appointed to the Auxiliary LE are that an applicant be 21, have a senior certificate, be in good health, of good character, and be eager to serve.

The first 16 volunteers were deployed in November 2013 after undergoing training at the Metro Police College, and by October 2018 it was reported that there were 452 auxiliary officers working 16 hours a month.²² By February 2018, the number had risen to 529.²³ This is similar to the number of people employed in the CTMPD at the time.

Three of the Big Five metropolitan municipalities are operating single emergency numbers, which can be used instead of the police emergency number, 10111.²⁴ Intermittent problems, including strike action and technology problems, have been observed in relation to 10111.

The remaining 'Smaller Three' metros have various policing offerings. Before the 2010 World Cup, a project team was to create a plan to implement an MPS in Nelson Mandela Bay.²⁵ A litany of problems meant it took until 2016 – after a change of metro government – for MPS officers to be appointed;²⁶ by 2017, NMB had 129 fully trained MPS officers and a 24-hour call centre.²⁷ In 2017/18 the number of MPS posts rose to 964 but employees remained at 130,²⁸ illustrating the difficulty of expanding policing. NMB also runs a separate traffic and licensing services department, employing 198 traffic officers (320 posts) in 2016/17²⁹ and a security sub-directorate to render a service for protection and safekeeping of municipal employees and property,³⁰ with 159 personnel (204 posts).³¹

Mangaung currently operates Traffic and Law Enforcement Services with 141 CCTV cameras to monitor crime at identified hotspots.³² In August 2018, Mangaung reported to Parliament that it had submitted an application for the establishment of an MPS and was awaiting a response from the National Commissioner.³³ The birthing process may be as protracted as that of NMB even though Mangaung remains under ANC control.

Similarly, the 2016/17 Buffalo City annual report records that the process of establishing Metro Police within BCMM had not yet been completed, with internal processes still to be completed.³⁴ Traffic Services and Law Enforcement Services are provided, however. In total, in 2016/17 Traffic and Law

²² Watkins K 'Auxiliary volunteers help tackle crime' *Constantiaberg Bulletin* 25 October 2018.

²³ 'City salutes its law enforcement volunteers' *Independent Online* 6 February 2019.

²⁴ Since 2000, the Cape Town municipality has operated its own single emergency number, 107, which is toll-free on a landline (021 480 7700 on a cell phone), with trained operators who direct the call to the relevant emergency service provider in the Cape Town area. Tshwane and Johannesburg also have single numbers but they are not toll-free (012 358 9999 and 011 375 5911).

²⁵ Straton A 'This week's launch of metro police force' *MYPE News* 12 May 2016 available at <http://mype.co.za/new/this-weeks-launch-of-metro-police-force-we-are-not-a-suspicious-bunch/69014/2016/05> accessed 26 February 2019.

²⁶ Nelson Mandela Bay *Annual Report 2016-2017* 190 available at <http://www.nelsonmandelabay.gov.za/datarepository/documents/adopted-2016-17-annual-report.pdf> accessed 26 February 2019.

²⁷ Democratic Alliance Press Statement: NMB a safer city as DA-led government is winning the fight against crime 10 July 2018 available at <https://www.da.org.za/2018/07/nelson-mandela-bay-a-safer-city-as-da-led-government-is-winning-the-fight-against-crime> accessed 26 February 2019.

²⁸ Nelson Mandela Bay *Annual Report 2017-2018* 234.

²⁹ Nelson Mandela Bay *Annual Report 2016-2017* 184.

³⁰ Nelson Mandela Bay *Annual Report 2016-2017* 187.

³¹ Nelson Mandela Bay *Annual Report 2016-2017* 189.

³² Mangaung *Annual Report 2011-2012* 69.

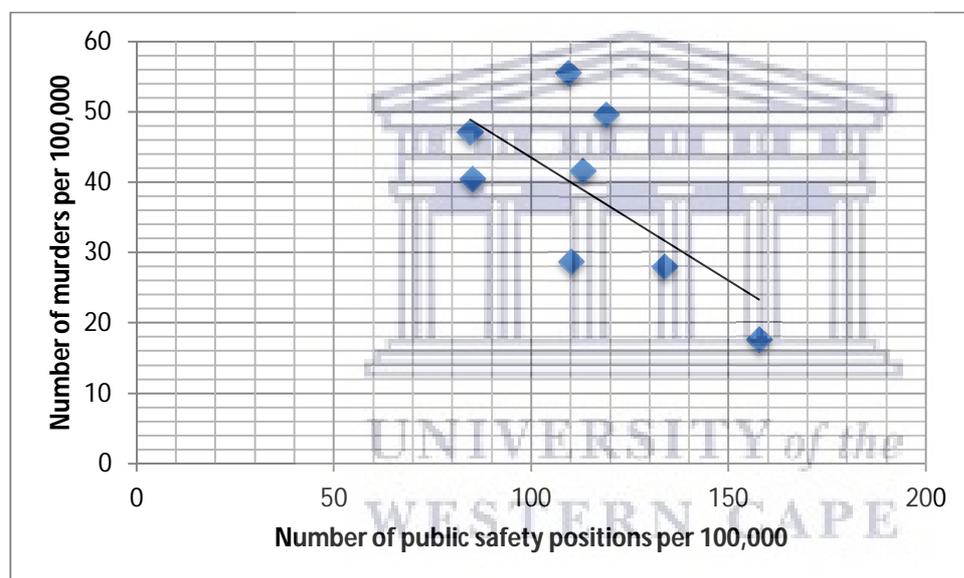
³³ PMG Minutes *NCOP Committee on Finance: IDP, LED & NDP: Mangaung & eThekweni Metropolitan Municipality briefing* 21 August 2018 available at <https://pmg.org.za/committee-meeting/26870/> accessed 26 February 2019.

³⁴ Buffalo City *Annual Report 2016-2017* 191.

Enforcement Services comprised 710 employees (742 posts).³⁵ Buffalo City has a relatively high deployment, suggesting that expansion of policing numbers may be easier with Law Enforcement, than with the requirements attached to establishing MPS.

Is there evidence to suggest that this deployment in metropolitan municipalities has had an impact? Metro deployment is additional to that of SAPS, and the numbers are sufficiently significant, and sufficiently persistent over time (that is, they have stabilised and are not themselves responding to crime trends), to make a relationship between it and crime reduction observable. The data suggest that the higher the rate of public safety positions in metros, the lower the rate of murder (see Figure 1).³⁶ In other words, more metro policing is associated with lower levels of violent crime. The relationship is 4 to 5 times as steep as that observed in longitudinal analyses of the impact of change in SAPS deployment (see Chapter 3 above). Assuming a causal relationship, this may be because SAPS deployment typically involves a large percentage of clerical-type functions compared to metro and law enforcement deployment, which involves high visibility patrolling.

Figure 14: Relationship between municipal policing rate and murder rate in metropolitan municipalities (2016)



Source: Own calculations using SAPS crime data and data from municipalities.co.za (see Chapter 1)

Indeed, it can be theorised that MPDs may be making an impact through more than traditional ‘visible policing’ alone. The EMPD provides one example. In 2005 in a report to Parliament, it detailed more than 20,000 arrests in relation to serious violent crime (8670) and warrants of arrest (1,1815) which the EMPD had carried out over three years.³⁷ In 2016 the ‘crime prevention’ arrests (that is, not traffic and by-law offences) by the EMPD exceeded 7,000, dropping to 4,000 in the subsequent year.³⁸ By 2016 the EMPD had 23 ‘police stations’³⁹ that included facilities such as holding cells.⁴⁰ Recent press

³⁵ Buffalo City Annual Report 2016-2017 202.

³⁶ Although $p > 0.05$ ($p = 0.076$), as there are only eight observations, a statistically significant relationship is not expected. $R\text{-squared} = 0.43$ and co-efficient 0.3483.

³⁷ Ekurhuleni Metropolitan Police Department ‘Impact of Municipal Police Services on Crime: Presentation to Parliament’ (2005) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050823ekurhuleni.ppt> 22 February 2019.

³⁸ ‘EMPD Results are down’ *Kempton Express* 5 April 2018.

³⁹ ‘Metro Opens New EMPD precinct in Thokoza’ *Kathorus Mail* 2 August 2016 available at <https://kathorusmail.co.za/12941/metro-opens-new-empd-precinct-in-thokoza/> accessed 21 February 2019.

reports indicate that the EMPD is frequently involved in arrests of perpetrators of serious and violent crime,⁴¹ including for organised vehicle theft,⁴² attempted murder, forgery,⁴³ and cash heists.⁴⁴ Similar arrests are observed in other cities. Notionally, such arrests would have been for SAPS to make, but MPDs are increasingly being called on to play this role. Specialised units of various kinds have emerged among most MPS and LE to address particular local problems not addressed adequately by SAPS, including drugs, marine poaching, and copper theft (see above and below).

7.1.2 Local municipalities

It would be a mistake to think that municipal policing is confined to the metros. Some local municipalities have public safety positions per capita similar to that of the metros. The deployment is not as an MPS as defined by the legislation; only one local municipality, Swartland, attempted and then abandoned an MPS. Rather, they are law enforcement and traffic services. The number of positions allocated to public safety (which includes law enforcement, traffic and fire brigades) among local municipalities ranges from 0 to 702, with a median of 31. Considered on a per capita basis, the range is from 0 to 241 per 100,000, with a median of 29 per 100,000. This suggests small to modest allocations in most municipalities, but significant allocations in some, with some 10 per cent deploying 85 or more per capita (see Table 8 below).

Table 6: Policing in local municipalities

Local municipalities	Minimum	25 th	Median	75 th	90 th	Maximum
Number of public safety positions	0	11	31	78	190	702
Public safety positions per capita	0	12	29	61	85	241

Source: Own calculations, data sourced from www.municipalities.co.za

The common qualities of the three municipalities with the largest per capita rate of public safety positions (Overstrand, Bitou, and Knysna) are that they have modest populations of under 100,000;

⁴⁰ 'Bringing Ekurhuleni Metro Police Services Closer to the people' *ENCA* 24 July 2016 available at <https://www.enca.com/south-africa/bringing-ekurhuleni-metro-police-services-closer-to-the-people> accessed 20 February 2019.

⁴¹ See, for example, Tseke M 'EMPD arrests Umthambeka man wanted for stabbing spree and murder' *The Tembisan* 13 February 2018 available at <https://tembisan.co.za/68481/empd-members-arrests-suspect-wanted-for-a-stabbing-spreed-and-murder/> accessed 22 February 2019.

⁴² See, for example, Walker R 'EMPD arrests nine suspects over two days' *Alberton Record* 29 January 2019 available at <https://albertonrecord.co.za/199103/empd-task-team-cracks-down-on-crime/> accessed 22 February 2019; News24 Reporter 'EMPD arrests 6 suspects linked to stolen vehicle, drugs and an unlicensed firearm' *News24* 19 May 2018 available at <https://www.news24.com/SouthAfrica/News/empd-arrests-6-suspects-linked-to-stolen-vehicle-drugs-and-an-unlicensed-firearm-20180519> accessed 22 February 2019; Van Zyl R 'Three suspects arrested after shootout could be related to Audi gang' *Roodepoort Record* 24 May 2018 available at <https://roodepoortrecord.co.za/2018/05/24/three-suspects-arrested-after-shootout-could-be-related-to-audi-gang/> accessed 25 February 2019.

⁴³ See, for example, Pijoos I '4 arrested in Joburg with fake documents worth R10m' *News24* 23 August 2017 available at <https://www.news24.com/SouthAfrica/News/4-arrested-in-joburg-with-fake-documents-worth-r10m-20170823> accessed 22 February 2019.

⁴⁴ See, for example, 'Death threats after EMPD arrest' *Kempton Express* 27 January 2014 available at <https://kemptonexpress.co.za/21312/death-threats-after-empd-arrest> accessed 25 February 2019; 'Estimated R15m possibly linked to cash heists recovered in Tsakane' *The Sowetan* 22 May 2018 available at <https://www.sowetanlive.co.za/news/south-africa/2018-05-22-estimated-r15m-possibly-linked-to-cash> accessed 25 February 2019; 'Alleged cash-in-transit bomber nabbed by EMPD' *Germiston City News* 11 January 2019 available at <https://germistoncitynews.co.za/194921/alleged-cash-in-transit-bomber-nabbed-by-empd> accessed 25 February 2019.

are wealthy with a significant proportion of non-resident ratepayers (holiday home-owners); have political control which is contested or opposition-led; rely on tourism for the local economy; contain well-established towns not in former 'Bantustan' areas; employ municipal policing in partnership with active citizen groups; and are located in the opposition-controlled Western Cape. All of these factors seem to be associated with municipal policing.

Overstrand Municipality has the top municipal deployment of 241 per 100,000; total recorded serious crime in Hermanus, the main town, doubled in number over the ten-year period to end 2015.⁴⁵ In response, in 2016 a CCTV surveillance project was implemented by the non-profit organisation (NPO) Hermanus Public Protection (HPP) in a joint venture with the municipality; the municipality houses a CCTV control room, with HPP providing additional patrols⁴⁶ and with information being passed on to both the SAPS and Overstrand Law Enforcement for response.⁴⁷ This was associated with a stabilisation in key crime indicators such as robbery and murder.

Similarly, Bitou (Plettenberg Bay with Kwanokuthula) deploys 138 per 100,000 in public safety positions, and since 2014, a year in which serious reported crime peaked, has a 24-hour CCTV control room, with municipal law enforcement operating two shifts,⁴⁸ with the Plettenberg Bay Crime Prevention Association (PBCPA) comprised of all⁴⁹ stakeholders coordinating response to crime.⁵⁰ So too Knysna, also a tourist town, with the third-highest non-metro deployment, has had CCTV since 2016.⁵¹ Law enforcement focuses on relevant municipal by-laws, loitering, animals, vandalism, and unruly and drunken behaviour in streets and public amenities.⁵² Knysna's various security providers⁵³ are closely integrated.⁵⁴ Recorded crime stabilised after 2016.

Other towns with high municipal deployment per capita greater than 100 per 100,000 include Dawid Kruiper (Upington), King Sabata Dalindyebo (Umtata), Mossel Bay, Nketoana (Reitz), Stellenbosch, Rustenburg, Greater Kokstad, Setsoto (Ficksburg), Moqhaka (Kroonstad), Kouga (Humansdrop and Jeffreys Bay), Msunduzi (Pietermaritzburg), and Midvaal. The larger picture, however, emerges from the quantitative data, which shows that while wealth plays a role, so does violent crime and SAPS neglect – with local and metro municipalities filling the gap if they can.

⁴⁵ SAPS Reported Crime 2005/6-2015/16.

⁴⁶ HPP has a staff complement of 27 allocated to 19 foot patrol officers, 5 bicycle patrol officers, 1 GPS controller and 2 supervisors.

⁴⁷ Hermanus Public Protection *Chairman's Report* 31 August 2016 available at www.hppsecurity.co.za accessed 22 February 2019.

⁴⁸ Bitou Municipality *Annual Report 2013-2014* 61.

⁴⁹ Private security companies, the Plett Business Chamber, the Plett Ratepayers Association, Municipality representatives, Municipal Law Enforcement, Bitou Traffic, all NHW Groups, all home owners associations, all emergency services, SAPS, and the CPF.

⁵⁰ *ShowMe Plettenberg Bay* 'Are you aware of the Plettenberg Bay Crime Prevention Association (PBCPA)?' 26 October 2017 available at <https://showme.co.za/plett/news/are-you-aware-of-the-pletttenberg-bay-crime-prevention-association-pbcpa/> accessed 22 February 2019.

⁵¹ Knysna Municipality 'Protection Services' Knysna Municipality Website available at <http://www.knysna.gov.za/resident-services/emergency-services/> accessed 26 February 2019.

⁵² Knysna Municipality 'Protection Services' Knysna Municipality Website available at <http://www.knysna.gov.za/resident-services/emergency-services/> accessed 26 February 2019.

⁵³ Including private security and neighbourhood watches, municipal and provincial traffic, law enforcement and SAPS.

⁵⁴ Britz C 'Knysna Community Police Forum' Presentation *Safer Western Cape Conference* (2018).

7.2 Municipal policing fills the gap

In this section the correlates of municipal policing will be explored. While it is a truism that correlation does not necessarily imply causation, without correlation it is difficult to theorise causation. With correlation established, theories can be built.

7.2.1 Municipal policing associated with SAPS under-policing – in richer municipalities

In a cross-sectional municipal analysis, SAPS policing rates per capita⁵⁵ are compared to the public safety posts allocated by a municipality (local and metropolitan) per capita. At first blush no relationship is apparent. However, lack of revenue may constrain law enforcement: municipal revenue per capita in 2016 ranged from over R11,000 to as little as R450, with a median of R3,061. The distribution appears in the Table 4 below.

Table 7: Revenue per capita, local and metropolitan municipalities

	Minimum	25 th	Median	75 th	Maximum
Municipal revenue (excluding capital transfers and infrastructure grants) per capita, 2017/18	R450	R1 550	R3 060	R4 850	R11 320

Source: Own calculations, data from municipalities.co.za

When the analysis is restricted to those 64 per cent of municipalities which have per capita revenue of R2,000 or more – which includes all the municipalities in Gauteng and Western Cape – then a statistically significant relationship emerges. The relationship is such that, on average, approximately every two *fewer* police deployed per 100,000 is associated with one additional municipal public safety deployment per 100,000 (Figure 2 below). The relationship is not strongly predictive⁵⁶ but does suggest that lower rates of SAPS deployment may play a role in municipal deployments, at least among those municipalities with sufficient revenue to do so.

A qualitative example of how municipalities might fill gaps: in 2010 Knysna Law Enforcement, in response to rising crime in Sedgfield,⁵⁷ set up a local office at the Sedgfield Fire Department, to be staffed on a 24-hour basis with residents being able to call the fire emergency number for this purpose.⁵⁸ Although Sedgfield has a satellite SAPS police station, its satellite status means it has low levels staffing and is not open at night – consequently, the municipality stepped in.

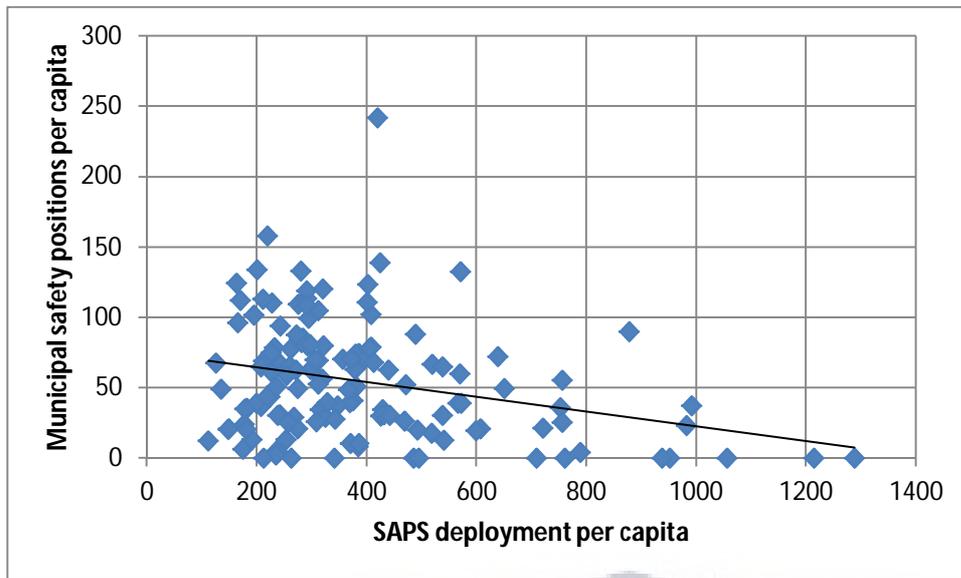
⁵⁵ Policing rates per capita are a crude objective measure of whether an area may be under- or over-policed. Obviously, many other factors play a role in the allocation of SAPS personnel to policing areas, but on the face of it relative per capita number of police suggests whether there may be under- or over-policing in relation to population size.

⁵⁶ $R^2=0.816$

⁵⁷ Sedgfield crime forms part of the data on Knysna as it is not reported on separately.

⁵⁸ Jones D 'Crime Wave in Sedgfield' *George Herald* 5 August 2010.

Figure 2: The relationship between SAPS and municipal deployment (municipal revenue > R2,000 per capita) (2016)



Source: Own calculations⁵⁹

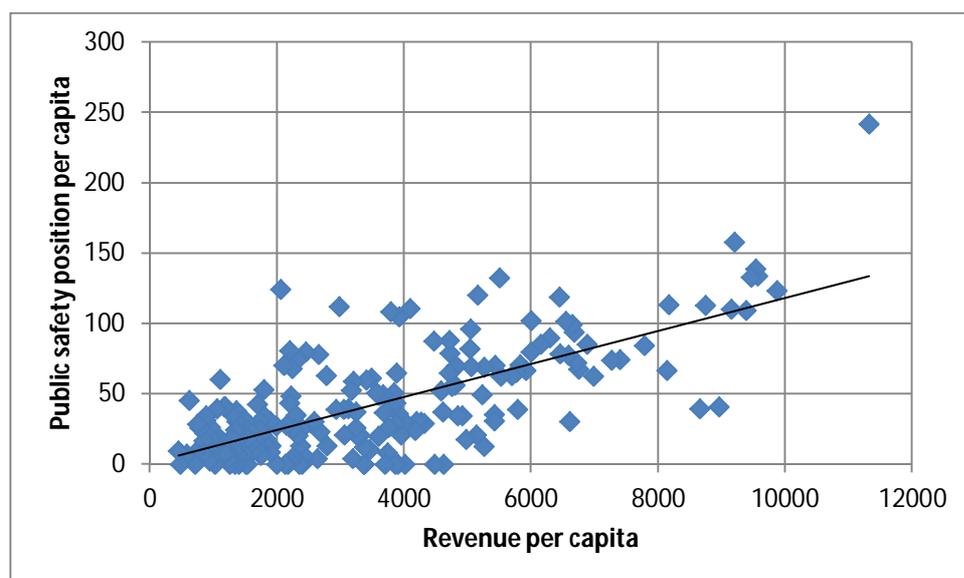
7.2.2 Municipal policing increases with municipal revenue – in richer municipalities

Is increasing revenue associated with increased municipal deployment in richer municipalities? Further cross-sectional analysis of municipalities with R2,000 or more revenue per capita suggests that the wealthier the municipality, the higher the number of public safety positions per capita: per capita revenue wealth determines 51 per cent of the variation in public safety positions per capita⁶⁰, and every additional R43 per capita is associated with one additional public safety position per capita. The relationship appears in Figure 3. This strongly suggests that where municipalities have additional means, these increasingly will be allocated toward higher deployment in the area of public safety.

⁵⁹ Public safety positions per capita were calculated from data obtained from the website www.municipalities.co.za. The variables extracted were ‘population 2016’ and ‘public safety positions 2016’. SAPS deployment per capita was calculated from PLV2 data.

⁶⁰ $R^2=0.5102$.

Figure 3: The relationship between revenue per capita and public safety positions per capita



Source: Own calculations⁶¹

7.2.3 Municipal deployment prioritised if murder high and SAPS low

In the earlier sections, municipalities with high deployment per capita were considered. Municipalities with high deployment per R100m of revenue provide another perspective. What are the characteristics of municipalities that prioritise public safety deployment, in that they have relatively high deployment per R100m revenue? Municipalities with deployment of 300 or more public safety positions per R100m of municipal revenue are those in Table 5.⁶²

They tend to have high murder rates, low rates of SAPS deployment, or both (highlighted in grey). This strongly suggests that insufficient SAPS deployment coupled with violent crime may drive the relative prioritisation of public safety expenditure. Many also have characteristics in common with Overstrand, Bitou and Knysna, including that they are holiday destinations incorporating national parks or beach holiday locations, or contain a large town inherited from the former ‘white’ South Africa, which would have had inherited municipal police at the time of the transition, as described in Chapter 6. Thus, a history of law enforcement plays a role.

Table 5: Municipalities with > 300 public safety positions per R100m revenue

Municipality	Province	Public safety positions per R100m revenue	SAPS local police per capita	Murder rate	Public safety positions per capita
Intsika Yethu	EC	732	134	69	45
King Sabata Dalindyebo	EC	602	163	61	124

⁶¹ Data was obtained from the website www.municipalities.co.za. The variables extracted were ‘population 2016’, ‘public safety positions 2016’ and revenue 2016.

⁶² King Sabata Dalindyebo (includes Umtata), Mnquma (includes Butterworth), Big Five Hlabisa (includes Hluhluwe), Mandeni, Rustenburg, Umzimvubu (includes Mount Frere), Umvoti (includes Greytown), Jozini (includes Ingwavuma), Mthonjaneni (includes Melmoth), Emalahleni EC (includes Glen Grey), Sundays River Valley (includes Addo), Bela-Bela (formerly Warmbaths), Ngquza Hill (includes Lusikisiki), Thulamela (includes Thohoyando), Ray Nkonyeni (includes Port Shepstone and Margate) and Elundini (includes Mount Fletcher).

Mnquma	EC	545	205	72	60
Big Five Hlabisa*	KZN	390	117	15	34
Mandeni#	KZN	377	212	45	28
Rustenburg#	NW	376	170	39	112
Umzimvubu	EC	374	127	38	40
Umvoti#	KZN	367	296	60	81
Jozini	KZN	353	158	17	31
Mthonjaneni#	KZN	348	95	31	41
Emalahleni EC	EC	346	217	58	41
Sundays River* Valley	EC	333	372	65	70
Bela-Bela*#	LIM	325	321	17	80
Ngquza Hill	EC	324	76	46	26
Thulamela	LIM	323	189	7	26
Ray Nkonyeni*#	KZN	320	226	46	75
Elundini#	EC	303	412	21	68

*holiday destination

inherited established towns

7.2.3 The situation in low-revenue municipalities

The question then arises: What is the policing situation in municipalities in the lowest third of revenue per capita? Does the SAPS cater for them appropriately? The evidence suggests not. The majority (86 per cent) of the 76 municipalities with revenue below R2,000 per capita have a SAPS deployment of less than the SAPS median deployment. The majority are in the deep-rural parts of the country. Some 40 per cent have police-recorded murder rates higher than the South African average, including infamous Engcobo in the Eastern Cape, where six police officials were killed at the SAPS police station in February 2018, and which has a murder rate of 73 per 100,000, more than double the national rate.

These rural municipalities have little revenue to compensate for under-deployment by SAPS. This results in reliance on traditional authorities, with the SAPS increasingly explicit in its reliance on traditional leaders to 'plug the gap' (see Chapter 9; the Traditional Courts Bill and other legislation that seeks to formalise reliance on traditional leadership⁶³ are discussed in Chapter 8).

7.2.4 Municipal deployment associated with less ruling-party support

Cross-sectional analysis reveals that deployment of municipal police per capita is weakly negatively associated with ruling-party support.⁶⁴ For example, the median level of municipal policing per capita in ANC-majority areas is 28 per 100,000, while in opposition areas, it is 41 per 100,000. This suggests that ANC control is associated with less investment in municipal policing – or that municipal policing reduces ANC electoral support.

⁶³ Karimakwenda N & Motala A 'Latest Traditional Courts Bill draft flouts constitutional rights even more disturbingly' *Daily Maverick* 13 September 2018.

⁶⁴ Testing municipal policing per 100,000 against percentage of ANC support found $p=0.000$, $R^2=0.1334$ and co-efficient -88.48854 .

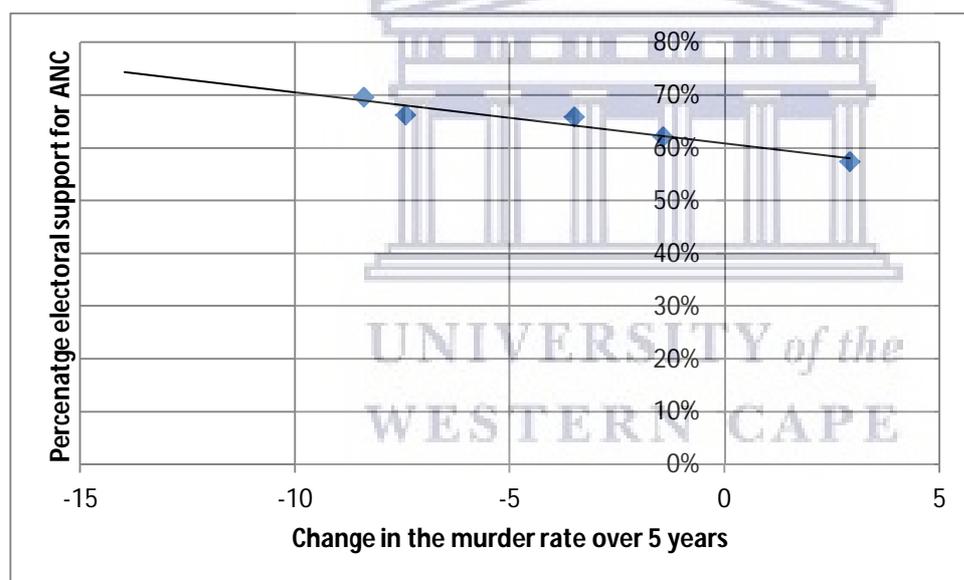
The former interpretation is supported by the fact that SAPS' policing, too, is negatively associated with ANC electoral support. In other words, policing of any kind is lower in ANC-support areas. What, then, is the relationship between violent crime and ANC support?

7.2.5 Relationship between violent crime and ANC electoral support

Cross-sectional analysis by municipality finds no relationship between relative average murder rates within the municipality and electoral support for the ANC at the level of the municipality in 2019.⁶⁵ This suggests that other cross-sectional variables – such as demographics and the support of traditional leaders – are more important than crime in determining local electoral support for the ANC from one area to the next (see Chapters 8 and 9).

However, longitudinal analysis finds that national support for the ANC closely tracks the change in the countrywide murder rate over the five years preceding a national election (see Figure 3 below). The relationship is such that the *change* in the murder rate over five years (that is, whether murder is getting better or worse) predicts 93 per cent of the variation in electoral support: an almost 1 percentage point drop in support is associated with each extra murder per 100,000 over five years.⁶⁶

Figure 15: Relationship between change in murder rate and ANC electoral support, 1999-2019 national elections



Source: Own calculations using IEC data and SAPS data

This suggests that while geographical variation in violent crime is not associated with ANC support on a cross-sectional basis, overall national support for the ANC appears to be influenced by whether violent crime as measured by the murder rate is increasing or decreasing. This may also be the case locally – that change in violent crime within an area, rather than its seriousness relative to other areas, is associated with political consequence. This has implications for how the ANC may choose to approach policy in future and is discussed in Chapter 10 below. Figure 3 above suggests that if the

⁶⁵ This research tested a dataset of policing and murder rates at the level of municipality combined with a dataset of ANC votes at municipal level. Individually testing per cent of valid votes for ANC, per cent of registered voters voting ANC, and per cent of population voting ANC, against murder rate per 100,000, found $p > 0.1$ on all of these.

⁶⁶ $R^2 = 0.9265$.

murder rate worsens by 8 per 100 000 between 2019 and 2024 the ANC is likely to lose its national majority.

This section has found that, on a geographical basis, there is evidence that where municipalities can step in, they do. The section below considers the expanding mandate which has accompanied their expansion.

7.3 Expanding municipal policing mandates

There has been a creeping expansion of the legal mandate of municipal police and law enforcement, which has accompanied the growth in municipal policing – and the initiatives undertaken by municipal police. In 1998 an astounding 137 pieces of legislation were passed. Among these were some innovative Acts which attempted to address persistent crime problems, which ultimately posed significant challenges in implementation for the SAPS. Municipal police and law enforcement have been drawn into policing this legislation. Three seemingly contradictory trends emerge: attempts by the national government to nationalise or control MPS; national government expansion of the mandate of MPS; and metropolitan governments' own initiative in attempting to expand the mandate.

An emerging theme is the important role that investigation and prosecution play in crime prevention. Despite the absence of investigatory powers for municipal police in the SAPS Act, quasi-investigatory powers have been accorded via ministerial fiat. Similarly, public order policing powers and obligations have been accorded to municipal police.

7.3.1 Domestic Violence Act of 1998

The Domestic Violence Act⁶⁷ of 1998 (DVA) replaced the Prevention of Family Violence Act⁶⁸ and placed obligations on SAPS members to provide practical help to victims of domestic violence.⁶⁹ These obligations are on SAPS members specifically and not on peace officers generally.⁷⁰ SAPS members are obliged to bring an application for a protection order on behalf of minors or those unable to provide consent.⁷¹ A SAPS member must arrest if there are grounds to suspect imminent harm, where there is failure to comply with a protection order,⁷² or issue a notice requiring the respondent to appear in court.⁷³

Municipal police were originally omitted from these obligations,⁷⁴ possibly because the SAPS Act amendments for municipal police were assented to in October 1998, while the DVA was assented to a

⁶⁷ Domestic Violence Act 116 of 1998 (DVA).

⁶⁸ Prevention of Family Violence Act 133 of 1993.

⁶⁹ Section 2(a), (b) and (c) Domestic Violence Act (DVA): SAPS members must explain to complainants that they are there to provide whatever assistance the circumstances require, which may include helping the complainant to find suitable shelter or obtain medical treatment. In addition, they must inform the complainant of her or his right both to apply for a protection order, as well as lay criminal charges. Where possible the complainant should be given a notice, which should set out the steps required to apply for a protection order, explains what the complainant should do in the event of a breach, and sets out the type of relief or protection the complainant may request from the court, which the SAPS member must explain

⁷⁰ Section 2(c) DVA.

⁷¹ Section 4(3) DVA: if the complainant is a minor; mentally retarded; unconscious; or a person whom the court is satisfied is unable to provide the required consent.

⁷² Section 8(4)(b) DVA.

⁷³ Section 8(4)(c) DVA.

⁷⁴ Section 1 provides that 'member of the South African Police Service' means any member as defined in section 1 of the South African Police Service Act 68 of 1995, while section 1 of the SAPS Act in turn defines such members of the SAPS, who include reserve force members and other temporary appointments but not members of municipal or other law enforcement.

month later in November 1998. Further, while the DVA was discussed by the Portfolio Committee on Justice, the SAPS Act amendment was dealt with the Portfolio Committee on Police. The omission was remedied in 1999. The minister exercised his power to prescribe such powers⁷⁵ and conferred on members of municipal police services the powers and obligations contained in section 2 (duty to assist and inform complainant of rights), section 4 (duty and obligation to assist in application for protection order) and section 8 (duty to arrest or serve notice), subject to the National Instructions of the National Commissioner, to be published in the Gazette.⁷⁶

By 2005, it was clear that the SAPS was struggling to comply with the DVA. Lisa Vetten, in her expert report to the UN in May 2005, referred to two studies which found the SAPS to be not only impotent but also negligent.⁷⁷ Reasons included lack of sufficient resources and police perceptions regarding domestic violence.⁷⁸ Vetten referred to court cases with audio recordings of SAPS members refusing to assist victims in emergency telephone calls.⁷⁹

The National Instructions on the DVA, first published in 1999,⁸⁰ were thus updated in 2006 and accompanied by the National Policing Standard for Municipal Police Services regarding Domestic Violence⁸¹ (Municipal Standards DVA). This makes the same national instructions, *mutatis mutandis*, directly applicable to Municipal Police. This followed Metro Police seeking more of a role in domestic violence.⁸² In 2005, then Ekurhuleni Metro Police Chief Robert McBride was tasked on behalf of all MPDs with devising a DVA model for metro police.⁸³ A specialist unit model was found to be ideal,⁸⁴ because domestic violence scenes are unstable and time-consuming, and specialist units ensure that normal patrol, or first responder metro police members, are not tied up at the scene for hours.⁸⁵

A specialised unit of 40 trained members was launched by the TMPD in April 2006.⁸⁶ The TMPD subsequently received between 15 and 30 complaints a month, and there were at least 12 families in municipal safe houses at any given time. TMPD sought to

build files on the offenders so we know how to deal with them if there are recurring problems. ... If the complainant decides to file (for) a protection order, our member will accompany the person to court and guide them through the procedure. ... In serious cases we provide safe houses for the family and, because we are part of local government, we are able to use council houses for that.⁸⁷

⁷⁵ Section 64F(2) SAPS Act.

⁷⁶ GNR.710 of 11 June 1999: Regulations for Municipal Police Services.

⁷⁷ Vetten L 'Addressing domestic violence in South Africa: Reflections on strategy and practice: Expert paper for Expert Group Meeting organised by the UN Division for the Advancement of Women' (2005) 6 available at <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf> accessed 26 February 2019.

⁷⁸ Vetten (2005).

⁷⁹ Vetten (2005).

⁸⁰ SAPS *National Instruction 7 of 1999* published in GG 20778 30 December 1999.

⁸¹ SAPS *National Policing Standard for Municipal Police Services regarding Domestic Violence* in GN 206 of 3 March 2006.

⁸² Bateman B 'Cops to help victims of domestic violence' *Independent Online* 5 April 2006 available at <https://www.iol.co.za/news/south-africa/cops-to-help-victims-of-domestic-violence-272138> accessed 26 February 2019.

⁸³ Bateman (2006).

⁸⁴ Bateman (2006).

⁸⁵ Bateman (2006).

⁸⁶ Bateman (2006).

⁸⁷ Bateman (2006).

Most MPDs at least ensure their recruits are trained in domestic violence,⁸⁸ and some domestic violence is reported to MPDs, although data are scarce. The CTMPD, for example, recorded a total of 152 direct complaints of domestic violence during 2017, or about 12 a month,⁸⁹ despite having only 402 members in 67 SAPS police station areas.⁹⁰ The SAPS does not report on domestic violence. The CTMPD has an explicit programme to ‘break the silence on domestic violence’ to encourage more reporting.⁹¹

Provisions of the Municipal Systems Act⁹² intended to prevent unfunded mandates provide that an executive assigning a power must submit to the minister and the National Treasury a memorandum giving a three-year projection of the financial implications for the municipality; disclosing any possible financial liabilities or risks after the three-year period; and indicating how any additional expenditure by the municipality will be funded.⁹³ The Financial and Fiscal Commission must also give advice. It is unclear whether this was ever done; in any event, there is no additional funding made available to municipal police in relation to the DVA.

The DVA obligations are an example of an explicit assignment through regulation to municipal police by national government. Such crime-related functions stretch the crime prevention mandate. The extensions of mandate are sometimes too great to be maintained – there is little evidence to suggest that the TMPD specialist unit launched in 2006 still exists, although MPS still responds to domestic violence.⁹⁴ Indeed, at the time of their launch there were indications of underfunding that may have undermined their existence.⁹⁵ A similar expansion of the mandate to cover public protests – and land invasions – followed the SAPS’ restructuring of its specialised units in 2002.

7.3.2 Public order policing

As a result of ill-timed policy changes, the SAPS has had insufficient capacity to conduct public order policing, or ‘crowd management’, and has sought to do so only where violence is likely or already occurring (see Chapter 4). Consequently, municipal police and law enforcement are increasingly drawn into this, notwithstanding that the Constitution explicitly provides that the maintenance of public order is one of the objects of the SAPS.⁹⁶

Pursuant to this, the SAPS Act provides that the National Commissioner must establish and maintain a ‘national public order policing unit’⁹⁷ which may be deployed at the request of a Provincial

⁸⁸ See, for example, Mashaba H ‘City welcomes 1500 new JMPD trainee officers’ *Joburg* 18 October 2017 available at

<https://www.joburg.org.za/media/MediaStatements/Pages/2017%20Press%20Releases/2017%20latest/18102017-City-welcomes-1500-new-JMPD-trainee-officers.aspx> accessed 15 October 2019.

⁸⁹ Cape Town Metropolitan Police Department (CTMPD) *Annual Police Plan 2018-2019* (2018) 7 available at <http://www.capetown.gov.za/councilonline/layouts/OpenDocument/OpenDocument.aspx?DocumentId=210ca0c6-a234-47d7-8066-6de80eca5f9a> accessed 30 November 2019.

⁹⁰ CTMPD *Annual Police Plan 2018-2019* (2018) 9.

⁹¹ CTMPD *Annual Police Plan 2018-2019* (2018) 31.

⁹² Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

⁹³ Section 10(1) Systems Act.

⁹⁴ A visit to an EMPD station in 2018 found officers ready to assist in relation to domestic violence and public violence, but suggested other crimes must be reported at the SAPS.

⁹⁵ Bateman (2006).

⁹⁶ Section 205(3) Constitution.

⁹⁷ Section 17(1) SAPS Act.

Commissioner⁹⁸ or at the request of the President, if the Provincial Commissioner is unable to maintain public order and the deployment of the unit is necessary to restore public order.⁹⁹

Such national – and, indeed, political – control of public order policing has its roots in the SAPS history, which saw ‘Riot Control Units’ established under the South African Police (SAP) in the 1970s and used as a tool of political control. Rauch and Storey observe:

The primary role of ... the riot control function was the enforcement of apartheid restrictions on the freedom to assemble and protest. Upholding and enforcing these laws essentially required preventing gatherings from taking place, and dispersing them when they did take place. Framed within the context of the illegitimacy of the regime they acted for, and against which large-scale political mobilisation was aimed, prevention and dispersal of gatherings inevitably led to the use of force.¹⁰⁰

In 1992, the SAP created the Internal Stability Division (ISD) to replace these units, its main function being the ‘policing of unrest through proactive (preventive) and reactive measures and the prevention of crime in unrest-plagued areas’.¹⁰¹ The ISD comprised 36 internal stability units that were deployed in 10 regions but quickly became unpopular due to their broad mandate and paramilitary style.¹⁰²

The 1995 SAPS Act makes provision for a national public order policing (POP) unit,¹⁰³ referencing section 218(1)(k) of the Interim Constitution which provided that it is the National Commissioner’s responsibility to see to the ‘the establishment and maintenance of a national public order policing unit’. The end of 1995 saw the ISD and the riot control units of the homeland police merge to create this unit.¹⁰⁴ The restructuring was far-reaching and entailed reselecting and retraining members within a two-year period, shrinking the public order component from 10,000 to 7,000 members and changing the emphasis from crowd control to crowd management.¹⁰⁵

During 2002 the POP unit was subject to SAPS restructuring and was duly aligned to function at SAPS policing ‘area’ level¹⁰⁶ and renamed ‘Area Crime Combating Units’ (ACCU), with its function changed to include ‘crime combating’; this was premised on the notion that the need for public order policing had decreased.¹⁰⁷ Bilkis Omar records that

these units began assisting police stations and other units in VIP protection, domestic violence complaints, stop and search, roadblocks, vehicle check points, patrolling of malls and streets, monitoring hijack hotspots, and other crime

⁹⁸ Section 17(2) SAPS Act.

⁹⁹ Section 17(5) SAPS Act.

¹⁰⁰ Rauch J & Storey D ‘The Policing of Public Gatherings and Demonstrations in South Africa 1960-1994: Paper commissioned by The Commission on Truth and Reconciliation (TRC) Research Department’ CSVR (1998) available at <https://www.csvr.org.za/publications/1483-the-policing-of-public-gatherings-and-demonstrations-in-south-africa-1960-1994.html> accessed 31 January 2019.

¹⁰¹ Omar B ‘Crowd Control: Can our public order police still deliver?’ *SA Crime Quarterly* 15 (2006) 8.

¹⁰² Omar (2006) 8.

¹⁰³ Section 17 SAPS Act.

¹⁰⁴ Omar (2006) 9.

¹⁰⁵ Omar (2006) 9.

¹⁰⁶ An area is larger than a station but smaller than a province – there were 43 areas.

¹⁰⁷ Omar (2006) 9.

combating functions. ... The argument given by the SAPS management for the change was that public protests had decreased with the demise of apartheid.¹⁰⁸

In the minister's words: '[U]nfortunately, this relegated the crowd management function into a secondary function.'¹⁰⁹ While it seemed appropriate initially, Mandy de Waal records that concerns about the dilution of specialised crowd control skills were voiced both inside and outside the SAPS.¹¹⁰ Indeed, the change was ill-timed. 'After 2002,' Omar¹¹¹ records, 'protest marches and violent protest marches increased steadily with the result that ACCU members' workload, in terms of both crime combating and crowd management, increased.' Furthermore, during the subsequent SAPS restructuring process in 2006, the policing 'areas' were themselves disbanded and policing resources 'released' to supplement capacity at station level. The ACCUs were again affected and their name was changed to Crime Combating Units (CCUs). 'The Area Crime Combating Units, after much deliberation, were not fully disbanded but were reduced from seven to three units', Omar records in regard to Gauteng.¹¹²

Protest marches, on the other hand, continued to increase nationwide, from 6,757 in 2002 to 10,162 in 2005.¹¹³ Yet by 2007 the ACCUs were reduced by more than 64 per cent in terms of personnel.¹¹⁴ In 1995, POP had comprised 42 units with 11,000 members, and by 2006 this had been reduced to half the units, with only 2,500 members.¹¹⁵

Thus, it is unsurprising that SAPS itself sought to bolster crowd control by ensuring municipal police had the necessary skills: in June 2006 it was reported that over the previous six months, metro police officials were trained in crowd management by SAPS supervisors to handle the upcoming elections in 2009 and the 2010 World Cup, after a decision taken in December 2006.¹¹⁶

This step may have been partly in response to the establishment in January 2006 of a Public Order Police unit of the Ekurhuleni Metro Police Department, consisting of 38 EMPD officers.¹¹⁷ By 2008 the SAPS issued standards to 'regulate crowd management by members of municipal police services during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards'.¹¹⁸ These standards require the executive head of a Municipal Police Service to report any information regarding 'potential violent disorder' to the Public Order

¹⁰⁸ Omar B *SAPS Costly Restructuring: A review of Public Order Policing Capacity* Monograph 183 (2007) Institute for Security Studies available at <https://issafrica.s3.amazonaws.com/site/uploads/M138FULL.PDF> accessed 1 February 2019.

¹⁰⁹ Minister of Police *Policy and Guidelines: Policing of Public Protests, Gatherings and Events* 29 August 2011 p14 available at <http://www.justice.gov.za/comm-mrk/exhibits/Exhibit-R-Policy.pdf> accessed 1 February 2019.

¹¹⁰ De Waal M 'Marikana, Selebi and the Murder of SAS specialist policing skills' *Daily Maverick* 27 August 2017 available at <https://www.dailymaverick.co.za/article/2012-08-27-marikana-selebi-and-the-murder-of-sas-specialist-policing-skills/> accessed 1 February 2019.

¹¹¹ Omar (2007).

¹¹² Omar (2007) 17.

¹¹³ Omar (2007) 17.

¹¹⁴ Hornberger, J 'We need a complicit police! Political policing then and now' WISER short paper (2014) available at <https://wiser.wits.ac.za/event/public-positions-police-against-people>.

¹¹⁵ Phiyega R in PMG 'SAPS on state of public order policing' Portfolio Committee on Police Minutes 2 September 2014 available at <https://pmg.org.za/committee-meeting/17473/>.

¹¹⁶ Van der Reijden D 'Cops training to boost crowd-control skills' *Independent Online* 9 June 2006.

¹¹⁷ Omar (2007) 54.

¹¹⁸ Regulation 1

Policing Unit of SAPS and the Provincial Commissioner.¹¹⁹ This suggests SAPS POP units are only to be deployed where there is potential violence.

The executive head of an MPS ‘must’ also build ‘positive and constructive relationships with event organizers, community leaders and non-governmental organizations; and explore the potential for establishing formal liaison panels, to prevent and defuse community disorder in conjunction with institutions such as local authorities, civic associations, community policing forums and non-governmental organizations’. This places the responsibility for defusing conflict on municipal police services. Yet this is the kind of interaction expected of the SAPS in terms of its community and sector policing model.¹²⁰

The Regulation of Gatherings Act¹²¹ (RGA), which emerged from the recommendations of the Goldstone Commission on the Prevention of Public Violence and Intimidation,¹²² envisaged a different role for municipalities. Police, in terms of the RGA, are accorded primarily reactive policing roles – in relation to planned ‘legal’ protests. Under the RGA, the emphasis is on the joint management of planned marches by organisers (represented by ‘convenors’), municipalities (represented by ‘responsible officers’) and police (represented by an ‘authorised member’ (SAPS?).¹²³ Unlike the DVA, the RGA defines police more broadly than ‘member of the SAPS’ but explicitly excludes traffic police.¹²⁴

Consequently, municipalities with traffic police alone do not have policing obligations in terms of the RGA, only the role assigned to local authorities in the ‘approval’ process. The RGA requires municipalities (‘local authorities’) to appoint a ‘responsible officer’ to carry out RGA functions.¹²⁵ In the absence of such an appointment, the CEO or her or his immediate junior are deemed to be the responsible officer.¹²⁶ Where credible information is received that a proposed gathering will result in serious disruption or damage, the responsible officer must consult with the convener (organisers) and the authorised member (police) to consider the prohibition of the gathering.¹²⁷ If, after such consulting, the responsible officer is of the view no amendment to the conditions of the gathering would prevent the damage or disruption, she or he may (not must) prohibit the gathering.¹²⁸

Police are given particular obligations and powers by the RGA, as authorised members and more generally. An ‘authorized member’ must be a suitably qualified and experienced member of the Police (broadly defined but excluding traffic police) appointed by the Commissioner (of the SAPS) to represent the police at consultations in terms of the RGA and other functions of authorised members.¹²⁹ The Commissioner must notify local authorities of every such authorisation, as well as of

¹¹⁹ Regulation 3(1) GN 307 (2008)

¹²⁰ Department of Safety and Security *White Paper on Safety and Security* (1998) Pretoria: Government Printers.

¹²¹ The Regulation of Gatherings Act 205 of 1994

¹²² Established in terms of s2 of the Prevention of Public Violence and Intimidation Act 139 of 1991.

¹²³ Ntliziywana P ‘The municipality’s role in implementing the gatherings Act’ Local Government Bulletin 13 3 September 2011 available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-13-issue-3-september-2011/lgb-13-3-september-2011-3-the-municipalities-role-in-implementing-the-gatherings-act.pdf> accessed 31 January 2019.

¹²⁴ Section 1 Regulation of Gatherings Act 205 of 1993 (RGA).

¹²⁵ Section 2 (4)(a) RGA.

¹²⁶ Section 2(4)(b) RGA.

¹²⁷ Section 5(1) RGA.

¹²⁸ Section 5(2) RGA

¹²⁹ Section 2(2)(a) RGA.

the name, rank and address of any authorised member.¹³⁰ If a gathering has been prohibited, the authorised member must ensure access to the proposed gathering is barred.¹³¹

Police (broadly defined but excluding traffic police) are accorded additional powers in relation to gatherings, whether or not they are in compliance with the RGA, that is, whether the process has been followed or not.¹³² Police members who on reasonable grounds are of the opinion that the police will not be able to provide adequate protection may notify the convenor and participating people of this fact; may prevent people from deviating from the agreed conditions or route; may restrict the route to contain traffic where inadequate notice has been given; may order any person or people interfering with a gathering to cease doing so; may specify an area where an incident has occurred; and *must* take all reasonable and appropriate steps to protect property and persons.¹³³

The fact that these powers apply whether or not the gathering¹³⁴ is in compliance with the RGA implies that police, including MPS and law enforcement, have these powers in relation to gatherings for which no RGA authorisation is sought. Illustrative of this is the purchase of ‘riot’ vehicles by the major metro municipalities. It was reported in 2016 that the Tshwane municipality had purchased three (used) armoured vehicles known as ‘Nyalas’ at a cost of R6 million for use by TMPD to assist primarily with ‘service delivery protests’.¹³⁵ In 2017 it was reported that the JMPD had taken delivery of two WP1800 crowd control vehicles, with another two planned.¹³⁶

Similarly, in 2019 it was reported that the eThekweni municipality had taken receipt of four ‘Casspirs’ at an estimated cost of R20 million, to be used ‘mainly for crowd control’ and ‘escalating riots’.¹³⁷ In 2018, a tender was advertised for the ‘supply and delivery of RG12 MK2 (Nyala) multipurpose armoured personnel carriers for the City of Cape Town’ ‘to fulfil *their public order policing role*’.¹³⁸ In 2018, tender awards in Ekurhuleni for ‘Supply and delivery of riot control vehicles (Water Cannons) until 22 May 2019’ and ‘Supply and delivery of troop carriers/second generation Nyala’s until 31 March 2020’ were publicised.¹³⁹ It is not clear if these were for the use of MPS or the SAPS; if the latter, it is unclear why the municipality would be buying equipment for use by the SAPS. Even

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¹³⁰ Section 2(2) RGA.

¹³¹ Section 6(6) RGA.

¹³² Section 9 RGA.

¹³³ Section 9(1) RGA.

¹³⁴ A gathering is defined in the RGA as ‘any assembly, concourse or procession of more than 15 persons in or on any public road or any public place or premises wholly or partly open-air at which the principles, policy, actions or failure to act of any government, political party or political organisation are discussed, attacked, criticized, promoted or propagated or held to form pressure groups, to hand over petitions to any person or to mobilize or demonstrate support for or opposition to the views, principles, policy or actions or omissions of any person or institution including any government, administration or governmental institution’ (s1).

¹³⁵ Moatshe R ‘Nyalas to help police with crowd control’ *Pretoria News* 11 February 2016.

¹³⁶ DefenceWeb ‘Denel to deliver four Casspir armoured vehicles to eThekweni municipality’ DefenceWeb 29 June 2017 available at <https://www.defenceweb.co.za/land/land/denel-to-deliver-four-casspir-armoured-vehicles-to-ethekweni-municipality/> accessed 4 February 2019.

¹³⁷ Head, T ‘eThekweni’s R20m riot vehicles arrive in the municipality’ *The South African* 30 January 2019 available at <https://www.thesouthafrican.com/ethekwinis-r20m-riot-vehicles-arrive-in-the-municipality-video/> accessed 4 February 2019.

¹³⁸ Own emphasis. City of Cape Town Tender number 85G/2019/19 available at http://www.etenders.gov.za/sites/default/files/tenders/Tender%2085G-2018-19_0.pdf accessed 30 November 2019.

¹³⁹ City of Ekurhuleni ‘Tenders Awarded August 2018’ available at <https://www.ekurhuleni.gov.za/tenders-awarded/bids-awarded-for-august-2018> accessed 30 November 2019.

the newly established NMB MP in 2017/18 had members trained by SAPS in crowd management, and together with SAPS, intervened in 68 protest actions in that year.¹⁴⁰

These significant investments occurred as it became apparent that the SAPS POP capacity was insufficient: in 2014 *The Citizen* revealed that SAPS POP commanding officer, Colonel David Makhubela, wrote to the Gauteng Provincial Head of Operational Response Service, pointing out that the SAPS Johannesburg POP served 52 police stations, and with the workload it faced, it could not serve 'professionally'.¹⁴¹ Makhubela wrote: 'Various specialised units request our assistance on an ongoing basis (eg. Sheriffs, City Power, the PPU (Public Protection Unit), the Organised Crime Unit etc. Assistance can therefore not be given to these units because of a shortage of manpower.'¹⁴²

In 2014 Parliament heard that there were 28 POP units nationally, comprising 4,563 members, while in 2012/13 there were 12,399 crowd-related incidents, of which 1,882 were violent.¹⁴³ This suggests nine incidents per POP unit every week, with at least one of these being violent. In April 2018, Parliament heard that the SAPS has insufficient budget for POP as it had determined the ideal number of members to be 12,779 but the actual number of members was only 5,600.¹⁴⁴ Even the tourist town of Plettenberg Bay in 2018 acquired an armoured vehicle for its 'rapid response unit',¹⁴⁵ because serious incidents such as farm attacks and riots require SAPS public order police to be dispatched from George, which delays them by more than an hour.¹⁴⁶

In 2019, a draft SAPS Act amendment Bill proposed that metro police be first responders to public order incidents.¹⁴⁷ In addition, the Bill proposed obligations on MPS to report on any such engagements to the SAPS.¹⁴⁸ Thus, the responsibility for crowd control is relegated to municipalities, and SAPS only intervenes in particular instances. This would be a serious instance of assignment of powers, creating an unfunded mandate which would require advice from the FFC, as discussed above.

During this time of increasing protests, there has been an explosion of one particular form of public order problem – 'land invasions' – which the SAPS has been reluctant to police. Land invasions pose particular challenges to municipalities, which have resulted in their taking extraordinary measures in the face of variable SAPS response to the problem.

7.3.3 'Land invasions'

Land invasions are an area of policing in which SAPS has in some instances refused to provide policing. The result has been that municipalities have almost entirely taken over this function. The Constitutional Court has defined 'land invasions' as the act of taking occupation of land or buildings with the express intent of 'coercing a state structure into providing housing on a preferential basis to those who participate'.¹⁴⁹ The Court said the term should not be stretched to include land occupations

¹⁴⁰ Nelson Mandela Bay *Annual Report 2017-2018* 233.

¹⁴¹ Watson A 'POP is a 'graveyard' for armoured vehicles' *The Citizen* 10 June 2015.

¹⁴² Watson A (2015).

¹⁴³ Kinnes I 'Briefing to Portfolio Committee: SAPS on state of public order policing' 2 September 2014 available at <https://pmg.org.za/committee-meeting/17473/> accessed 4 February 2014.

¹⁴⁴ DefenceWeb 'SAPS needs a bigger public order protection unit' *DefenceWeb* 25 April 2018 available at <https://www.defenceweb.co.za/security/civil-security/saps-needs-a-bigger-public-order-protection-unit/accessed> 30 November 2019.

¹⁴⁵ Stander Y 'Armoured Vehicle for crime-fighting' *Knysna-Plett Herald* 2 August 2018.

¹⁴⁶ Stander Y 'Armoured Vehicle for crime-fighting' *Knysna-Plett Herald* 2 August 2018.

¹⁴⁷ Civilian Secretariat for Policing Services 'Explanatory Memorandum' SAPS Act Amendment Act (CSP 2018 Bill SAPS).

¹⁴⁸ CSP 2018 Bill SAPS.

¹⁴⁹ *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) para 92.

undertaken out of necessity, in circumstances where the occupiers have no alternative land or shelter realistically available to them.¹⁵⁰ Situations where persons who currently reside elsewhere are deliberately moved onto land in order to obtain rights (other than housing rights) and as a form of protest are also in common parlance referred to as ‘land invasions’.¹⁵¹

The Constitutional Court’s interpretation of ‘land invasion’ arises out of the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹⁵² (PIE). Together with the earlier Extension of Security of Tenure Act¹⁵³ (ESTA), both Acts seek to protect rights of occupation.¹⁵⁴ At the time the laws were passed, there was a clear need to protect the most vulnerable members of society who were being rendered homeless by evictions echoing the forced removals of the apartheid era. However, more recently, political parties such as the Economic Freedom Fighters (EFF) and Black First Land First (BFLF)¹⁵⁵ have been implicated in deliberately encouraging and facilitating the occupation of land for the purposes of obtaining rights¹⁵⁶ and land and housing protests increasingly take the form of ‘land invasions’ – arguably a form of ‘service delivery protest’ to which the provisions of the RGA theoretically apply.

Julius Malema, leader of the EFF, has been charged with incitement in relation to two such incidents. On 16 December 2014 in the Free State, he allegedly told the EFF elective conference that he was ‘not the Holy Spirit’ and could not occupy land everywhere. He urged supporters to ‘be part of the occupation of land everywhere else in South Africa’. On 26 June 2016 in KwaZulu-Natal, he allegedly said, ‘[I]f you see a piece of land, don’t apologise, and you like it, go and occupy that land. That land belongs to us.’¹⁵⁷

‘Land invaders’ are theoretically guilty of trespassing at the moment of land invasion. Trespassing remains a crime in South African law through the Trespass Act,¹⁵⁸ which provides that any person who enters land or a building without permission is guilty of an offence unless she or he has a lawful reason.¹⁵⁹ After homes have been established on the land, however, constitutional rights are acquired,

¹⁵⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 20, footnote 22.

¹⁵¹ Limberg X ‘Land invasions affect us all’ *People’s Post* 13 November 2018 available at <https://www.news24.com/SouthAfrica/Local/Peoples-Post/land-invasions-affect-us-all-20181112> accessed 31 January 2019.

¹⁵² Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

¹⁵³ Extension of Security of Tenure Act 62 of 1997.

¹⁵⁴ Part of the legislative reform process of the late 1990s sought to bring the law in alignment with constitutional provisions relating to property and housing rights, including section 26(3) of the Constitution which provides that no one may be evicted from their home, or have their home demolished, without a court order which is made after consideration of all the relevant circumstances. While PIE covers the whole country, ESTA seeks to give effect to section 25(6) of the Constitution, which was aimed at improving security of tenure for those ‘whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices’ – predominantly rural occupants of farming land.

¹⁵⁵ BLF was de-registered as a political party by the IEC in 2019 due to the restriction of its membership to black people. The Electoral Court upheld the deregistration.

¹⁵⁶ Magubane T ‘KZN to set up anti-land invasion unit’ *The Witness* 12 May 2015; Makhafola G ‘Land invasions spiked before elections – Makhura’ *Independent Online* 16 September 2016 available at <https://www.iol.co.za/news/land-invasions-spiked-before-elections-makhura-2069154>; Dlamini P ‘EFF takes responsibility for land invasion’ *The Times* 13 March 2018 available at <https://www.timeslive.co.za/politics/2018-03-13-eff-takes-responsibility-for-land-invasion/> all accessed 30 January 2019.

¹⁵⁷ Maughan K ‘“Never imprison people for speaking,” Malema’s lawyer says in land grab case’ *TimesLive* 12 December 2018 available at <https://www.timeslive.co.za/politics/2018-12-12-never-imprison-people-for-speaking-malemas-lawyer-says-in-land-grab-case/> 30 January 2018.

¹⁵⁸ Trespass Act 6 of 1959.

¹⁵⁹ Section 1 Trespass Act 6 of 1959.

and a court order is required in order for eviction to be ordered, with the process set out in PIE coming into operation.¹⁶⁰ Even if no home has been established, where no other realistic option is available is to those occupying land, a court order is also necessary for an eviction.¹⁶¹

The SAPS National Instructions acknowledge trespassing as a crime and provide that '[t]respassers must be arrested as soon as possible by members of the Service after a complaint of trespassing is lodged and must be brought before court'.¹⁶² In addition, some land invasions, particularly those occurring *en masse* as a form of protest, may qualify as a gathering, and police (both SAPS and MPS) are, in terms of the RGA, therefore obliged to take all reasonable and appropriate steps to protect property and persons when a gathering is to occur.¹⁶³

But the SAPS has been reluctant to become involved on many occasions, despite the land invasion in progress often being clearly criminally motivated through the fraudulent 'sale' of parcels of land by 'organisers'. For example, in August 2018 a Pretoria property-owner was forced to approach the court for an order to compel the SAPS to remove trespassers.¹⁶⁴ The owner had attempted to obtain the assistance of SAPS before any structures had been built, but SAPS refused to allow him to open a case of trespassing.¹⁶⁵ The 'land invaders' in question were allegedly 'selling' portions of land to potential occupiers.¹⁶⁶

Similarly, in September 2018 it was reported that the SAPS had refused to assist cane farmers in Mandeni battling land invasions, in spite of a court order mandating the eviction and the refusal of the occupants to comply.¹⁶⁷ In August 2017, the SAPS near East London refused to assist land claimants (persons dispossessed of land during apartheid who have had their land restored) to remove persons occupying their land, despite having a court order compelling the SAPS to assist.¹⁶⁸ In the latter case, the Mdantsane SAPS spokesperson was quoted as saying: 'The Buffalo City Municipality law enforcement officials were in the area, as this is within their competence, not that of SAPS.'¹⁶⁹ He added: 'The SAPS is in no way involved in evictions and they are only present during evictions to ensure the safety of the sheriff and those assisting him with evictions.'¹⁷⁰

Indeed, the SAPS has consistently maintained that it will not assist in 'evictions' unless ordered to do so by a court or where violence is occurring. In a presentation to Parliament in 2016, it argued that its legislative mandate implied that 'SAPS members *may not* [emphasis added] assist land owners to

¹⁶⁰ Wilson S 'Annexure 1: Legal Opinion: Managing and Curbing Unauthorised Land Occupation' in Housing Development Agency *Managing and Curbing Unauthorised Land Occupation* (2016).

¹⁶¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 20, footnote 22.

¹⁶² Clause 3(d) SAPS National Instruction 7 of 2017.

¹⁶³ Section 9: 'Powers of Police.—(1) If a gathering or demonstration is to take place, whether or not in compliance with the provisions of this Act, a member of the Police— (f) shall take such steps, including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property, whether or not they are participating in the gathering or demonstration.'

¹⁶⁴ Mitchley A 'Court orders Minister of Police to help remove trespassers from Pretoria farm' *News24* 31 August 2018 available at <https://www.news24.com/SouthAfrica/News/court-orders-minister-of-police-to-help-remove-trespassers-from-pretoria-farm-20180831> accessed 7 February 2019.

¹⁶⁵ Mitchley A (2018).

¹⁶⁶ Mitchley A (2018).

¹⁶⁷ Abrahams, A 'Mandeni farmers battle land invasions' *North Coast Courier* 13 September 2018 available at <https://northcoastcourier.co.za/116833/mandeni-farmers-battle-land-invasions/> accessed 7 February 2019.

¹⁶⁸ Fuzile B 'Cops wash hands of land invasion' *Daily Dispatch* 31 August 2017.

¹⁶⁹ Fuzile B (2017).

¹⁷⁰ Fuzile B (2017).

“evict” or remove so-called “illegal occupiers”¹⁷¹. In the latter presentation, the SAPS recorded 71 instances of land invasion over the period April to October 2016, in relation to which it made only 26 arrests for trespassing, of which 25 emanated from a single incident in Hoopstad, Free State.¹⁷² In a response to a parliamentary question, the SAPS stated that it

only supports the Municipal Police or the Sherriff of the Court when the evictions become violent and are classified as violent public protests. The SAPS does not keep the statistics of evicted people, since it is not a SAPS key function.¹⁷³

The reference to ‘supporting municipal police’ in the parliamentary reply is curious, as legislation has not imposed any direct obligations on local governments in terms of the *policing* of ‘land invasions’ or supporting evictions. The use of the word ‘evictions’ seems to relegate the problem to that of a civil dispute. The SAPS’ disinclination to involve itself and the implications of land invasions for local government have become such that it is in municipalities’ interests to ensure that land invasions are dealt with speedily, leading to the establishment of ‘land invasion units’ in most metropolitan municipalities, including Cape Town,¹⁷⁴ eThekweni¹⁷⁵ and Tshwane,¹⁷⁶ as well as other non-metropolitan municipalities such as Msunduzi.¹⁷⁷ This is in addition to any municipal police component and associated public order component. The City of Johannesburg and Ekurhuleni use private companies, known colloquially as the Red Ants due to their red uniforms, to assist with such evictions.¹⁷⁸

At least one MPS has attempted to argue in the High Court that metro police do not have a duty to assist in executing a court order of eviction in relation to private land.¹⁷⁹ The Court, per Adams J, was unequivocal that Metro Police do have such a duty:

I am of the view that the Metro police do have such a duty. The simple fact of the matter is that one of the statutory functions of Metro Police is the “prevention of crime”. It is a crime to unlawfully invade land, even more so to occupy land in contravention of a court order. There is no need to go into an in-depth analysis and interpretation of the term “crime prevention”. One needs to have regard only to its ordinary meaning, which, as I have indicated, includes the prevention of persons from acting in total disregard of a court order. Furthermore, as correctly pointed

¹⁷¹ SAPS ‘Rural Development and Land Reform: Section 23 of the Extension of Security of Tenure Amendment Bill and criminal cases instituted under this Act: Presentation to Parliament 23 November 2016’ available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/161123saps.pdf> accessed 30 January 2019.

¹⁷² SAPS ‘Presentation to Parliament’ (23 November 2016).

¹⁷³ Minister of Police ‘Reply to Parliamentary Question 2018-W1954’ 11 July 2018 available at <https://www.pa.org.za/question/?minister=questions-asked-to-the-minister-of-police&orderby=recentquestions> accessed 30 January 2019.

¹⁷⁴ Sacks J ‘City of Cape Town: protecting private property at the expense of shack-dwellers’ *Daily Maverick* 4 October 2013 available at <https://www.dailymaverick.co.za/opinionista/2013-10-04-city-of-cape-town-protecting-private-property-at-the-expense-of-shack-dwellers/> accessed 30 January 2019.

¹⁷⁵ eThekweni Municipality ‘City intensifies action against land invasions’ 18 March 2016 available at http://www.durban.gov.za/Resource_Centre/new2/Pages/City-intensifies-action-against-land-invasions.aspx accessed 30 January 2019.

¹⁷⁶ Manda, S ‘Metros pay millions to ‘Red Ants’’ *Mail & Guardian* 13 June 2017 available at <https://mg.co.za/article/2017-06-13-00-metros-pay-millions-to-red-ants> accessed 30 January 2019.

¹⁷⁷ Mtolo, N ‘Municipality to tackle land invasions’ *Maritzburg Fever* 13 April 2016 available at <https://www.news24.com/SouthAfrica/Local/Maritzburg-Fever/municipality-to-tackle-land-invasions-20160406> accessed 30 January 2019.

¹⁷⁸ Manda S (13 June 2017).

¹⁷⁹ *Elmir Mining (Pty) Limited and Others v Zulu and Others* (30385/2016) [2017] ZAGPPHC 968 (1 September 2017).

out by Mr Hamman, these individuals by invading the land belonging to the applicants, are committing the crime of trespassing.¹⁸⁰

What is more pertinent given SAPS' attitude, however, is that this court appeared to take it as self-evident that invading land is a crime, as is occupying land in contravention of a court order. Presumably this is because once a court order for an eviction is obtained, anyone unlawfully and intentionally disobeying that court order is guilty of contempt of court,¹⁸¹ which is a criminal offence that theoretically would trigger the involvement of the SAPS.¹⁸² However, contempt of court in civil matters (which eviction proceedings are) follows a 'civil' process in South Africa, with the aggrieved party having to apply to court for an order of contempt.¹⁸³ This may be the root of the SAPS' insistence on additional court orders before acquiescing to be involved in many instances of land invasion, even where a court order in favour of eviction exists.

It is in the interests of municipalities to act swiftly where there is invasion of state land, not solely from a law enforcement perspective. This is because PIE applies wherever ESTA does not and establishes the principle that evictions which may lead to homelessness are not private disputes, as they always involve the state, whose duties to provide emergency housing may be triggered by an eviction.¹⁸⁴ The Constitutional Court in *Blue Moonlight* has held that it is the responsibility of the municipality to provide temporary alternative accommodation in cases of eviction from private land.¹⁸⁵ This is despite housing appearing in the relevant Constitutional schedules as a concurrent responsibility of national and provincial government—not local government.¹⁸⁶ The municipalities' obligation is triggered by national legislation assigning responsibilities to them.

To secure an eviction in terms of PIE, alternative accommodation should ideally be available, if the eviction is from state land or if the occupants have been there for six months.¹⁸⁷ A court will be reluctant to grant an eviction order if the occupiers have been settled on the property for many years unless it is satisfied that reasonable alternative accommodation is available even as an interim measure.¹⁸⁸ This has placed an onerous burden on municipalities, which contributes to their interest in preventing land invasions in the face of SAPS reluctance to intervene. Anna Tshangana argues that municipalities are

backed into a corner when private land owners fail to act in response to land invasions, allowing the mushrooming of informal settlements. Later, when the land is sold and the informal settlement has exploded to hundreds of households, the municipality is finally approached and told they must evict (and provide alternate accommodation), or be forced to purchase the land from the private owner at substantial cost. The court-ordered provision of alternate accommodation to thousands of evictees can disrupt existing plans to deliver units to beneficiaries

¹⁸⁰ *Elmir Mining* 8.

¹⁸¹ *S v Beyers* 1968 (3) SA 70 (A).

¹⁸² Section 106 Magistrates' Court Act 21 of 1944 and section 46 Superior Courts Act 10 of 2013.

¹⁸³ JRL Milton 'Defining Contempt of Court' (1968) 85 SALJ 387: 'The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be chosen to illustrate this point perhaps the most striking is that of the classification of contempts of court into civil contempt (or contempt in procedure) and criminal contempt.'

¹⁸⁴ Liebenberg S 'What the law has to say about evictions' *Mail & Guardian* 1 September 2014 available at <https://mg.co.za/article/2014-09-01-what-the-law-has-to-say-about-evictions> accessed 28 January 2019.

¹⁸⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC).

¹⁸⁶ Schedule 4A Constitution.

¹⁸⁷ Section 4 and s6 PIE.

¹⁸⁸ *Port Elizabeth Municipality v Various Occupiers* at para 28.

who have patiently registered on the National Housing Needs Register and sat on waiting lists for years.¹⁸⁹

The interests of municipalities are clearly affected by land invasions, and the interpretation by the SAPS of its lack of mandate in this regard – save where such invasions or evictions become violent – has forced municipal law enforcement to provide policing resources for dealing with the issue. The phenomenon is closely related to public order protests. The SAPS lack of action in relation to land invasions in progress has led to litigation in which court orders have been sought compelling it to assist. Significant investment in law enforcement capacity in relation to land invasions has thus taken place by municipalities, often in addition to their public order policing investment. Closely related to the general problem of public order is the issue of safety on trains.

7.3.4 Policing on trains

Policing on trains provides an example of an arena in which the SAPS has stopped just short of outright refusal to provide policing. It has provided a level of policing at one point so low as to constitute not policing at all. As a result, municipalities have been drawn in to address the problem.

Until 1986, policing on the rail network in South Africa was provided by an entity known as the South African Railways Police Force (SARPF), which resorted under the control of the South African Transport Services (SATS), as it was then known.¹⁹⁰ The SARPF was disbanded in 1986 and its members integrated into the then SAP.¹⁹¹ According to Johan Burger, the integration was accompanied by undertakings that with an enlarged centralised SAP, more policing attention would be given to the rail industry, its property, staff and commuters.¹⁹² However, the opposite happened, with the situation deteriorating.¹⁹³ The change meant the specialised services of the Railway Police, and their expertise, were lost to SATS.

Safety and security on trains manifestly deteriorated in the late 1990s and early 2000s. A commuter civil society group sued for better safety on trains, prompted, inter alia, by the homicide of a commuter in 2001.¹⁹⁴ The High Court declared that Metrorail,¹⁹⁵ a business unit of Transnet (a national state-owned enterprise),¹⁹⁶ had a legal duty to protect the lives and property of rail commuters, but declined to make any order against the SAPS. It did so because the applicants had not argued that SAPS' resource allocations to rail were irrational, stating furthermore that in the light of 'widespread police shortages', such an order would involve a policy decision better suited to elected representatives.¹⁹⁷ The High Court judgment was overturned, but on further appeal to the Constitutional Court, it was declared that Metrorail/Transnet and the South African Rail Commuter

¹⁸⁹ Tshangana A 'Empowering Municipalities to proactively address urbanisation, land invasions and evictions' *Voices 360* 5 April 2018 *available at* <https://www.voices360.com/empowering-municipalities-to-proactively-address-urbanisation-land-invasions-and-evictions/> accessed 7 February 2019.

¹⁹⁰ In terms of the South African Transport Services Act 65 of 1981.

¹⁹¹ In terms of the Transfer of the South African Railways Police Force to the South African Police Act 83 of 1986.

¹⁹² Burger J 'The policy proposal for integrating municipal police and the national South African Police Service will only add to the problems facing both agencies' *ISS Today* 20 January 2014.

¹⁹³ Burger J (2014).

¹⁹⁴ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* (1) 2003 (5) SA 518 (C).

¹⁹⁵ Metrorail is one of the five business units of Transnet Ltd.

¹⁹⁶ Transnet Ltd, a public company with share capital but in which the state is the only shareholder, was established in terms of the Legal Succession to the South African Transport Services Act 9 of 1989.

¹⁹⁷ *Rail Commuter* 2005 (4) BCLR 301 (CC) para 101.

Corporation (SARCC),¹⁹⁸ a national body with the object of ensuring rail services are provided, had an obligation to ensure reasonable measures to provide for the security of rail commuters.

In the Constitutional Court, Metrorail and SARCC denied that they bore obligations to rail commuters to protect their safety and security.¹⁹⁹ They argued that it was the SAPS which bore such obligations, in terms of section 205 of the Constitution,²⁰⁰ and not them.²⁰¹ Indeed, the service agreement arrangements between SARCC and Metrorail had recorded that the SAPS was primarily responsible for ensuring the safety and security of rail commuters.²⁰² But the Constitutional Court noted that in March 1999, the SAPS and Metrorail jointly produced a report which stated:

The changed environment in South Africa, after the 1994 elections and the rising crime, forced the SAPS to prioritise and concentrate its efforts in maintaining law and order in the broad perspective. The unfortunate shortage of resources resulted in the re-allocation of the Mobile Units into normal policing functions at station level, once again creating a void in the train commuter environment. The existence of such a void forced Metrorail, with its limited resources, to manage the public and non-public components without the assistance of a dedicated police force.²⁰³

O' Regan J notes that although Metrorail's role in relation to the security of rail passengers is a 'supportive' and 'complementary' one, this implies that where a void is created, it must be filled. Thus, once it was clear that the SAPS was unable to carry out the task given their resource constraints, Metrorail had to take reasonable steps to ensure that the void filled.²⁰⁴

The Minister of Safety and Security accepted that he bears an obligation in terms of section 205 of the Constitution to maintain law and order in the Republic, but pointed out that it is a duty which runs throughout the Republic and which requires a range of policy decisions to determine how best it should be met.²⁰⁵ The Minister placed evidence on record that key police stations had been identified for prioritisation.²⁰⁶

The only evidence the applicants had to rebut the minister's claim of a rational resource allocation process was that the Commuter Patrol Unit based in the Western Cape was reduced from approximately 200 members to only 38.²⁰⁷ The Constitutional Court found, as did the High Court, that the applicants had not shown that the policy of the Minister was not rational, lawful or directed to improper purposes.²⁰⁸ Therefore, the Court made no order in relation to the Minister or, by extension, the SAPS.

This leaves open the possibility that such an order could be made – if more convincing evidence were available. The Court seems to have accepted SAPS' *ipse dixit* of a 'lack of resources' and 'rational allocation' process. In fact, perusal of Treasury documents reveals that government expenditure in nominal terms on the SAPS more than doubled from R9.8 billion in 1995/6 to R19.2 billion in 2001/2

¹⁹⁸ Established in terms of the Legal Succession to the South African Transport Services Act 9 of 1989.

¹⁹⁹ *Rail Commuter CC* para 89.

²⁰⁰ Section 205(3) provides: The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

²⁰¹ *Rail Commuter CC* para 89.

²⁰² *Rail Commuter CC* para 91.

²⁰³ *Rail Commuter CC* para 91.

²⁰⁴ *Rail Commuter CC* para 92.

²⁰⁵ *Rail Commuter CC* para 100.

²⁰⁶ *Rail Commuter CC* para 100.

²⁰⁷ *Rail Commuter CC* para 100.

²⁰⁸ *Rail Commuter CC* para 101.

– taking inflation into account, a real increase of more than one-third.²⁰⁹ This seems to suggest greater, rather than fewer, resources available to the SAPS, notwithstanding that in court it claimed a lack of resources.

The SAPS' reluctance to take responsibility was partly because it construed the problem of security on trains as one of 'guarding', arguing that 'the SAPS does not perform guard duties'.²¹⁰ This attitude ignores the likely role of repeat offenders and the potential impact of investigations leading to their conviction and imprisonment. In spite of the absence of a direct order, the litigation prompted the SAPS to take action. On 11 June 2003, the cabinet approved the mandate, functions and resources of the National Division: Protection and Security Services (PSS), which included Railway Police, and railway policing was re-introduced during 2004.²¹¹ It was reported that in its first year of operation in the Western Cape in 2003/4, crime on trains and at stations was reduced by 60 per cent, while fare evasion decreased and the number of commuters increased.²¹² At the official launch of the 'Railway Police' in 2006, the Minister of Transport announced that by 2008 more than 5,000 police personnel would serve in the rail environment.²¹³

Much of this was conceivably motivated by the imperatives of the impending World Cup Soccer event to take place in 2010. But in a further SAPS' restructuring process, the Railway Police were moved to the Division: Visible Policing,²¹⁴ as the 'Rapid Rail Police Units' (RRP) to render inter alia 'crime prevention and crime combating operations in the rail environment',²¹⁵ with no mention of investigation. The rail environment covers 33,000 km of rail and 469,876,215 passenger trips annually,²¹⁶ yet SAPS RRP amounted to only 3,232 Police Act members.²¹⁷

Security further deteriorated, characterised by theft of infrastructure and arson²¹⁸ and attacks on drivers, leading to the resignation of train drivers, with the union remarking that the 'RRP of the SAPS lacks the expertise to combat copper theft by international crime syndicates. These rings are targeting rail infrastructure because it is such a soft target'.²¹⁹ Some 214 train carriages were burnt in



²⁰⁹ See National Treasury *Expenditure Review* 1995/96 and 2001/2.

²¹⁰ *Rail Commuter CC* para 100.

²¹¹ SAPS 'Status and functioning of Rapid Rail Police: Presentation to Parliament 21 September 2016' 3 available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160921Rapid_Rail_Police.pdf accessed 11 February 2019.

²¹² Ndenze, B 'Railway police help cut crime by 40%' IOL 22 May 2008 available at <https://www.iol.co.za/news/south-africa/railway-police-help-cut-crime-by-40-401441> accessed 30 November 2019.

²¹³ Radebe J 'Address at the Retreat South African Police Service (SAPS) Rail Police launch by Mr Jeff Radebe, MP, Minister of Transport, Retreat Station 30 October 2006' available at <https://www.gov.za/j-radebe-south-african-police-service-rail-police-launch> accessed 26 February 2019.

²¹⁴ SAPS 'Status and functioning of Rapid Rail Police: Presentation to Parliament' (2016) 3.

²¹⁵ SAPS 'Status and functioning of Rapid Rail Police: Presentation to Parliament' (2016) 4.

²¹⁶ GCIS 'Police, Defence and Intelligence' *South Africa 2016/17 Yearbook* 4 available at <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/PoliceDefence2017.pdf> accessed 11 February 2019.

²¹⁷ SAPS 'Status and functioning of Rapid Rail Police: Presentation to Parliament' (2016) 4.

²¹⁸ Hyman A and Molyneaux A 'Who's behind the six-year wave of Cape Town train fires?' *Sunday Times* 10 February 2019

²¹⁹ ANA 'Terrified train drivers resigning in numbers' *The Daily Voice* 14 March 2018 available at <https://www.dailyvoice.co.za/news/terrified-train-drivers-resigning-in-numbers-13814378> accessed 30 November 2019.

three years, with 174 of them torched in the Western Cape.²²⁰ Although a SAPS crime intelligence operation attempted to investigate the problem, it remained unresolved.²²¹

This inability and unwillingness of SAPS meaningfully to address the problem led in early 2018 to the City of Cape Town, the Provincial Public Works and Transport Department of the Western Cape and PRASA signing a memorandum of understanding (MOU) in terms of which of the entities would contribute R16 million for one year toward the training and deployment of 100 ‘rail enforcement officers’ (city law enforcement officials) on Metrorail trains in Cape Town. Law enforcement, and not MPS, had to be deployed, as external funding of MPS is not permitted in terms of the SAPS Act.

Before the launch of the unit, a gang of five men robbed commuters travelling on a train between Lynedoch and Eerste River near Stellenbosch and then threw them off the train; one man was killed and eight others seriously injured.²²² In the aftermath it was reported that city officials were investigating whether a state of emergency could be declared for the train system, such that additional financial resources could be brought to bear on the rail system in the Western Cape.²²³ In late September 2018, the SAPS blamed PRASA for the deteriorating situation when appearing before the Western Cape Provincial Parliament.²²⁴

In late 2018 the municipal Rail Enforcement Unit was finally deployed. In January 2019 it was reported that the unit had confiscated 379.5 metres of stolen cable and 800 kilograms of stolen railway signal cable, while 36 people had been arrested on charges including assault, possession of drugs and stolen property, and malicious damage to property.²²⁵ Metrorail Western Cape regional manager Richard Walker was quoted as saying that ‘the next priority would be closing down non-compliant scrap dealers and lobbying for legislative changes to permit only traceable electronic payment methods ... the current practice of cash-for-copper-no-questions-asked encourages illegal and illicit scrap dealing’.²²⁶

The approach of the city law enforcement to the problem has thus been explicitly investigatory. The City of Cape Town and Metrorail said ‘the promulgation of two enabling laws in the fight against metal theft’, in addition to the use of technology and forensic resources, had enabled the securing of 198 offenders in custody, the successful prosecution of 17 offenders, and a total of 95 years in prison sentences.²²⁷ The reference to ‘promulgation of laws’ refers to amendments to the Second Hand Goods Act and the Criminal Matters Amendment Act 18 of 2015, which created new offences of ‘tampering with infrastructure’ and tightened bail and sentencing in relation to metal theft.

A key element was that the national minister had been persuaded to extend to the City of Cape Town Law Enforcement ‘Metal Theft Unit’ powers of search, seizure and arrest contained in Chapter 9 of

²²⁰ Makinana, A ‘Arsonists blamed for torching of 214 trains in SA over past three years’ *Sowetan* 22 January 2019.

²²¹ Hyman A and Molyneux A ‘Who’s behind the six-year wave of Cape Town train fires?’ *Sunday Times* 10 February 2019

²²² Correspondent ‘Condolences and shock after Stellenbosch train attack’ *News24* September 2018.

²²³ Knight T ‘Cape officials want state of emergency for rail network after deadly attack’ *Eyewitness News* 10 September 2018.

²²⁴ Washinyira, T ‘Police slam Prasa on rail safety’ *News24* 27 September 2018.

²²⁵ ANA ‘Rail Enforcement Unit improves safety of Cape Town Metrorail commuters’ *The Citizen* 11 January 2019.

²²⁶ ANA ‘Rail Enforcement Unit improves safety of Cape Town Metrorail commuters’ *The Citizen* 11 January 2019

²²⁷ ANA ‘Rail Enforcement Unit improves safety of Cape Town Metrorail commuters’ *The Citizen* 11 January 2019.

the Second Hand Goods Act.²²⁸ This permits law enforcement to conduct investigations into metal theft (discussed in the next section).

The security problem on trains is related to copper theft. In this, too, there has been an expansion of municipalities' policing mandate.

7.3.5 Copper theft

The security problem on trains was partly driven and characterised by copper theft, as copper forms a key part of signalling equipment and other trains infrastructure. In 2009, Transnet was losing 27 km of cable per month to copper thieves.²²⁹ Other infrastructure is also targeted. Public Enterprises Minister Barbara Hogan said theft of copper cables had cost Eskom R69.2 million between 2004/05 and 2008/09, and replacing it cost a further R137.6 million.²³⁰ Combating copper theft, which frequently affects municipal infrastructure, is another sector in which municipalities have been forced to take their own action in the face of insufficient SAPS response.

Data from SAPS indicated that from 2003/04 to 2007/08 recorded copper theft increased by 240 per cent from 13,675 to 33,156. Thus, it was clear that the prevalence was increasing rather than decreasing. The SAPS, however, stopped using the code for metal theft after 2008 and thereafter it was simply recorded as 'theft-other'; tracking trends became more difficult, as metal theft was subsumed in the broader category.²³¹

Copper is not classified as a precious metal in terms of the Precious Metals Act;²³² the stringent precious metal requirements relating to sale and purchase do not apply, and nor was theft of copper managed by the erstwhile specialised Diamonds and Precious Metal Unit of the SAPS. However, copper theft was in 2010 considered by the SAPS to be a 'Priority Crime' and nine task teams located in the Organised Crime Division were addressing the problem.²³³ The problems relating to the investigation of organised crime are discussed below in Chapter 3; suffice it to say, the response was inadequate to the problem.

This is illustrated by the fact that in the 2016/17, the SAPS said that a docket analysis in Kwazulu-Natal showed that metal theft accounted for 32 per cent of all recorded 'other theft',²³⁴ suggesting that in that year more than 15,000 cases were recorded in that province alone; if the same percentage were to apply to the whole country, it would suggest in the region of 115,000 cases nationwide. Apart from the effect on parastatals such as Eskom and Transnet, municipalities suffer the consequences of cable and metals theft. With damages reportedly amounting to three times the cost of the material stolen, law enforcement task teams were formed in Cape Town, Tshwane and Johannesburg Municipalities.²³⁵ Umsunduzi and eThekweni have also taken measures.

The Tshwane Metro Council initially launched a technologically equipped centre operated by a private company, Combined Private Investigations (CPI), which relies on technology to combat

²²⁸ GG 40616 (620) February 2017.

²²⁹ Reporter 'New twist in Transnet's war on copper thieves' *Business Report* 18 August 2009

²³⁰ Reporter 'New twist in Transnet's war on copper thieves' *Business Report* 18 August 2009.

²³¹ Rasool F 'DA proposes copper theft solution' *ITWeb* 25 August 2011.

²³² Act 37 of 2005.

²³³ Arendse, N Presentation: Copper Theft Prevention Analysis *SARPA Convention* 29 July 2010 available at http://sarpa.co.za/Websites/sarpa/files/Content/6397723/Neil_Arendse_-_Copper_Theft_Prevention.pdf accessed 14 February 2019.

²³⁴ SAPS *Annual Crime Report 2015/16 Addendum to the SAPS Annual Report* 70.

²³⁵ Yorke-Smith, L 'Solving copper theft' *HiTech Security Solutions Magazine* January 2010 available at <http://www.securitysa.com/article.aspx?pkarticleid=5905> accessed 14 February 2019.

copper cable theft.²³⁶ In 2010 it was reported that approximately 248 copper cable thieves were arrested and successfully prosecuted through the investigation by CPI.²³⁷ This, too, was insufficient for the scale of the problem. In 2017, an Anti-Cable Theft Unit was established within the TMPD to provide static guarding at open and new tranches and substations, regular patrols of hotspots, regular inspections of scrapyards, response to cable theft complaints, and apprehension of suspects involved in cable theft.²³⁸ In 2018 it was reported that Tshwane had purchased 130 off-road vehicles for the express purpose of combating cable theft.²³⁹

In September 2017, it was reported that the City of Johannesburg had established within JMPD a specialised copper unit, after the previous month saw 32 km of cables being ripped out, stolen or damaged, leaving the city with a R45 million repair bill.²⁴⁰ In 2014, Mzunduzi Municipality formed an electricity theft task team to work together with other law enforcement partners in addressing cable theft.²⁴¹ eThekweni Municipality established a similar task team in 2009, with the explicit aim of conducting investigations in support of the SAPS.²⁴²

The City of Cape Town established a Copper Theft Task Team, known as the Copperheads, in 2007-2008.²⁴³ In 2017, the minister extended powers of search and seizure to this law enforcement unit, providing it with greater investigatory powers, as it would be able to execute search warrants on properties, conduct search and seizure operations and conduct premises where illicit second-hand goods are being traded in contravention of the Act.²⁴⁴ This was strongly lobbied for by the City of Cape Town.

Thus, municipalities are forced to police, and conduct investigations either themselves or in support of the SAPS, to protect their infrastructural interests. This is the result of failure by the SAPS adequately to address organised crime. Key, however, to the MPS' approach, and success, has been to conduct investigations. The SAPS Act does not mention 'investigating crime' as a function of MPS, but where organised crime is involved, investigation is the best method of preventing crime. This opens the door to investigations in other contexts.

7.3.6 Organised crime and gangs

The problem of gangs and organised crime has been a persistent feature of crime in South Africa. The Prevention of Organised Crime Act (POCA)²⁴⁵ introduced racketeering and gang membership offences and civil and criminal asset forfeiture, while the National Prosecuting Authority Act²⁴⁶ provided for 'Investigating Directorates' within the NPA to implement the new POCA provisions.²⁴⁷

²³⁶ Yorke-Smith L (2010).

²³⁷ Yorke-Smith L (2010).

²³⁸ City of Tshwane Official Facebook page 20 April 2017.

²³⁹ Daniel L 'City of Tshwane buys 130 off-road vehicles to combat cable theft' *The South African* 24 July 2018 available at <https://www.thesouthafrican.com/news/city-of-tshwane-buys-130-off-road-vehicles-to-combat-cable-theft/> accessed 30 November 2019.

²⁴⁰ AFP 'Johannesburg gripped by copper cable warfare' *News24* 29 October 2017.

²⁴¹ Peters S 'Team tasked with eradicating copper cable theft' *IOL* 16 May 2014.

²⁴² EThekweni Municipality 'Cable Theft' available at http://www.durban.gov.za/City_Services/electricity/Pages/Cable%20Theft.aspx accessed 30 November 2019.

²⁴³ Booysen J 'Copper theft: 100 arrests in six months' *IOL* 27 March 2008 available at <https://www.iol.co.za/news/south-africa/copper-theft-100-arrests-in-six-months-394392> accessed 30 November 2019.

²⁴⁴ Charles M 'Metal theft unit gets more teeth' *Cape Argus* 27 August 2017.

²⁴⁵ Prevention of Organised Crime Act 121 of 1998 (POCA).

²⁴⁶ National Prosecuting Authority Act 32 of 1998 (NPA Act).

²⁴⁷ Chapter 5 NPA Act

Relaunched as a the 'Directorate of Special Operations (DSO or Scorpions), they were initially successful.²⁴⁸ The disbandment of the DSO was widely understood to be political.²⁴⁹ The SAPS in its restructuring process disbanded or reduced relevant SAPS units.

In this climate, MPS began to establish units which focused on gangs, organised crime and drugs, pursuant to powers accorded to them in relation to drugs via ministerial regulation in 1999.²⁵⁰ A presentation to Parliament indicated that by September 2007 the TMPD had a 'Substance Abuse Unit' while the CTMPD had a substance abuse unit and a 'Gang Task Team'.²⁵¹ However the TMPD unit's existence was often under threat, and it was reported in July 2008 that it would be 'shut down' in 2008 despite seizing narcotics worth hundreds of thousands of rands and arresting more than 200 drug peddlers and syndicate members since January that year.²⁵² In 2016 ANC mayor Kgosientso Ramokgopa said that 'we are aware that Tshwane has been labelled the drug capital of South Africa and this has led to us allocating R50 million to tackle the problem in the 2015/16 financial year'.²⁵³ These plans were successfully implemented under a new political administration, when a DA coalition took over governing the city in 2016.²⁵⁴

In Cape Town in 2009 CTMPD officers became instigators of warrants of arrest and search and seizure in matters leading to the forfeiture of assets in terms of POCA.²⁵⁵ Specialised legislation intended to be used by DSO-like investigatory units became a tool in the hands of metro police. In addition to gang and drug units, in Cape Town the CTMPD acquired a 'Special Operations Unit' which makes use of tip-offs from the community in order to conduct surveillance operations to confirm illegal activity pursuant to obtaining search warrants and conducting searches in partnership with the SAPS.²⁵⁶ In addition to Special Operations, the CTMPD had a 'Special Investigations Unit' which reportedly undertook 'shadow' investigations, which it characterised as being in support of the SAPS.²⁵⁷ The unit was accused of being a 'parallel police force' and 'shut down' by the then mayor, Patricia de Lille; it arose from the ashes after her departure.

The unit had its roots in the obligation imposed on municipalities to conduct investigations in relation to internal corruption (see below). These units frequently expanded their investigatory ambit to include matters of interest to municipalities, but had their roots in the difficulty of combating corruption. Like the SIU, such units have no direct powers of arrest or prosecution. Internal corruption remains something largely investigated by municipalities themselves.

²⁴⁸ Goga, K 'Taking stock of the last 20 years: responses to organised crime in a democratic South Africa' *SA Crime Quarterly* 48 (2014) 67-68.

²⁴⁹ Hamlyn, M 'Scorpions' disbanding "is to protect ANC" *Mail & Guardian* 21 January 2008.

²⁵⁰ In terms of the Drugs and Drug Trafficking Act, powers of entry, search, questioning and seizure; in terms of the SAPS Act, power to execute a warrant, summons or other legal process. See Annexure 6 read with Regulation 10, GNR.710 of 11 June 1999: Regulations for Municipal Police Services.

²⁵¹ Metropolitan Police Services' Presentation to Parliament: 'Report on the status of Metropolitan Police Departments in South Africa 16 September 2007' available at <https://pmg.org.za/files/160907Report.ppt> accessed 10 November 2019.

²⁵² Hosken G 'Metro police's drug unit shut down' 11 July 2008 available at <https://www.iol.co.za/news/south-africa/metro-polices-drug-unit-shut-down-407877> accessed 10 November 2019.

²⁵³ 'Tshwane Gets Tough on Drugs Vuk'uzenzele (2016) available at <https://www.vukuzenzele.gov.za/tshwane-gets-tough-drugs> accessed 17 November 2018.

²⁵⁴ Nkosi N 'TMPD drug unit already yielding results' *Pretoria News* 8 May 2017 available at <https://www.iol.co.za/news/tmpd-drug-unit-already-yielding-results-9005562> accessed 10 November 2019.

²⁵⁵ *National Director of Public Prosecutions v Stemmet and Another* (13008/2007) [2009] ZAWCHC 86 (30 April 2009).

²⁵⁶ CTMPD *Annual Police Plan 2012-13* (2012) 38.

²⁵⁷ Isaacs L 'What JP's unit got up to' *Cape Times* 7 August 2018.

7.3.7 Internal corruption investigations

Corruption is a particularly insidious form of crime which cannot easily be measured – it is often when it is least reported that it is most prevalent. Although a range of measures were put in place for national government to address corruption in the post-apartheid era, many of these foundered and by 2014 obligations were placed on municipalities to investigate internal corruption themselves.

The Prevention and Combating of Corrupt Activities Act (POCCA)²⁵⁸ created a range of corruption offences, which if they met certain financial thresholds, were supposed to be investigated by the Scorpions.²⁵⁹ In addition, the Special Investigating Unit (SIU) was formed under the Special Investigating Units and Special Tribunals Act,²⁶⁰ in terms of which the President may by way of proclamation order the investigation by the SIU of any state maladministration, improper or unlawful conduct, unlawful appropriation, irregular transactions or intentional or negligent loss of public money.²⁶¹ With the demise of the Scorpions and the collapse of SAPS specialised skills referred to above, the investigation by a national entity of corruption was primarily by way of Proclamation by the President through the SIU.

Although the SIU has investigatory powers, it does not have powers of arrest or of prosecution: matters investigated are reported to Parliament and must be referred on to the SAPS and the NPA for prosecution. Furthermore, over the period 2009 to 2014, then President Zuma signed only 36 proclamations; during 2013/14 the SIU submitted 30 final reports to Parliament, of which only nine emanated from the period 2009-2014.²⁶² This is suggestive of extremely slow turnaround times and strongly suggests that corruption and maladministration were being inadequately addressed by the SIU.

This may have prompted the Minister of Finance, acting with the concurrence of the minister responsible for local government, to exercise the powers accorded in section 175 of the Municipal Finance Management Act²⁶³ to regulate the internal investigation of financial impropriety by a municipality. Regulations²⁶⁴ promulgated in 2014 *oblige* a municipal council of a municipal entity to establish a disciplinary board to investigate allegations of financial misconduct in the municipality or municipal entity, and to monitor the institution of disciplinary proceedings against an alleged transgressor.²⁶⁵

Although the regulations primarily deal with the disciplining in terms of employment law of those against whom findings are made, the regulations do appear to envisage the possibility of criminal proceedings arising from the investigation: where the alleged financial misconduct constitutes an offence in terms of section 173 of the same Act, the municipality must report to relevant institutions ‘whether’ a charge has been laid against the person with the SAPS.²⁶⁶

Thus, the Minister of Finance has conferred investigatory powers on municipalities in respect of alleged corruption offences within a municipality. Yet instead of empowering a direct referral to the

²⁵⁸ Prevention and Combating of Corrupt Activities Act 12 of 2004.

²⁵⁹ In terms of the self-imposed ‘mandate’ of the Scorpions in place at the time.

²⁶⁰ Special Investigating Units and Special Tribunals Act 74 of 1996.

²⁶¹ Sections 2(1) and 2(2) Act 74 of 1996.

²⁶² SIU Annual Report 2013/2014.

²⁶³ Municipal Finance Management Act 56 of 2003.

²⁶⁴ GG 37699 GNR.430 of 30 May 2014: ‘Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings’.

²⁶⁵ Regulation 4 *Municipal Regulations on Financial Misconduct*.

²⁶⁶ Regulation 16 *Municipal Regulations on Financial Misconduct*.

NPA, criminal charges must be laid with the SAPS – to investigate all over again. The Municipal Systems Act²⁶⁷ of 2000 provides that a municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers, reaffirming the similar constitutional provision regarding incidental powers;²⁶⁸ both investigations and direct referrals could be inferred.

Pursuant to the provisions, eThekweni Municipality established a City Integrity and Investigations Unit (CIU), which is responsible for the implementation of the Anti-Fraud and Anti-Corruption strategy in the Municipality, and is mandated to investigate all allegations of fraud and corruption within the municipality, using a staff complement of 70 members.²⁶⁹ By November 2017, some 39 cases had been referred to the SAPS.²⁷⁰ Similarly, the City of Johannesburg established a Group Forensic Investigation Service (GFIS) in 2017, mandated by municipal resolution to, within the municipality, ‘prevent, detect, investigate and resolve all reported allegations of fraud, corruption, theft and maladministration’.²⁷¹ In addition, the mandate includes ‘investigation of hijacking and slum-lording of properties’ and ‘stakeholder management’.²⁷² The mandate has thus been extended slightly outside of the narrow mandate of internal corruption investigation in terms of the regulations referred to above.

This widening of the mandate took fullest expression within the controversial Cape Town ‘Special Investigating Unit’(CTSIU), which appears to have investigated any matter affecting metropolitan staff or representatives.²⁷³ In August 2017 the mayor, Patricia de Lille, sought to change the mandate of the unit to conduct internal investigations into staff misconduct only.²⁷⁴ Safety and Security Mayco member JP Smith said the unit had conducted ‘shadow investigations’ on matters affecting the municipality to support an understaffed and under-resourced national police force.²⁷⁵ Included among high-profile cases investigated was the murder of DA ward councillor Xolile Gwangxu, shot dead in Philippi East in 2017, and the murder of metro police officer Ben Koopman, who was robbed of his service pistol and shot outside his home in Eerste River in 2016.²⁷⁶ The attempted murder and hijacking of councillor Suzette Little in Athlone, and a hostage situation involving councillor Xanthea Limberg, were also on the list of investigations.²⁷⁷ The CTSIU was, furthermore, involved in an international investigation by Interpol, and traced a suspect implicated in business fraud amounting to R60 million, also providing information that led to an arrest.

Smith said these were not autonomous investigations and the word ‘investigation’, and what constituted an investigation, was a matter of interpretation.²⁷⁸ However, in a letter dated November 7, Major-General Felix Mbeki, the SAPS provincial head for legal and policy services, informed the city

²⁶⁷ Municipal Systems Act 32 of 2000 as amended.

²⁶⁸ Constitution s156(5).

²⁶⁹ Ngcobo M ‘Ethekeeni Integrity and Investigations Unit (CIU) Presentation to the Anti-Fraud and Corruption Seminar Durban 15 November 2017’ (2017).

²⁷⁰ Ngcobo M (2017).

²⁷¹ Annexure A ‘Performance Agreement between the City of Johannesburg Metropolitan Municipality and Shadrack Sibiyi’ 11 July 2018 available at <https://www.joburg.org.za/about/Documents/GFIS.pdf> accessed 8 February 2019.

²⁷² Annexure A ‘Performance Agreement between the City of Johannesburg Metropolitan Municipality and Shadrack Sibiyi’ 11 July 2018 available at <https://www.joburg.org.za/about/Documents/GFIS.pdf> accessed 8 February 2019.

²⁷³ Isaacs L ‘What JP Smith’s Unit got up to’ *Cape Times* 7 August 2018.

²⁷⁴ Duval, M ‘JP’s unit back on the job’ *The Voice* 18 May 2018.

²⁷⁵ Isaacs (2018).

²⁷⁶ Isaacs (2018).

²⁷⁷ Isaacs (2018).

²⁷⁸ Isaacs (2018).

that the MPS ‘had not been allocated investigative powers and functions’.²⁷⁹ Yet powers of arrest, search and seizure are investigatory in nature, and these have been accorded to MPS and law enforcement in various contexts (see Chapter 6).

Furthermore, there is an argument that if an investigation is incidental to other functions, such as combating corruption or preventing crime, it may well be appropriate for a municipality to investigate, in much the same way that the South African Revenue Service (SARS), in collecting tax, conducted investigations incidental to its tax collection function prior to the passage of specific empowering legislation. Investigations do not always require invasive processes and much can be done with open sources of information, without any special powers.

For example, in 2019, Cape Town municipal enforcement used mobile phone footage posted online of a mobile phone theft to track the apparently colluding minibus taxi into which the thief escaped; the suspect was traced and the phone returned to the owner.²⁸⁰ A murder of a motorbike rider in 2018 saw municipal enforcement receive a tip-off and then execute an arrest, finding the weapon and credit cards of the victim on the suspect.²⁸¹ The tip-off may have been made to metro police rather than SAPS because of the widespread belief some SAPS members are complicit with gangs.²⁸²

In these arrests, and many others, no powers beyond that already accorded to law enforcement or MPS were used though arguably ‘an investigation’ was carried out. As the victim of the mobile phone theft said, ‘[T]his means one less group of criminals who can prey on innocent members of the public.’²⁸³ Investigations result in crime prevention.

In May 2018, it was reported that the Cape Town unit had been ‘reinstated’.²⁸⁴ Smith has been explicit that the unit sought to fill the gap left by SAPS failure: ‘The SIU is trying to, within our extremely limited powers, to deal with challenges where national government is failing.’²⁸⁵

7.4 Conclusion

The analysis above suggests that municipalities do step into the policing gap both geographically and in terms of type of policing. Why do they do so, given that policing is a national mandate and policing must come from discretionary revenue?

The gap in SAPS delivery impacts on local government service delivery and gives rise to public demand. Subnational service delivery is frequently disrupted by crime: schools cannot teach effectively in unsafe environments;²⁸⁶ services such as water, lighting, and electricity cannot be

²⁷⁹ Isaacs (2018).

²⁸⁰ Hyman A ‘Phone snatched in brazen theft – but creative cops soon catch the thieves’ *TimesLive* 17 October 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-10-17-watch-phone-snatched-in-brazen-theft-but-creative-cops-soon-catch-the-thieves/> accessed 15 November 2019.

²⁸¹ Citizen Reporter ‘Man arrested in connection with murder of biker woman with flat tyre’ *The Citizen* 29 September 2018 <https://citizen.co.za/news/south-africa/2015666/man-arrested-in-connection-with-murder-of-biker-woman-with-flat-tyre/> accessed 15 November 2019.

²⁸² Dolley C and Sole S ‘SAPS Wars Part 1: The blurry blue line between the cops and the Cape underworld’ *News24* 4 March 2019 available at <https://www.news24.com/SouthAfrica/News/saps-wars-part-1-the-blurry-blue-line-between-the-cops-and-the-cape-underworld-20190303> accessed 15 November 2019.

²⁸³ Hyman A (2019).

²⁸⁴ Dolley C ‘Cape Town investigation unit reinstated following shut down by De Lille’ *Mail & Guardian* 23 May 2018.

²⁸⁵ Isaacs (2018).

²⁸⁶ Nkosi-Malobane S ‘How school violence impacts a conducive learning and teaching environment’ *IOL* 23 April 2019.

delivered because of loss of critical infrastructure due to theft and sabotage;²⁸⁷ ambulances and fire engines cannot reach their destinations due to attacks;²⁸⁸ housing cannot be delivered in fair and equitable fashion due to land invasions;²⁸⁹ employees cannot get to work on trains or buses which are on fire,²⁹⁰ or taxis are involved in violent turf warfare.²⁹¹ Indeed, even interventions with direct crime-prevention effects, such as expanded street lighting, fail because street lights are stolen.²⁹² With increasing crime, the local economy falters as investment and tourists are deterred,²⁹³ further expediting the downward spiral of compromised delivery.

Ensuring that crime is contained – by whatever means – is thus a *sine qua non* of delivery for subnational governments seeking to deliver. Furthermore, there is demand from the public for increased subnational policing. Citizens increasingly look to subnational governments to control crime.²⁹⁴ ‘Blame’ for crime is increasingly placed on subnational government in public discourse.²⁹⁵ Headlines referring to ‘Johannesburg Police’ or ‘Western Cape Police’ seem, if by dint of grammar, to imply political control and not a geographical moniker. Subnational governments are expected to address crime via policing, both with some control over the SAPS and with subnational police; the paradox is that the more policing is deployed, the more public expectations may be raised. The tendency for the ruling party itself to ‘blame’ subnational governments for crime has become more common as control shifts to opposition parties.²⁹⁶

The rhetoric of social crime prevention furthermore supports the narrative that it is subnational governments which must address ‘the root causes’ of crime.²⁹⁷ Thus, local and provincial governments are increasingly held to account by the public for deteriorating situations of safety. Despite their limited mandate and extremely limited budgets, provinces maintain departments for

²⁸⁷ See, inter alia, Mostshe R ‘Theft of city street lights on increase’ *Pretoria News* 12 October 2018; Staff Writer ‘Why criminals are breaking street lights’ *BusinessTech* available at <https://businesstech.co.za/news/energy/97659/why-criminals-are-breaking-joburg-street-lights/> accessed 17 June 2019.

²⁸⁸ May A ‘Attacks on EMS staff causing drop in ambulances across the Cape’ *Cape Argus* 6 December 2018.

²⁸⁹ ‘Land invasion sabotages service delivery’: Gauteng housing dept’ accessed at <https://www.enca.com/south-africa/land-invasion-sabotages-service-delivery-gauteng-housing-dept> 3 June 2019.

²⁹⁰ Nombembe P ‘Train arsonists paralyse Cape Town’ *Sunday Times* 5 August 2018.

²⁹¹ Kerr A ‘Minibus Taxis, Public Transport, and the Poor’ *Republic of South Africa Systematic Country Diagnostic* World Bank Group (undated).

²⁹² Moatshe R ‘Theft of city street lights on increase’ *Pretoria News* 12 October 2018.

²⁹³ Small Business Project *The impact of crime on small businesses in South Africa* (2008).

²⁹⁴ Daniel L ‘Is the Democratic Alliance losing the fight against crime in Cape Town?’ *The South African* 17 July 2018.

²⁹⁵ See, inter alia, Moatshe R ‘Traders tell of Pretoria crime of grime’ *Pretoria News* 18 February 2019: ‘Retailers attributed a lack of metro police visibility to the increasing crime levels in the city’; Cape Talk *Combating crime in the Western Cape - what's going wrong?* 7 June 2019: ‘Despite being the only province in the country with a Community Safety Act, the Western Cape remains one of the most crime-ridden areas in the country’; Masilela B ‘DA accused of failing to combat crime in Cape Town’ *African News Agency* 16 July 2018; Makhetha Tebohoe ‘An Open Letter to Helen Zille’ (2016) *Live SA* available at <https://livemag.co.za/an-open-letter-to-helen-zille/> accessed 17 June 2019: ‘(To the provincial premier) In fact, fighting crime is part of your job’.

²⁹⁶ See, inter alia, Jacobs F and Sayed K ‘Using crime as an election issue will not be easy for the DA: The DA in the Western Cape should stop blaming national government for policing challenges which the provincial government has failed to address’ *Daily Maverick* 5 December 2018 available at <https://www.dailymaverick.co.za/opinionista/2018-12-05-using-crime-as-an-election-issue-will-not-be-easy-for-the-da/> accessed 30 November 2019; ‘ANC accuses DA of failing to combat crime in Cape Town’ *The Citizen* 17 July 2018; ‘Mashaba blamed for range of ills as ANC marches through Jozi’ *The Times* October 2018.

²⁹⁷ See, inter alia, Newham G ‘A Decade of Crime Prevention in South Africa: From a national strategy to a local challenge’ *CSVR Research Report* (2005) accessed at <http://www.csvr.org.za/docs/policing/decadeofcrimeprevention.pdf> 3 June 2019.

safety and security and all engage in crime-prevention rhetoric. So, too, the haste with which metropolitan governments have established and resourced policing-type agencies despite the significant costs associated with these. The upshot is that municipalities are stepping in geographically where SAPS is absent – and also in relation to the ways in which SAPS is absent.

The principle of subsidiarity entails that functions should be carried out at the lowest level at which they are likely to be effective. In South Africa, the evidence is increasingly suggesting that some kinds of policing at municipal level may well be more effective and responsive, and despite a restrictive legislative framework, such municipal policing has accordingly expanded considerably. Increasingly, municipalities are diverting manpower to the policing and law enforcement arena to protect their own interests – as well as those of the people they serve.

The data show that even local and poor municipalities raise their public safety deployment in the face of SAPS under-resourcing (whether consciously or not) or high violent crime. Municipalities are increasingly grappling with public order protests and land invasions, which the SAPS is increasingly loath to police, while the delivery of municipal services is itself threatened by metal theft. Gangs and drugs are local municipal priorities in more than one metro. Metros such as Ekurhuleni make a range of arrests for serious crime pursuant to following leads, while Cape Town explicitly undertakes ‘shadow investigations’ to ‘support’ SAPS. Ironically, the MPD which has perhaps most taken on the demeanour of a full police service, complete with police stations, holding cells, and riot control vehicles, carrying out serious crime arrests, is that of Ekurhuleni, which remains under ANC control. However, the majority of these are done in partnership with the SAPS – in opposition-led Cape Town, municipal police and law enforcement frequently investigate and arrest alone.

Centralised policing means that the prioritisation of policing is in the gift of national government; this assumes a rational and well-informed national government. While this was taken for granted in *Rail Commuter*, in the recent *Social Justice Coalition*²⁹⁸ matter the SAPS was found to have unfairly discriminated in allocating resources. If one sphere of government has erred, whether intentionally or not, may (or must) another sphere with a complementary role step in? What is the appropriate role for municipal police?

O’ Regan J in *Rail Commuter* opined that even though Metrorail’s role in relation to the security of rail passengers is ‘supportive’ and ‘complementary’ to that of the SAPS, this implies that where a void is created, it must be filled.²⁹⁹ Thus, once it was clear that the SAPS was unable to carry out the task given its resource constraints, Metrorail had to take reasonable steps to ensure that a void was not created. There is thus a strong argument that there is a constitutional obligation on municipalities to step in to the void left by the SAPS. The Constitution enjoins the state to ‘respect, protect, promote and fulfil’³⁰⁰ constitutional rights, including the right to be free from all forms of violence,³⁰¹ and the right to life.³⁰² The ‘state’ in South Africa is not a unitary state but a federal, multilevel system of government, and all organs of state are bound by the Bill of Rights.³⁰³ The Constitution enjoins all spheres of government and organs of state to secure the well-being of the people of the Republic.³⁰⁴

²⁹⁸ *Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) (14 December 2018).

²⁹⁹ *Rail Commuter* CC para 92.

³⁰⁰ Section 7(2) Constitution.

³⁰¹ Section 12(1)(c) Constitution.

³⁰² Section 11 Constitution.

³⁰³ *Rail Commuter* CC para 6.7

³⁰⁴ Section 41(1)(b) Constitution.

Furthermore, municipal police clearly have a complementary role to that of the SAPS, through their crime prevention mandate.

Whether or not there is such an obligation on municipalities to fill the void in policing, it is apparent from this chapter that municipalities are indeed stepping into the void, even as the rhetoric of a 'single national police services' is maintained. This has become particularly significant in metros and a number of larger towns. These voids relate to geography (some areas are under-policed), ideology (resistance or tardiness in policing of certain crimes), and flexible response to local needs (response to tourist influx and other local anomalies).

The next two chapters consider the situation where there is SAPS neglect and municipality incapacity in 'poor' municipalities to fill the void – the situation in the former 'Bantustans'.



Chapter 8:

The state legislates 'traditional' law and order

8.1 Introduction

The record of the democratic era outlined in Chapter 3 strongly suggests that the national SAPS has neglected communal areas formerly located in homelands and independent states ('Bantustans'). This chapter explores how both national and provincial government have sought to legislate in favour of traditional leadership being required to maintain 'law and order' in communal areas, despite a constitutional framework which places this obligation on the SAPS.

The primary impetus of the legislation does not appear explicitly related to the failings by the SAPS but rather continues a long tradition of the co-option of traditional leadership in communal areas, employed in both the colonial and apartheid eras: in the current era, there is evidence to suggest that traditional leaders influence voting patterns in favour of the ruling party in exchange for the maintenance of their powers in communal areas, including control over land and mineral rights.

However, the available evidence further suggests that their powers over law and order and the adjudication of disputes are ineffective in controlling violence in areas where the social bonds of communal control have broken down. (This will be explored in the next chapter.)

8.2 Constitutional framework

The 1996 constitutional framework, particularly the constitutional scheme of three spheres of government, removed from traditional leadership and institutions the majority of powers and functions they had. Yet Chapter 12 of the Constitution explicitly recognises traditional leadership and customary law¹ subject to the Constitution itself, while providing that any elements of traditional leadership or customary law inconsistent with the Constitution are invalid.² Chapter 12 concludes by providing that '*national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities*'.³ The Constitution consequently seems to limit traditional leaders' powers to:

1. Roles and functions arising from customary law. These must not be in conflict with the Constitution. An example would be traditional leaders' customary role in voluntary dispute resolution among community members.⁴
2. Roles assigned by national legislation in relation to local matters. National legislation may not assign roles which are not local in nature, nor roles which relate to functional areas of

¹ Section 211(1) Constitution.

² Section 212(2) Constitution.

³ Section 212(1) Constitution. Emphases added.

⁴ Bennett describes traditional dispute processing: 'All the ethnographic accounts of dispute processing in tribal courts highlight the role of the community ... In the opening phase, both parties state their case and call their witnesses; in the second stage the issue is thrown open to the public for debate, and in the third phase, the case is summed up and judgment is pronounced. ... [T]he litigants had to persuade not only the judge but also the audience. Further, the judge, who lacked independent means to impose his will on the parties, also had to appropriate community sentiment as a sanction to back up his judgment. ... [T]he dispute is seen in terms of the parties' relationship, not in terms of predetermined, normative categories.' Bennett TW *Sourcebook of African Customary Law* (1991) 75-76.

exclusive provincial competence. An example of such a role assigned by national legislation would be the consultative role in the drafting of municipalities' integrated development plans.⁵

3. Roles and functions assigned by old-order legislation which in terms of the Constitution's transitional provisions continue to exist and which have not been repealed or declared unconstitutional. An example would be the Venda requirement, assigned to Limpopo, that the minister consult the relevant traditional leader before authorising the disturbance of graves.⁶

This constitutional scheme, on the face of it, amounts to a drastic curtailment of the powers of traditional leaders. This has been bemoaned by such traditional stalwarts as Mangosuthu Buthelezi, *Inkosi*, Member of Parliament and long-standing leader of the IFP:

[W]e have witnessed the institution of traditional leadership being side-lined for decades while the powers, functions and role of traditional leaders are increasingly diminished. There is an unspoken attitude within Government that sees traditional leadership and all its institutions as remnants of the past which are bound to fade away.⁷

The polemics of Buthelezi notwithstanding, the reality, despite the limiting constitutional framework, is a complicated situation of powers in legislation retained through transitional provisions and new powers for traditional leadership enacted by national and provincial legislation. The persistence of these powers is closely related to the politics of traditional support for the ruling party. National legislation passed in 2003, shortly before the 2004 national and provincial elections, has sparked the passage of provincial new-era legislation providing for traditional leaders to have powers in the maintenance of law and order and the resolution of disputes. Similarly, the Traditional and Khoisan Leadership Bill, passed shortly before the 2019 national and provincial elections, apparently affirms traditional leadership. 'Salary' increases were also announced for traditional leaders in February 2019.

8.4 National legislation

8.4.1 Traditional Leadership and Governance Framework Act 41 of 2003

The Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act) was intended to be the national legislation referred to in Chapter 12 of the Constitution, and was enacted a few months before the 2004 election. In the previous election in 1999, the ANC received just under 40 per cent of the vote in KwaZulu-Natal on both the national and provincial ballot, losing out to the IFP.⁸ This was primarily due to the results in places like Nongoma, where 96 per cent of the electorate voted for the IFP.⁹ In the 2000 local government elections the ANC received only 34 per cent overall support, garnering merely 2 per cent at Ulundi and Nongoma.¹⁰ Mcebisi Ndletyana and Bavusile

⁵ Section 29(1)(b)(iii) Local Government: Municipal Systems Act 32 of 2000.

⁶ Venda Graves and Removal of Dead Bodies Act 5 of 1977.

⁷ Buthelezi M *Keynote Address Integrated Rural Development Indaba* Durban 23 November 2011 available at <https://www.politicsweb.co.za/documents/traditional-leaders-have-important-role-to-play--b> accessed 30 March 2019.

⁸ IEC National and Provincial Election Results 1999 available at <http://www.elections.org.za/content/Elections/National-and-provincial-elections-results/> accessed 9 April 2019.

⁹ IEC National and Provincial Election Results 1999 available at <http://www.elections.org.za/content/Elections/National-and-provincial-elections-results/> accessed 9 April 2019.

¹⁰ IEC Municipal Election Results 2000 available at <http://www.elections.org.za/content/Elections/Municipal-elections-results/> accessed 9 April 2019.

Maaba's analysis suggests that the IFP's advantage before 2004 was partly due its role as the 'guardian of chieftaincy', with its support overlapping with that of tribal leadership.¹¹

The ANC thus sought to undo the IFP's role of guardian of traditional leadership by demonstrating its support for the institution of traditional leadership and 'wresting' the Zulu king from the IFP.¹² The Framework Act, which sought to 'mollify' traditional leaders, was part of this strategy,¹³ as was the Communal Land Rights Bill, first tabled in 2003 and passed in 2004, which sought to give powers over communal land to traditional structures.¹⁴

The Framework Act follows the scheme usually followed where the national legislative mandate overlaps with that of the provinces, that is, by legislating a 'framework' for the passage of other national and provincial legislation. Section 20 of the Framework Act provides for the assignment via legislation by both national government and provincial government to traditional leadership of a range of functions. This is arguably unconstitutional, because although 'indigenous law and customary law' falls under Schedule 4 (concurrent national and provincial competence), it is subject to Chapter 12, which provides that national legislation must provide for roles of traditional leadership. Although the National Assembly may assign any of its legislative powers to any legislative body in another sphere of government,¹⁵ this assignment must be within the limits of the Constitution.¹⁶ Further, the Constitution permits executive authority to be exercised only by the three spheres of government.¹⁷

Despite this, section 20 lists a range of functional areas in which provincial legislatures may legislate a role for 'traditional councils¹⁸ or traditional leaders' (which are not one of the three spheres of government). Furthermore, some of these are matters which fall outside matters designated by the

¹¹ Ndletyana M and Maaba B 'The African National Congress's Unprecedented Victory in KwaZulu-Natal' *Journal of African Elections* 9(2) 2010 123 at 130 available at <https://www.eisa.org.za/pdf/JAE9.2Maaba.pdf> accessed 9 April 2019.

¹² Ndletyana M and Maaba B 131-132.

¹³ Beall J and Ngonyama M 'Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development' *Crisis States Working Papers Series 2(55)* (2009) Crisis States Research Centre 10 available at <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csre-working-papers-phase-two/wp55.2-indigenous-institutions-traditional-leaders-elite-coalitions.pdf> accessed 9 April 2019.

¹⁴ The Communal Land Rights Act 11 of 2004 was declared unconstitutional in May 2010.

¹⁵ Section 44(1)(a)(iii) Constitution.

¹⁶ Section 44(4) Constitution.

¹⁷ The Constitution provides that the President together with cabinet exercises executive authority in implementing national legislation (s 85). Such authority to implement national legislation may be assigned to a member of a provincial executive council or to a municipal council (section 99). Similarly, the Constitution provides that the Premier of a province together with the MECs exercises the executive authority to implement provincial legislation or national legislation listed in Schedules 4 and 5 (section 125). Such authority may be assigned to a municipal council (s 126).

¹⁸ 'Traditional councils' are introduced by the Framework Act. Transitional provisions of the Framework Act (s 28(4)) provide that recognised and established 'tribal authorities' that existed at the commencement of the Framework Act (24 September 2004) are deemed to be traditional councils, provided that such a tribal authority complies with section 3(2) of the Framework Act within seven years of the commencement of the Framework Act (that is, prior to 24 September 2011). Section 3(2) provides for the constitution of traditional councils via a formula including a 40 per cent elected component and a minimum proportion of one-third women members. The Framework Act is silent on the consequences should the proviso in section 28(4) not be met. Given that the Black Authorities Act 68 of 1951, in terms of which tribal authorities were established, was repealed on 3 December 2010, it is argued that tribal authorities recognised and established in terms of the Black Authorities Act and converted to traditional councils by section 28 of the Framework Act, fell away on 24 September 2011 should they have failed to re-constitute themselves in terms of the proviso before this date. This implies that traditional councils failing to meet the proviso must be established *de novo* via a process of recognition of the traditional community as provided for in the provincial and national legislation. No traditional council elections have ever taken place in Limpopo, and thus no reconstitution has occurred, suggesting that traditional councils would need to be reconstituted to be recognised in that province.

Constitution as local in nature (in Schedules 4B and 5B), including ‘safety and security’ and ‘the administration justice’.¹⁹ Neither of these are Schedule 4 matters on which provincial governments may legislate, and they are clearly national functions.

The constitutionality of section 20 has not been tested in the Constitutional Court.²⁰ The imminent repeal of the Framework Act by the Traditional and Khoisan Leadership Bill brings the status of provincial legislation passed in terms of the Framework Act further under question. Whatever its constitutionality or status, provincial legislation provides for traditional leaders wielding a range of functions, including policing and the administration of justice. In the Eastern Cape, for example, as recently as 2017 the provincial legislature imposed on traditional leaders, in consultation with traditional councils, the obligation ‘to maintain law and order’²¹ (a key SAPS obligation). The ambit of this legislation is discussed below.

8.4.2 Traditional and Khoisan Leadership Bill

The Traditional and Khoisan Leadership Bill [B23D-2015](TKL Bill) was passed by both houses of Parliament in February 2019, but at the time of writing (November 2019) had not yet been signed into law by the President. The Bill seeks to replace and repeal the Framework Act. The Bill does not have an equivalent of section 20, that is, it does not have a clause assigning to provinces the power to legislate national functions for traditional leaders. It does provide that traditional leaders have functions in terms of any other law which is not unconstitutional – presumably this provision has an eye on the impending Traditional Courts Bill.

The aim of the TKL Bill appears primarily to be to bring legality to traditional councils which failed to be reconstituted and to provide for Khoisan traditional councils, as well as to provide for the procedure for recognition of traditional leaders. This is important, not least because traditional leaders are remunerated.²² The latest determination of their remuneration in 2019 provides that Kings or Queens and Principal Traditional Leaders (PTL) should be paid in excess of R1 million per annum, while senior traditional leaders earn R256,000 and headmen, R110,000.²³ Although the remuneration

¹⁹ Section 20(1)(f) and 20(1)(g) Framework Act.

²⁰ In the Communal Land Rights Act (CLARA) matter (*Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* CLARA (11678/2006) [2009] ZAGPPHC 127; 2010 (8) BCLR 838 (GNP) (30 October 2009) (CLARA)), the applicants in the High Court argued that section 20 read with section 5 of the Framework Act creates a fourth sphere of government not acknowledged by the Constitution. They also raised the argument presented here, namely that the Constitution only permits national legislation to assign roles to traditional leaders. The applicants in the CLARA matter also point out that Chapter 12 of the Constitution stops short of referring to functions and uses the word ‘role’. This suggests any role for traditional leaders should fall short of governmental functions. Ledwaba J in the High Court did not deal with the arguments in detail before dismissing them. Subsequently in the Constitutional Court, argument on the constitutionality of section 20 was not presented and only the procedural aspects of the case were considered.

²¹ Section 30(2)(g) Eastern Cape and Traditional Leadership and Governance Act 1 of 2017.

²² In the Framework Act, this is provided for obliquely: ‘Support to traditional councils, principal traditional councils and kingship or queenship councils.—The national government and a provincial government may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of traditional councils, principal traditional councils and kingship or queenship councils within the province to fulfill their functions.’ In the TKL Bill, the equivalent provision provides in section 15(2)(2): ‘The Minister may, taking into account a recommendation made by the Independent Commission for the Remuneration of Public Office-bearers in terms of section 8(4)(c) of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act No. 92 of 1997), and after consultation with all Premiers, by notice in the Gazette determine the resources to be made available to traditional and Khoi-San leaders as may be necessary to enable them to perform their functions effectively.’

²³ Proc 2 of 18 January 2019: Determination of salaries and allowances of Traditional Leaders, members of National House and Provincial Houses of Traditional Leaders (GG 42174).

standards are set nationally in terms of the Remuneration of Public Office Bearers Act²⁴, provincial governments appear to have assumed the responsibility for the actual payment of traditional leaders' 'salaries'. It is difficult not to consider it to have been politically expedient that the salaries were raised a few months before the national and provincial election of May 2019, after they had been 'frozen' the previous year.

Despite the imminent repeal of the Framework Act, most provinces have already passed legislation in terms of the Framework Act, and many have retained assigned legislation from the homeland era. Both types of legislation have implications for policing and criminal justice, and will be discussed after consideration of the national Traditional Courts Bill.

8.4.3 Traditional Courts Bill

The national legislature has attempted since 2008, the year before the 2009 national and provincial elections [in the form of B15-2008 and B1-2012], to legislate for traditional courts, most recently in terms of the Traditional Courts Bill [B1-2017](TCB). The national legislature may legislate for courts, as the Constitution provides that the courts are the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa;²⁵ the Magistrates' Courts; and 'any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts'. Consequently, national legislation may provide for additional courts, which is what the TCB seeks to do.

The latest version of the TCB no longer provides that participation in such traditional courts is voluntary, thus effectively forcing participation in a separate system of justice. This is likely to be unconstitutional on the basis of equality, yet despite being so advised by the parliamentary law advisor, Parliament has apparently insisted on this form of the Bill.²⁶ Although the sentencing and offence jurisdiction is limited, the envisaged courts do not follow customary processes and are adjudicatory rather than restorative in nature.

In the hearings on the bill, Patrick Mashego, an activist living in communal areas of Limpopo, points out that the Bill

ignores all the customary courts that exist at village level and concentrates power in the hands of the senior traditional leader as presiding officer of the only court that is recognised, the tribal authority court. This is completely different from existing customary practice in the villages of Rakgwadi where villagers and councillors participate in localised dispute resolution forums in the villages.²⁷

Aninka Claassens argues that the processing of the TLK Bill and TCB has been expedited during the build-up to national elections in 2019, which has contributed to the view that bills apparently favouring the interests of traditional leaders are about electoral politics and appeasing traditional leaders who 'deliver the rural vote'.²⁸ Whatever the motivations for enactment, the Bill continues the

²⁴ Remuneration of Public Office Bearers Act 20 of 1998.

²⁵ '[A]nd any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa.'

²⁶ Luwayo N 'Vulnerable rural people at further risk as parliamentary committee adopts controversial Traditional Courts Bill' *Daily Maverick* 13 March 2019.

²⁷ Mashego, P 'Submission by Patrick Mashego of the Letebejane Village - Limpopo Tribal levies problem - impact of the Traditional Court Bill' (2008) available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/comm_submission_mashego_2008.pdf accessed 9 April 2019.

²⁸ Claassens A *Mining magnates and traditional leaders: the role of law in elevating elite interests and*

trend of leaving policing and criminal justice in the hands of traditional leaders – a trend affirmed in provincial legislation – and accompanied by neglect by the SAPS of these areas.

8.5 Provincial legislation

8.5.1 Introduction

Provincial legislation empowering traditional leaders persists from the apartheid era and has been enacted in the democratic era – moreover, it frequently relates to law and order functions. The Constitution provides that all law that was in force when the 1996 Constitution took effect continues to remain in force, subject to amendment or repeal and consistency with the Constitution.²⁹ The Interim Constitution compelled the President to assign to the provinces all old order legislation that fell within the ambit of the functional areas contained in Schedule 6 of the Interim Constitution. Traditional leadership was one such functional area. As a result, the President assigned most old-order South African legislation and the old (pre-1994) homeland (TBVC and self-governing territories) legislation relevant to traditional leadership to the relevant provinces. The transitional provisions made the assigned legislation subject to subsequent repeal or amendment by the President.³⁰

The most significant national legislation assigned to the relevant provinces was the Black Administration Act 38 of 1927 (BAA).³¹ Section 20 of the BAA gave the minister the power to confer on a ‘black chief or headman’ jurisdiction to try and punish any ‘Black’ who has in the area of his geographical jurisdiction any offence under common law or under ‘Black law and custom’ as well as any statutory offences, save for those listed in Schedule 3 to the BAA.³² This schedule confined their

deepening exclusion 2002-2018 Working Paper Mapungubwe Institute for Strategic Reflection (2019) 3.

²⁹ Item 2(1) of Schedule 6, Constitution.

³⁰ Section 235(8)(a) and (b) Constitution of the Republic of South Africa Act 200 of 1993: ‘(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may-

(i) amend or adapt such law in order to regulate its application or interpretation;

(ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.’

³¹ In terms of proclamation 139 of 9 September 1994, the administration of sections 1, 2 (7), (7) bis, (7) ter and (8) of the Black Administration Act 38 of 1927 was assigned to the various relevant provinces.

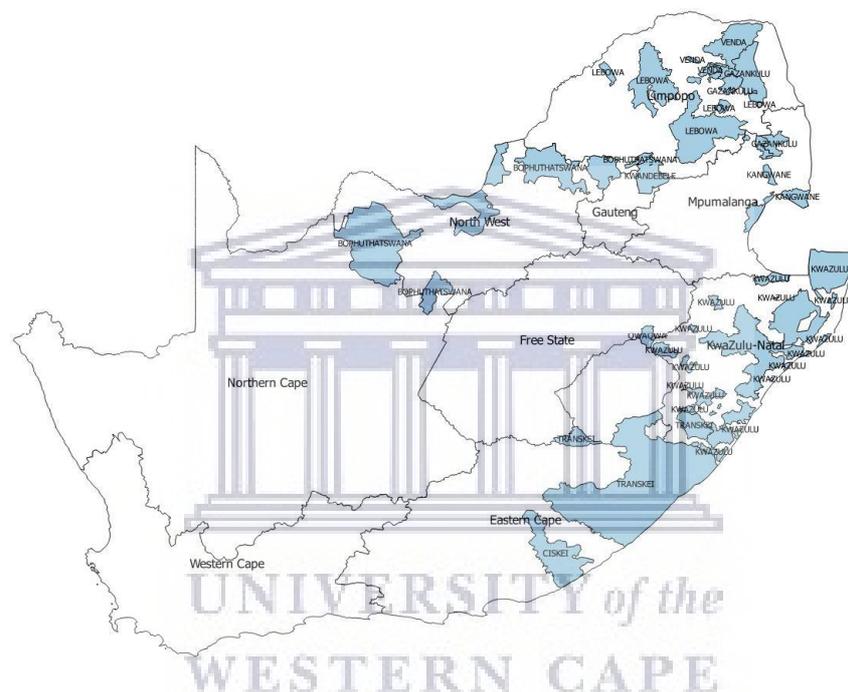
³² The Schedule, as amended, contained the following: treason, *crimen laesae majestatis*, public violence, sedition, murder, culpable homicide, rape, robbery, assault with intent to do grievous bodily harm, assault with intent to commit murder, rape or robbery, indecent assault, arson, bigamy, *crimen injuria*, abortion, abduction, offences under any law relating to stock theft, sodomy, bestiality, any offence referred to in part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute; receiving any stolen property knowing that it has been stolen; fraud; forgery or uttering a forged document knowing it to be forged; any offence under any law relating to illicit possession of or dealing in any precious metals or precious stones; any offence under any law relating to conveyance, possession or supply of habit-forming drugs or intoxicating liquor; any offence relating to the

jurisdiction to common theft and common assault and ‘offences under Black law’ not appearing in the Schedule.

Section 20 of the BAA fell away as recently as 30 December 2009 when the state failed to pass legislation to regulate these matters.³³ Nonetheless, it is the case that in some areas homeland and provincial legislation conferring criminal jurisdiction on chiefs and headmen still exists through the operation of the transitional provisions and the failure of those provinces to repeal that legislation. As a result, chiefs and headman frequently continue to exercise these powers.

The map below shows the geographic location of the former independent states and homelands (‘Bantustans’) where these laws applied. In these areas communal ownership of land often applies.³⁴

Map 1: The provinces and former independent states and homelands (‘Bantustans’)



Source: Own map generated using HSRC shape files

Some provinces (Mpumalanga, Free State, Northern Cape and to some extent Eastern Cape) have rationalised old-era legislation through a process of repeal, but some old-order legislation relating to traditional leaders remains. Other provinces (KwaZulu-Natal, Limpopo, and North-West) have retained a great deal of the old-order legislation, much of which appears to contain unconstitutional assignments of functions to traditional leaders, including functions relating to policing and the hearing of disputes in traditional courts.

All the provinces, save for the Western Cape, have passed new legislation for traditional leaders in terms of section 20 of the Framework Act. Many impose the obligation to maintain law and order on traditional leaders. The best example of this is KwaZulu-Natal.

coinage; perjury; pretended witchcraft; faction fighting; man stealing; incest. extortion; defeating or obstructing the course of justice; and any conspiracy, incitement or attempt to commit any of the abovementioned offences.

³³ Section 20 (1) is repealed by section 1 (3) of Act 28 of 2005 (as amended by s. 1 of Act 8 of 2006 and by s. 1 of Act 7 of 2008) on 30 December 2009; or such date as national legislation to further regulate the matters dealt with in section 20 (1) is implemented, whichever occurs first).

³⁴ A variety of tenure systems exist in the former Bantustans, which include trust, quitrent, freehold, communal and tenancy arrangements.

8.5.2 KwaZulu-Natal

KwaZulu-Natal has retained a great deal of old-order legislation empowering traditional leaders in policing and criminal justice – as well as new legislation affirming this. Areas of the former KwaZulu are held communally under the Ingonyama Trust.³⁵ The KwaZulu Act on the Code of Zulu Law 16 of 1985 consolidates and amends Zulu law and provides for judicial powers of traditional leaders. Chiefs and headmen have authority to require compliance by the people under their jurisdiction with their duties under Zulu law and may give orders for that purpose.³⁶ Section 8 of the Zulu Code states:

In exercising their lawful judicial functions, chiefs and headmen are entitled to the privileges of a court of law in respect of disobedience of their orders or contempt of court and may impose a fine not exceeding fifty rand for any such offence.³⁷

The Act further provides for various aspects of Zulu law relating to family discipline, including the infliction of corporal punishment by the family head.³⁸

The KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 provides for the powers and functions of tribal authorities. Chiefs must, *inter alia*

carry out the lawful orders of government; maintain law and order and report to the Government any condition of unrest or dissatisfaction; exercise powers of arrest, search and seizure; ensure the protection of life, persons and property and the safety of bona fide travellers within his area, and report forthwith to the magistrate of the district deaths, violence, crimes and the like; disperse any riotous or unlawful meeting or gathering.³⁹

The requirement to report deaths means the obligation is on traditional leaders in communal areas of KwaZulu-Natal to report deaths. If they fail to do so, data on deaths, including murders, may be inaccurate.

The KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (KZN TLGA) affirms these laws. The Act provides that each *Inkosi*⁴⁰ must 'maintain law and order and report to the responsible Member of the Executive Council without delay any matter or concern, including any condition of unrest or dissatisfaction'⁴¹ and 'ensure the protection of life, persons and property and the safety of travellers within his or her area of jurisdiction, and report forthwith to the relevant department in the Provincial Government or municipality, or any other relevant authority

- (i) the death of any person from violence or any other unnatural causes;
- (ii) the outbreak of any contagious or infectious disease;
- (iii) any misuse of government property;
- (iv) any irregular receipt or use of public moneys; and

³⁵ Originally in terms of the KwaZulu Ingonyama Trust Act, passed on the eve of the 1994 election. The legislation was replaced in 1998.

³⁶ Section 7 KwaZulu Act on the Code of Zulu Law 16 of 1985 (Zulu Code).

³⁷ Section 8 Zulu Code.

³⁸ Section 25 Zulu Code.

³⁹ Section 18 KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 (the Chiefs Act).

⁴⁰ *Inkosi* means a senior traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act 41 of 2003, and recognised as such in terms of section 19 of this Act; *amakhosi* has a corresponding meaning.

⁴¹ Section 20(1)(f) KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (KZN TLGA).

- (v) the commission of any offence, which does not fall to be dealt with under his or her own jurisdiction.⁴²

Furthermore, they must 'ensure compliance with all laws and orders and instructions of a competent authority'.⁴³ The Act also provides that the traditional council must exercise such powers and perform such duties and functions in connection with the administration of justice as may be conferred or assigned to it by law.⁴⁴ Any person obstructing a traditional leader in carrying out duties is guilty of an offence and liable to a fine or to imprisonment up to 12 months.⁴⁵

Legislation in KwaZulu-Natal is therefore firmly in favour of traditional leaders maintaining law and order and adjudicating offences. The province has the highest proportion of municipalities (70 per cent) with policing under 200 per 100,000. Without traditional leadership exercising these functions, there would effectively be a vacuum.

8.5.3 Limpopo

Old-order legislation from Venda – but not Lebowa and Gazankulu – assigned to Limpopo and still retained gives traditional leaders significant powers, as does new law. The District and Territorial Councils Act (Venda) 15 of 1986 (Venda Councils Act) substituted territorial and district councils for tribal and regional councils (arising from the Black Authorities Act), defined their constitution, powers, authorities and functions,⁴⁶ and provides for the levy of tribal taxes.⁴⁷ It further provides that 'the *khosi* in respect of any territory shall exercise his powers and perform his functions and duties ... vested in him by virtue of any law'.

The Venda Traditional Leaders Administration Proclamation 29 of 1991 (the Venda Proclamation) was such a law providing that a chief or headman must exercise the function of 'the prevention, detection and punishment for crime'⁴⁸ and 'try and punish, in accordance with the jurisdiction conferred upon him by or under this Proclamation, any resident of his area who has committed an offence over which such a chief or headman has jurisdiction'.⁴⁹ Limpopo passed the Limpopo Traditional Leaders and Institutions Act 6 of 2005 (Limpopo Act), which in section 34 read with Schedule 1 appears intended to seek the repeal the Venda Proclamation at a date to be determined by notice in the Gazette. However, such Gazette notice does not appear to have been issued.

The Limpopo Act mimics the wording of the Framework Act. The Limpopo Act provides that a traditional leader performs any function provided for in terms of customary law, or assigned to him or her in terms of any law, in consultation with the traditional councils, subject to section 20 of the National Framework Act.⁵⁰ The Limpopo Act provides that traditional leaders may continue to exercise functions in terms of customary law, including the adjudication of offences. The Limpopo Act specifically refers to fines imposed in terms of traditional custom and law as accruing to traditional council funds.⁵¹

⁴² Section 20(1)(g) KZN TLGA.

⁴³ Section 20(1)(j) KZN TLGA.

⁴⁴ Section 9 KZN TLGA.

⁴⁵ Section 51(1) and (2) KZN TLGA.

⁴⁶ Sections 4 (territorial council) and 19 (district council) District and Territorial Councils Act (Venda) 15 of 1986 (Venda Councils Act)

⁴⁷ Section 36 District and Territorial Councils Act (Venda) 15 of 1986 (Venda Councils Act).

⁴⁸ Section 17(1)(i) Venda Traditional Leaders Administration Proclamation 29 of 1991.

⁴⁹ Section 17(1)(j) Venda Traditional Leaders Administration Proclamation 29 of 1991.

⁵⁰ Section 18 Limpopo Traditional Leadership and Institutions Act 6 of 2005.

⁵¹ Section 24 Limpopo Traditional Leadership and Institutions Act 6 of 2005.

The Limpopo Act therefore affirms customary roles of maintaining law and order and adjudicating offences. Some 64 per cent of municipalities in Limpopo have very low ratios of policing (under 200 per 100,000). Limpopo also has very low rates of accurate death reporting, as discussed in Chapter 3.

8.5.4 Eastern Cape

Laws important for policing of the former 'independent states' of Transkei and Ciskei remain in place in the Eastern Cape. The Chief's Courts Act (Transkei) 6 of 1983 provides for the conferment of civil and criminal jurisdiction upon any chief. The Act provides that the 'Minister' may confer

upon any chief or headman who is the head of a tribal authority jurisdiction to hear and determine civil claims arising out of traditional law and custom brought before him and which involve parties who are subject to such traditional law and custom and in which the defendant is resident within the area of jurisdiction of the tribal authority concerned.⁵²

The Act also confers 'jurisdiction to try and punish any person who is subject to traditional law and custom who has committed, within the area of jurisdiction of the tribal authority concerned, any non-scheduled offence at common law or under traditional law and custom or any statutory offence'.⁵³ Unfortunately, the Schedule to the Act is missing from available records, thus it is not possible to determine which offences were excluded. Offences by persons not subject to traditional law and custom are excluded.⁵⁴

In relation to sentencing, the legislation provides that only fines may be imposed (neither incarceration nor corporal punishment) and that these may not exceed four head of large stock, 20 head of small stock, or R400. The Act further provides that fines and fees collected through the exercise of a chief's jurisdiction in terms of this Act must be paid into the account of the tribal authority concerned.⁵⁵ 'Contempt of traditional court' offences are also created by this Transkei Act.⁵⁶ Relatively severe punishments for these 'contempt of traditional court' offences appear not to have been repealed.⁵⁷

In neighbouring Ciskei, tribal authorities⁵⁸ and traditional leaders⁵⁹ were conferred with administrative, legislative and judicial authority by the Administrative Authorities Act (Ciskei) 37 of 1983. Tribal authorities must administer the affairs of the tribes for which they were established,

⁵² Section 2 Chief's Courts Act (Transkei) 6 of 1983.

⁵³ Section 2 Chief's Courts Act (Transkei) 6 of 1983.

⁵⁴ Section 2 Chief's Courts Act (Transkei) 6 of 1983.

⁵⁵ Section 7 Chief's Courts Act (Transkei) 6 of 1983.

⁵⁶ Section 11(1) Chief's Courts Act (Transkei) 6 of 1983: 'Any person who wilfully insults a chief or other member of his court during a sitting of the court or who wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where the court is held; or having been personally warned to attend a sitting of the chief's court, wilfully and without good cause, fails so to attend; or obstructs a messenger of a chief in the execution of his duty; or being a judgment debtor and whether or not the judgment in question is the subject of an appeal, makes or allows a disposition of his property with the intention of avoiding execution in satisfaction of the judgment debt, the onus of disproving such intention being on him, is guilty of an offence.'

⁵⁷ Section 11(2) Chief's Courts Act (Transkei) 6 of 1983: 'Any person convicted of the first two offences is liable to a fine not exceeding R100 or, in default of payment, to imprisonment for a period not exceeding three months; the next two offences, to the same, or imprisonment for three months without the option of a fine; in relation to the fifth offence, the person may on the order of the chief be removed from the place where the court is being held and, if necessary, detained in custody until the rising of the court.'

⁵⁸ Section 4(1) Administrative Authorities Act (Ciskei) 37 of 1984 (AA Act Ciskei).

⁵⁹ Section 26 AA Act Ciskei.

safeguard government buildings, and assist the chief in carrying out his functions.⁶⁰ The Act further provides that tribal authorities have the power to make by-laws.⁶¹ The Act provides for the settlement of certain civil disputes by chiefs, chiefs' deputies and certain headmen⁶² and the trial of certain offences by chief, chief's deputy or headman.⁶³ There is also provision for the payment of a tribal tax by every male member of the tribe.⁶⁴

The chiefs' functions include the maintenance of law and order; reporting of diseases, violence and crimes to the magistrate; the carrying out of lawful orders from government; and the banning of meetings where a state of lawlessness exists.⁶⁵ The chief also has the power to search without warrant any person or any homestead or other place within his area, and to detain any animal which has been brought into his area under suspicious circumstances and deal with such animal in accordance with the pound laws.⁶⁶

In addition to the Transkei and Ciskei old-order laws, there are new laws. The democratic-era Eastern Cape legislation initially passed in terms of the Framework Act did not repeal old-order laws but affirmed them. The Eastern Cape Traditional Leadership and Governance Act 4 of 2005 provided that '[a] traditional leader performs the functions provided for by the customs and customary law of the traditional community concerned', and further provided in section 29 that the funds of a traditional council consist of 'fines collected by a traditional leader or traditional council in accordance with the traditional community's customs and customary law', thereby affirming the operation of traditional courts.

This Act was repealed by the Eastern Cape and Traditional Leadership and Governance Act 1 of 2017 (EC TL Act) – which also does not repeal the Transkei and Ciskei laws. The 2017 Act provides for a range of functions for traditional leaders, including functions of customary law⁶⁷ and, in consultation with traditional councils, the obligation 'to maintain law and order'.⁶⁸ Again this appears to affirm prior roles in terms of the old-order legislation. The Eastern Cape has exceptionally high murder rates and more than a third of policing areas are poorly policed.

8.5.5 North West

Old- and new-order legislation also exists in the North West. The most significant old-order legislation is that of the Bophuthatswana Traditional Courts Act 29 of 1979. This Act provides for the President to confer and assign civil and criminal jurisdiction on tribal courts. Such courts comprise the chief or headman or chairman of the 'community authority' and those members of the community recognised as comprising the court.⁶⁹ The net effect of the Bophuthatswana Traditional Courts Act is to deprive people resident in the former Bophuthatswana of direct access to the magistrates courts in a defined list of matters.

The Act provides that tribal courts have exclusive and original jurisdiction over any defendants or respondents resident, employed or undertaking a business in the area, or those who consent to their

⁶⁰ Section 4 AA Act Ciskei.

⁶¹ Section 4(2) AA Act Ciskei.

⁶² Section 39 AA Act Ciskei.

⁶³ Section 40 AA Act Ciskei.

⁶⁴ Section 44 AA Act Ciskei.

⁶⁵ Section 26 AA Act Ciskei.

⁶⁶ Section 26 AA Act Ciskei.

⁶⁷ Section 30(1)(a) Eastern Cape and Traditional Leadership and Governance Act 1 of 2017.

⁶⁸ Section 30(2)(g) Eastern Cape and Traditional Leadership and Governance Act 1 of 2017.

⁶⁹ Section 2 Bophuthatswana Traditional Courts Act 29 of 1979 (Bop Courts Act).

jurisdiction.⁷⁰ The legislation provides for appeal to a special district court comprising the district magistrate and two other members.⁷¹ In terms of criminal jurisdiction, tribal courts in areas of the former Bophuthatswana may hear matters of ordinary assault and matters of theft involving amounts of less than R200, on authorisation of 'the President'.⁷² They may hear any offence at common or tribal law, save a list of Schedule offences such as sexual assault cases, robbery, housebreaking or stock theft.⁷³ Sentencing is limited to a fine of R200, forced labour of 180 hours, or corporal punishment; imprisonment is not available.⁷⁴ This legislation is certainly not dead-letter law, with the Bafokeng the most notable example of a traditional community in the North West still applying this law (see Chapter 9).

In the democratic era, the North West Traditional Leadership and Governance Act 2 of 2005 assigns various broad roles to traditional councils, including administering the affairs of a traditional community, administering the finances of the traditional community, and assisting supporting and guiding traditional leaders (defined as both *kgosi*, or chiefs, and *kgosana*, or headmen) in the performance of their functions.⁷⁵

Roles and functions of the *kgosi* include administering the affairs of the community; maintaining peace and conciliating and mediating disputes between members of the community; and reporting deaths, diseases, allegations of witchcraft, and offences beyond their jurisdiction to the relevant authorities.⁷⁶ The Act also provides that *kgosi* are entitled to the 'loyalty, respect, support and obedience of any member of the traditional community'.⁷⁷ *Kgosana* are appointed by the royal family.⁷⁸ They must attempt to settle dispute within *motsana* (outlying villages); obey and execute the lawful instructions of the *kgosi*; and perform any customary functions.⁷⁹

Consequently, the new-order legislation further affirms the role of traditional leaders. The province has more than a third of municipalities with low ratios of policing.

8.5.6 Mpumalanga

Mpumalanga follows a somewhat different pattern – although new-order legislation has been passed, it does not accord any functions to traditional leaders, and the province has repealed most old-order legislation. The Mpumalanga General Laws Repeal and Application Act of 1998 provides for the repeal of most assigned laws from Bophuthatswana, KaNgwane, KwaNdebele and Lebowa territories. The Mpumalanga Acts which replaced these Acts were made applicable throughout Mpumalanga.

However, some old-order legislation, including the Bophuthatswana Traditional Courts Act which was assigned to Mpumalanga in relation to relevant geographical areas of Mpumalanga, remains. The Act does not appear to have been repealed by either of the two major repealing laws in Mpumalanga and is discussed in the section on North West above. The main effect of the Act is to deprive people resident in the former Bophuthatswana of direct access to the magistrates' courts in a defined list of matters, and to vest traditional leaders with judicial powers.

⁷⁰ Section 5 Bop Courts Act.

⁷¹ Section 9 Bop Courts Act.

⁷² Section 6 Bop Courts Act.

⁷³ Section 6 read with Schedule 1 Bop Courts Act.

⁷⁴ Section 7 Bop Courts Act.

⁷⁵ Section 9 North West Traditional Leadership and Governance Act 2 of 2005 (NWTL Act)

⁷⁶ Section 18 NWTL Act.

⁷⁷ Section 18(3) NWTL Act.

⁷⁸ Section 19 NWTL Act.

⁷⁹ Section 23 NWTL Act.

The Mpumalanga Traditional Leadership and Governance Act 3 of 2005 is the major democratic-era Act and follows the common formulation in section 9 for the functions of traditional councils, but fails to list any functions for traditional leaders. The Act repeals Proclamation 110 of 1957, which previously prescribed the duties, powers privileges and conditions of service of chiefs and headmen. It also repeals various Acts prescribing rates and levies in these areas. It further provides for a code of conduct for traditional leaders. The Mpumalanga legislature thus appears to have been less amenable to having traditional leaders carrying out law and order functions. This is despite more than a third of municipalities being poorly policed.

This tendency not to empower traditional leaders may have contributed to the launch in 2019 in Mpumalanga of the South African National Congress of Traditional Authorities (SANCOTA),⁸⁰ which is explicitly premised on promoting traditional leadership and has sought to co-opt ANC public representatives to its cause. According to press reports, SANCOTA, the brainchild of Deputy President David Mabuza's estranged friend, Themba Sigudla, is targeting the rural vote by lobbying traditional leaders into its ranks,⁸¹ and seeks to force by-elections by the co-option of ANC representatives to their cause.⁸² SANCOTA is to be clearly distinguished from the earlier CONTRALESA⁸³, as the latter worked closely with the ANC rather than seeking to subvert it. Although very few votes were won by the new SANCOTA, the number of votes for the ANC in the province in 2019 dropped 16 per cent for the National Assembly and 23 per cent for the provincial legislature compared to 2014.⁸⁴

8.5.7 Free State

The Free State only has the former QwaQwa within its borders, which always had a relatively good level of policing, and significant functions are not allocated to traditional leaders. It was assigned QwaQwa legislation, most of which was repealed terms of the (Free State) General Laws Repeal Act 6 of 2005, except for the QwaQwa Levying of Tribal Taxes Act 5 of 1983, in terms of which a tribal council may levy a direct tax for the benefit of such tribal council upon every taxpayer of the tribe concerned.⁸⁵ Only one municipality in Free State, Maluti-a-Phofung, has the former Qwa-Qwa within its borders (apart from the detached portion of Botshabelo).

In the new era, the Free State Traditional Leadership and Governance Act 8 of 2005 provides in section 8 for the functions of traditional councils – including any customary functions, which presumably would include customary voluntary dispute resolution.⁸⁶ The Act further provides that '[t]he traditional council must exercise powers and perform duties and functions in connection with

⁸⁰ GG 42221(644) 8 February 2019.

⁸¹ Yende S 'Sancota determined to win seats in municipalities before May elections' City Press 27 February 2019 available at <https://city-press.news24.com/News/sancota-determined-to-win-seats-in-municipalities-before-may-elections-20190227> accessed 12 November 2019.

⁸² Yende (2019).

⁸³ Congress of Traditional Leaders of South Africa.

⁸⁴ Own calculations using 'IEC election dashboard' available at <https://www.elections.org.za/NPEDashboard/app/dashboard.html> accessed 12 November 2019

⁸⁵ Section 2 QwaQwa Levying of Tribal Taxes Act 5 of 1983.

⁸⁶ The functions are to administer the affairs of the community in accordance with custom; assist traditional leaders in performing their functions; work with municipalities to identify community needs; facilitate community involvement in developing IDPs; recommending interventions to government to contribute to development and service delivery; participate in local policy development and development programmes in the national and provincial sphere; promote cooperative governance and indigenous knowledge for disaster management; alert government of hazards; share information with other traditional councils; and perform customary functions.

the administration of justice as may be conferred on or assigned to it by law'.⁸⁷ The latter provision will have relevance once the Traditional Courts Bill comes into effect.

The Act does not explicitly provide for the roles and functions of traditional leaders, as opposed to traditional councils, which must, *inter alia*, perform 'the functions conferred by customary law, customs and statutory law consistent with the Constitution'.⁸⁸ Consequently, there is a fairly limited role in the Free State for traditional leaders in policing. The Free State does not have any municipalities with very low policing. However, Maluti-a-Phofung has the second lowest rate in the province, in line with the trend of under-resourcing.

8.5.8 Northern Cape

Northern Cape has new legislation conferring powers, absent in the old order. Only one municipality in the Northern Cape contains part of a section of the former Bophuthatswana (Joe Morolong Municipality). The Northern Cape has passed legislation in terms of the Framework Act. The Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007 follows the formulation common in provincial legislation for the functions of traditional councils.⁸⁹ Roles and functions of senior traditional leaders are contained in section 1, which provides that they are to administer the affairs of the traditional community; carry out dispute resolution; and report unnatural deaths, outbreak of disease, allegations of witchcraft or the commission of any offence 'which cannot lawfully be disposed of through the exercise of the senior traditional leader's powers in cooperation with the traditional council and jurisdiction conferred upon such senior traditional leader'.⁹⁰ Adjudicatory jurisdiction is apparently anticipated in this provision, through the Traditional Courts Bill.

Thus, the Northern Cape is relatively unusual for putting into place roles for traditional leaders which were not previously provided for in homeland legislation. This may be in anticipation of the Khoisan, who are primarily resident in the Northern Cape, exerting their traditional authority in terms of the TKL Bill.

8.5.9 Gauteng

Gauteng is primarily urban and did not initially inherit traditional areas. Changes to provincial geographical boundaries have recently resulted in two traditional council areas being located inside the borders of Gauteng. Democratic-era legislation in Gauteng mentioning traditional leaders is limited to the Gauteng Traditional Leadership and Governance Act 4 of 2010, which in section 52 provides for the general functions of traditional leadership, that is, those arising from customary law or assigned by law, subject to section 20 of the Framework Act. Again, this is a fairly limited role.

8.6 Conclusion

Four provinces (KwaZulu-Natal, Limpopo, North-West and Eastern Cape) have significant legislation obliging traditional leadership to maintain law and order, adjudicate criminal offences, and report

⁸⁷ Section 9 Free State Traditional Leadership and Governance Act 8 of 2005 (FS TLGA).

⁸⁸ Section 8 FS TLGA.

⁸⁹ Including administering the affairs of the community, promoting interests, administering finances, supporting traditional leaders, supporting municipalities in the identification of needs: Section 9 Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007.

⁹⁰ Section 1 Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act 2 of 2007.

unnatural deaths. Given the limited constitutional framework for the powers of traditional leaders, why has this occurred?

Despite the association with low levels of policing, according traditional leaders important powers such as these is primarily a matter of politics and only marginally one of attempting to control crime. The Afrobarometer Survey in 2018 found ANC support at 59 per cent in rural areas, where traditional leaders are primarily located, and 43 per cent in urban areas.⁹¹ Consequently, it is clear that the ruling party relies on rural areas to deliver the vote which keeps them in power. Indeed, in a 2014 paper, Daniel de Kadt and Horacio A Larreguy find that traditional leaders in South Africa provide electoral benefits of roughly 6.5 percentage points to the ruling ANC, which they argue is a party which has protected traditional rulers both politically and legislatively since the end of apartheid.⁹² They conclude: ‘By controlling land resources, by having the power to adjudicate disputes, and by marshalling the authority granted by custom, traditional leaders are able to generate (ANC) party loyalty, but only do so when the party is in turn loyal to them.’⁹³

The impetus for the empowerment of traditional leadership in law and order is thus clearly less about filling the gap created by the absence of SAPS services and more about political control. It costs provinces nothing to ‘transfer’ powers they do not have themselves, yet it appears to secure them the political support of traditional leaders. Nevertheless, the pattern of neglect by the SAPS of policing, touched on in Chapter 3 and which will be explored further in the next chapter, closely follows the pattern of empowerment of traditional leaders in provincial legislation identified in this chapter, in relation to law and order and dispute resolution. While legislation empowering traditional leaders in general may be retained or arise for political reasons, the fact that such legislation includes a focus on the maintenance of law and order and dispute resolution speaks to the recognition by those provinces of the absence of national services in those areas. Indeed, in Chapter 5, provincial policing interventions touted by provinces frequently relate to traditional leadership.

In her recent paper on the TCB and TLK Bill, Aninka Claassens concludes that ‘[t]he South African state, in concert with apartheid-era traditional leaders, has therefore resorted to a “shadow land” of traditional powers and functions that do not actually exist in law.’⁹⁴ A shadowland is an indeterminate borderland between places or states. From Claassens’ perspective, these laws do not exist because they are almost certainly unconstitutional. However, until declared unconstitutional or repealed, the laws manifestly do exist, and as will be seen in the next chapter, their existence supports a reality in which traditional leaders can and do ‘police’ in a variety of ways.

⁹¹ Staff Writer *Business Day* 30 October 2018 ‘Afrobarometer shows EFF and DA tied in second place for votes’ *Business Day* 30 October 2018.

⁹² De Kadt D and Larreguy HA ‘Agents of the Regime? Electoral clientelism and traditional leaders in South Africa’ (2014) *Massachusetts Institute of Technology (MIT) Research Paper* available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/de-kadt.pdf> accessed 12 November 2019.

⁹³ De Kadt and Larreguy (2014) 23.

⁹⁴ Claassens A (2019) 32.

Chapter 9: Shadowland policing

Shadowland (n) – An indeterminate borderland between places or states...

-Lexico Dictionary

9.1 Introduction

From the previous chapter it is apparent that legislation empowering traditional leaders to police in spite of the constitutional framework exists. This legislative ‘shadowland’ is accompanied in practice by under-policing by the SAPS and explicit reliance on traditional leaders by it – in some cases in spite of traditional leaders’ hesitance to shoulder the burden.

In the previous chapter, four provinces with significant legislation in favour of traditional leaders exerting ‘policing’ powers were identified. These provinces are also the provinces in which rural areas are neglected by the SAPS. The table below shows the number and percentage of municipalities within each province with very low rates of policing;⁹⁵ the low rates correlate strongly with provinces that have significant territory comprised of former Bantustans and which have legislation providing for law and order and criminal adjudication powers for traditional leaders.

Table 8: Number and per cent of municipalities with low rates of policing per province

Province	Municipalities with ‘low’ policing (<200 per 100 000)	Total municipalities	Per cent ‘low’ of total
KZN	30	43	70%
LIM	14	22	64%
NW	8	18	44%
EC	12	33	36%
MP	6	17	35%
NC	0	24	0%
FS	0	20	0%
GT	0	9	0%
WC	0	25	0%
Total	70	211	33%

Source: Own calculations, PLV2 data

The provinces with low policing also correspond with the provinces with high numbers of paid principal and senior traditional leaders: 204 such leaders in Limpopo, 278 in KwaZulu-Natal, 244 in

⁹⁵ Under 200 per 100,000.

Eastern Cape, 58 in North West and 50 in Mpumalanga.⁹⁶ (The numbers do not include headmen and headwomen, of which there were more than 2,000 in 2015 in KwaZulu-Natal.)⁹⁷

Three provinces, Gauteng, Western Cape and Northern Cape, did not inherit any homeland legislation or traditional areas.⁹⁸ These three non-homeland provinces do not have *any* local municipalities where the SAPS policing rate in 2016 was under 200 per 100,000. The Free State also does not have any municipalities with a rate of policing below 200 per 100,000; the only homeland it inherited was QwaQwa, which already had a high policing rate at the time of amalgamation (see Chapter 3 above).

It is tempting to conclude that in communal areas the state expects traditional leaders to close the gap in SAPS service delivery. But the reality is more complex. Empowerment of traditional leaders in general is partly political, as discussed in Chapter 8. Two further reasons underpin the trends.

Disempowerment of the SAPS in some areas of KwaZulu-Natal may initially have been connected to the need to disempower former members of the KZP, who were absorbed into the SAPS. More prosaically, neglect of these rural areas by SAPS is also an almost inevitable result of the method used by the SAPS to calculate its theoretical human resource requirements. This will be discussed in more detail in this chapter.

In Chapter 8, the retention of legislation for traditional powers was described, as was the new legislation affirming or expanding policing-type powers in four provinces. This chapter will demonstrate that the response of traditional leaders has been mixed: in some instances they have simply proceeded as they always have; in others they are unwilling recipients of the burden of obligations so imposed; in others they call for more policing resources; while in others still, they are overzealous despots.

The extent to which law and order is actually maintained depends on the control and resources, political, human, and financial, available to traditional leaders. Where the social and political means of control are unavailable to traditional leaders, the concurrent absence of SAPS is associated with a high degree of violence and crime.

Indeed, at many of the hearings on the TCB carried out in 2012, people living in communal areas complained about rampant crime and poverty in their communities.⁹⁹ Rural people described situations of hardship and lamented what they viewed as a decline in social order.¹⁰⁰ As a result of the dire situations in which many rural communities found themselves, some voices identified the TCB as a solution to these problems.¹⁰¹ This may have been a result of not knowing any other form of law and

⁹⁶ Staff Writer 'South Africa has a huge number of traditional leaders – here's how much they get paid' *Business Tech* available at <https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/> accessed 13 March 2019.

⁹⁷ Ndaliso C 'Headmen to get R1 300 salary' *Daily News* 29 July 2015 available at <https://www.iol.co.za/news/politics/headmen-to-get-r1-300-salary-1892506> accessed 13 March 2019.

⁹⁸ Due to border changes, Gauteng subsequently gained two traditional areas, leading to the province passing legislation in terms of the Framework Act. The Northern Cape, although not inheriting any former homeland areas, nevertheless passed legislation permitting traditional communities to be recognised, of which there are six in the Northern Cape.

⁹⁹ Luwaya N 'Report on the Provincial Traditional Courts Bill Hearings' Centre for Law and Society (2013) 31 available at [http://www.cls.uct.ac.za/usr/lrg/publications/Issues_in_L&S_ISSUE02\(Nov2013\).pdf](http://www.cls.uct.ac.za/usr/lrg/publications/Issues_in_L&S_ISSUE02(Nov2013).pdf) accessed 13 March 2019.

¹⁰⁰ Luwaya N 31.

¹⁰¹ Luwaya N 31.

order. In other hearings, traditional leaders themselves called for more police to assist them in their duty of maintaining law and order.¹⁰²

The low policing ratios in rural traditional areas, which in some instances amounts to the abandonment of any real attempt at policing by national government, has thus been accompanied by an ongoing reliance on traditional leaders at a practical level. How this plays out in practice varies, as demonstrated in case studies in the four main provinces where there is reliance on traditional leadership: (1) traditional leaders are willing to police, but plead for more police to assist in so doing (KwaZulu-Natal); (2) policing in partnership with the SAPS (Eastern Cape and Limpopo); (3) creation of entirely separate tribal police service supplanting SAPS (North West); and (4) exercise of customary powers outside of mandate in an abusive manner (Eastern Cape and possibly North-West).

It is instructive that in the latest Afrobarometer Survey (Round 7 – 2018), trust in traditional leaders is higher than trust in police (42 versus 36 per cent) among rural people – but both enjoy amongst the lowest levels of trust of all institutions measured.

Traditional leaders can only be successful in maintaining law and order in very particular circumstances, ones which are not always present. The primary way in which traditional leaders customarily maintain law and order is through customary dispute resolution – of which the Constitution approves, as long as rights are not infringed. Such dispute resolution is embedded in networks of social control, which in many communal areas have long ceased to exist. Nevertheless, customary ‘policing’ is an important form of maintaining law and order in communal areas.

9.2 Customary ‘policing’ relies on societal ties

In communal areas truly policed by custom, there was/is no ‘visible policing’ or ‘investigation of crime’ in the maintenance of ‘law and order’. The customary equivalent of ‘visible policing’ occurs through the moral authority exerted by families and respected elders, who ensure that behaviour is kept within customarily agreed norms. When a dispute arises that cannot be resolved within the family or by an elder, customary dispute resolution under the auspices of a traditional leader is brought into play.¹⁰³ Consequently, the dispute resolution process – the tribal court – may be viewed as the equivalent of an ‘investigation’ rather than as the culmination of an investigation. In this it is closer to the inquisitorial system in Francophone and Lusophone systems than it is to the adversarial Anglophone system, where crimes are theoretically prosecuted only after an investigation by an independent police service has established there is a case to answer. Thus, the tribal ‘court’ process is investigatory in nature.

Although hosted and chaired by the traditional leader, the tribal court process is an attempt to uncover the factual and normative ‘truth’ of what occurred between the parties, in the light of customary norms, taking into account the full relationship between the parties. All members of the community contribute to the process and may provide an opinion, and the ‘ruling’ of the traditional leader is in the nature of a summation and affirmation of the views expressed by the community, viewed as a whole, in the process (‘a full stop to a sentence’). The entire process is ‘restorative’ in the sense that it seeks to repair the harm caused to the community.

¹⁰² Horne N Personal Communication on observations at TCB hearings 28 February 2019.

¹⁰³ For sources for this interpretation, see, inter alia, Mnisi Weeks S *Access to justice and human security: Cultural contradictions in rural South Africa* (2018); Bennett TW *Sourcebook of African Customary Law* (1991); Comaroff J and Roberts S *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).

The success of the customary process – the extent to which it is indeed restorative – depends on the voluntary submission of the parties to both the process and the outcome, as well as on the mutual respect between the traditional leader and the community. Indeed, the entire customary method of maintaining law and order also depends on voluntary submission to authority and mutual respect. This is in contrast to the formal justice system, in which the participation of alleged suspects is compelled by processes of arrest and detention.

It has been argued that customary dispute resolution was undermined by apartheid laws which in some instances grouped people living in communal areas under leaders whom they did not recognise, thus undermining the basis on which the customary system of ‘law and order’ operates. It may even be argued that the traditional councils introduced by the Traditional Leadership and Governance Framework Act 2003 (Framework Act), which re-affirms those boundaries and insists on a 40 per cent elected and 60 per cent appointed (by the traditional leader) council supporting the traditional leader, have also been sources of discord and perceived preference undermining the voluntary basis of customary authority.

Nevertheless, disputes are still frequently resolved through customary processes under the auspices of traditional leaders across South Africa. Research by Sindiso Mnisi Weeks records that in Msinga, KwaZulu-Natal, even serious offences such as rape may be resolved by customary processes depending on the circumstances. For example, where the alleged perpetrator is very young and the victim does not wish to ‘ruin his life’, damages may be paid without resort being had to the criminal justice system embodied in the SAPS, NPA and the magistrates’ courts.

‘Customary policing’ breaks down when the leadership of the leader is disputed, when there is a lack of mutual respect between communities and leaders, when the community is no longer close-knit or is no longer comprised of people who mutually reinforce agreed norms through the moral influence of respected elders. It also breaks down when norms are so loose as to permit serious crimes to occur. This may occur when the community becomes too large, or is comprised of different groups who embrace conflicting norms, or the traditional leader abuses his powers for personal gain.

As the breakdown emerges, resort may be had by a declining traditional leader to other means to maintain control, such as physical discipline enforced by headmen or even the commissioning of ‘tribal police’ to replace the moral authority previously exerted through accepted authority. The breakdown in law and order which occurs is similar to what is evident in transitional zones of recent migrants from rural areas in informal settlements on the outskirts of towns and cities, resulting in an ‘anomie’ or disconnectedness from a wider norm-enforcing community.

Most communal areas are in the process of moving from the ideal form of ‘customary’ policing to another point on the continuum. National legislation has impacted on this process by permitting provinces to legislate a range of functions for traditional leaders, which extend beyond voluntary customary dispute resolution. This has led to a variety of outcomes in practice. Consequently, while some smaller villages and rural areas may be able to harness customary policing to the benefit of all inhabitants, breakdown of societal ties implies that violence and disorder are likely to be emerging in most areas.

9.3 KZN leaders attempt control in the shadow of SAPS neglect

In Kwazulu-Natal, traditional leaders are primarily unwilling recipients of the burden of maintaining law and order – and policing has been deliberately emasculated to undermine the power of any remnants of the KZP.

police stations located in the former Natal. The population of the policing areas attached to the former homeland police stations is 4.4 million compared to the population of the rest of the province of 5.8 million. Thus, the average rate of policing in the former homeland is 120 per 100,000, compared to 237 per 100,000 in the rest of the province.

Regression analysis further indicates there is a relationship between policing and the prior murder rate in the former Natal areas – policing increases with a worse murder rate – but no relationship between policing and the murder rate in former homeland areas, suggesting the allocations there are not rationally influenced by the prior murder rate.

Aspects of the spatial geography of under-policing in the province point to one of the reasons for neglect by the SAPS of the province – control of the KZP. There are 16 police station areas where the number of operational police reflects a rate even lower than the 94 per 100,000 evident in KwaZulu in 1994, include Esikhawini/Esikhaleni, a township near Empangeni.¹⁰⁷ Human Rights Watch in 1993 singled out the area as one in which there had been significant police misconduct and political bias of the KZP during the pre-transition period.¹⁰⁸ Some convictions were subsequently achieved which indicated that certain members of the KZP were indeed involved in political killings, and three accused found guilty claimed membership of a group given name ‘The Esikhaweni Hit Squad’.¹⁰⁹

Many of the areas with very low policing feature prominently in Truth and Reconciliation transcripts as areas in which the KZP were active.¹¹⁰ This suggests that these areas may have been, at least in the immediate post-apartheid era, deliberately deprived of policing resources to reduce the ability of the remnants of the KZP, who were absorbed into the newly formed SAPS, from being a force within the SAPS. Over time, the under-resourcing in turn negatively affected the reporting of crime, which in turn influenced the allocation of police resources, resulting in extremely low figures still seen 20 years after the advent of democracy.

Traditional leaders do not easily fill this gap in policing, especially as some of these areas are urban or peri-urban. Ingrid Palmary in 2004 records in her research in traditional areas on the outskirts of Durban that the *Amakhosi* themselves lamented the lack of police:

Although the police play a certain role in crime prevention it is not satisfying because sometimes when you call the station they tell you that the van is out and they cannot attend to your problem immediately. We have to wait for the van; sometimes they come the following day when we're desperate for their help. We do have policing forums that engage with the police but we find that although we [raise] our issues police always complain that they do not have enough vans to visit communities and cover all the community's needs.¹¹¹

She further records that some as a result retained the practice of having chiefs' police, whose functions were to issue summons to the chiefs' courts and to maintain public order at events such as sports matches and weddings where fights could break out.¹¹² Those with chiefs' police said there was

¹⁰⁷ Own calculations based on data provided by the *Natal Witness*.

¹⁰⁸ Human Rights Watch *Traditional dictatorship: One Party State in KwaZulu Homeland Threatens Transition to Democracy* September 1993.

¹⁰⁹ Truth and Reconciliation Commission *Transcripts: Special Hearing Durban 4 August 1997* available at <http://sabctrc.saha.org.za> accessed 9 June 2018.

¹¹⁰ uMzimkhulu, Ntabamhlophe, Esikhawini, KwaMakhutha, Ematimatolo, Bhekithemba, Ematsheni, Ingwavuma, Nongoma, Melmoth, Ndumo, Emanguzi, Ndwedwe, Nsuze, Mondlo, and Intsikeni.

¹¹¹ Palmary I *Traditional Leaders in the eThekweni Metropolitan Region: Their role in crime prevention and safety promotion* CSVR (2004) 25.

¹¹² Palmary (2004) 26.

resistance, but argued that it was necessary given the lack of police capacity in the area.¹¹³ She further records that in all the areas she visited traditional courts were operating.¹¹⁴

'Tribal courts' were indeed distributed extensively across KwaZulu-Natal, and in 2006 were 'converted' into 'Traditional Administration Centres' though they are still referred to as tribal or traditional courts and court activities still occur there.¹¹⁵ A review of traditional councils in 2016 found that 21 of the 38 traditional councils visited in the evaluation had functional traditional courts.¹¹⁶

Recent research carried out by the provincial government in Msinga in 2010, a similar area in KwaZulu-Natal with low levels of policing (106 per 100,000), revealed high rates of interpersonal violence and the ready availability of firearms, resulting in low levels of security.¹¹⁷ The research further revealed the reliance placed on traditional justice, with the lack of policing support also lamented by the province: 'There is a perception that the SAPS take long to react to crimes in progress because they themselves are fearful of violent criminals. ... Traditional structures make attempts to impose order and mete out punishment.'¹¹⁸

The provincial government acknowledges the policing resource problem, and appears to see traditional authorities as part of the solution, arguing that '[t]raditional authorities must also develop appropriate crime prevention responses at ward level. It is important that initiatives grow 'organically' from within communities themselves rather than being imposed from outside'.¹¹⁹

It is difficult to escape the conclusion that over large parts of the province and various time periods, traditional leadership has carried the burden of law and order maintenance and dispute resolution, while national government has neglected its obligation.

While accepting the obligation, traditional leaders lament the failure of the SAPS to assist them adequately. The estimated 2,000 headmen in KwaZulu-Natal increase the number of people notionally involved in law and order by only some 10 per cent. If KwaZulu-Natal were to have the median rate of policing of 283 per 100,000 which pertains for South Africa, the province should have 31,000 SAPS members – approximately double the number it actually has. Indeed, if the former homeland were merely to be equalised with the rest of the province, this would require just over 24,000 SAPS members for the province – an additional 4,500.

The result is a high incidence of violence. The 2012 NBD estimates suggest that KwaZulu-Natal may be under-recording its murder rate by some 32 per cent. Despite this undercount, the province still exhibits a higher than average murder rate. High incidence of political killings, taxi warfare and other forms of interpersonal violence remain evident. It was found from autopsy data over the period 2000-2008 that the homicide rate in the Umkhanyakude district of northern KZN was 66 per 100,000,

¹¹³ Palmary (2004) 26.

¹¹⁴ Palmary (2004) 26.

¹¹⁵ KZN Department of Cooperative Governance and Traditional Affairs (COGTA) *Diagnostic Evaluation on the Functionality of Traditional Institutions* (2017) available at <http://www.kzncogta.gov.za/wp-content/uploads/2017/09/TRADS-FUNCTIONALITY-OF-TRADITIONAL-HOUSES-EVALUATION-REPORT.pdf> accessed 13 March 2019.

¹¹⁶ KZN COGTA (2017) 35.

¹¹⁷ KZN Department of Community Safety and Liaison *Rural Safety in KwaZulu-Natal* (2010) 12-13 available at <http://www.kzncomsafety.gov.za/Portals/0/Documents/rural%20safety%20report.pdf> accessed 9 April 2019.

¹¹⁸ KZN Department of Community Safety and Liaison (2010) 22.

¹¹⁹ KZN Department of Community Safety and Liaison (2010) 29.

substantially higher than that for South Africa as whole.¹²⁰ The study also found that non-resident males were more than 40 per cent more likely to experience a homicide death compared to male residents, suggesting that visitors are particularly at risk. Violence in KwaZulu-Natal remains exceptionally high.

9.3 Limpopo leaders feel the lack of policing

In Limpopo, too, the SAPS relies on traditional leaders, who in turn feel the lack of policing – in addition to which they themselves may be implicated in some of the crimes of most concern in the province. Boyane Tshehla in 2004 records the following in respect of the intersection between policing and traditional leadership, from interviews he conducted in Limpopo: ‘SAPS in Limpopo see the (traditional) leaders as indispensable role players in the fight against crime.’ He further records that the head of the SAPS Seshego crime prevention unit – the station responsible for part of Moletji which comprises 52 villages – stated that ‘without traditional leaders it would be impossible to deal with crime in the rural areas’.¹²¹

Tshehla records that the crime-prevention unit of Seshego SAPS police station visited the traditional authority office only once a week to attend to a ‘satellite police station’ situated at the traditional authority office. During these visits, all services that were normally performed in a SAPS community service centre were rendered at the traditional authority, including opening case dockets, certifying documents and generally attending to queries from community members.¹²² Thus, functions which would in other areas be available daily on a 24-hour basis were available only once a week at one location serving 52 villages. It is clear that crime-prevention patrolling by SAPS did not occur in these areas.

Tshela also notes that some traditional leaders were wary of the responsibility which had by default been placed on their shoulders and the lack of police response. He reports a traditional leader saying, ‘People come to us to report crime that we know we cannot handle. We call the police to come and deal with the cases. Sometimes police come and at other times they do not come.’¹²³ The situation in Limpopo at this time thus represents a case study of one of the most common observed trends: a willingness by traditional leaders to take on duties, but a lamenting of the lack of support by the SAPS.

9.4 Eastern Cape shows blended policing and despots

The Eastern Cape struggles with serious violent crime, yet the SAPS persists in looking to traditional leaders to solve the problem. In addition, a case of serious abuse of power by a traditional leader went unchallenged for years before being addressed.

The Eastern Cape has the highest recorded murder rate of any province in terms of a range of sources of data, and policing is not only sparse but also inept. Incidents such as the killings of five police and a civilian at a police station in Engcobo, former Transkei, in 2018, by suspects allegedly involved in a sex cult with more than 100 ‘sex slaves’ and hoarding weapons a mere three kilometres away, is

¹²⁰ Otieno G et al. ‘High rates of homicide in a rural South African population (2000–2008): findings from a population-based cohort study’ (2015) 13(20) *Population Health Metrics* available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4545817/> accessed 9 April 2019.

¹²¹ Tshehla B ‘Here to stay: Traditional leaders’ role in justice and crime prevention’ 11 *SA Crime Quarterly* (2005) 15.

¹²² Tshehla 17.

¹²³ Tshehla 19.

suggestive of a larger network of criminality which is not reflected in SAPS crime data – and not addressed by the SAPS, despite community knowledge of the problem. Interviewed after the incident, the chief of the area said, ‘Before this incident [the shooting] there were rumours of other incidents happening around here, including house break-ins, rape of minors.’¹²⁴

Engcobo is in fact a bustling town, with its main police station recording a very high SAPS murder rate of 67 per 100,000 – more than double the national average. It has had around 70 murders every year for the last 10 years – a clear indication of a problem. Yet it had only 130 police per 100,000 allocated to Engcobo police station, which is less than half the national median. The larger Engcobo area of the entire local municipality has an even higher murder rate of 73 per 100,000, and even lower policing rate of 125 per 100,000.¹²⁵

In December 2018, possibly partly in response to the Engcobo killings, National Police Minister Bheki Cele launched the ‘Traditional Policing Concept’ in the Eastern Cape at Nqadu Great Place near Willowvale¹²⁶ – part of the Mbhashe municipality which has an exceptionally high murder rate of 65 per 100,000. In February 2019, the ‘concept’ was extended to Mngqesha Great Place near King William’s Town.

According to news reports, the ‘concept’ involves the provision of human and material resources to various traditional authorities to combat crime in rural areas, which comprised at Mngqesha a 24-hour SAPS ‘service point’ staffed with four police officials, a mobile police station, a service centre and two police vans.¹²⁷ The Mngqesha royal house donated a room to house the officers, as well as beds for the service centre.¹²⁸ Eastern Cape SAPS Provincial Commissioner Lt Gen Liziwe Ntshinga said at the Mngqesha launch that the aim was to

close the gap between the police and the community; we want to improve our public safety to a level where [people]men and women can travel and walk freely; we want to we want to improve communication between police and the community ... to enhance the public perception of the police, and; we want traditional leadership to take a leading role in fighting crime.¹²⁹

Both the ‘concept’ itself and the Provincial Commissioner’s statement are revealing. The ‘concept’ involves an extremely small increase in policing resources, one which suggests that ‘nothing’ previously existed. The statement acknowledges the seriousness of the crime situation – people cannot walk freely – and affirms the continuing reliance on traditional leadership in taking the ‘leading role’ in fighting crime in those communities.

Some years earlier, further north in the Eastern Cape, a case occurred of a traditional leader assuming powers beyond that accorded and indeed abusing his mandate for years. King Dalindyebo of the AbeThembu in the Eastern Cape was eventually convicted by the High Court for crimes which arose

¹²⁴ Pijoo I ‘News24 takes you inside the cult that captured an Eastern Cape community’ *News24* 15 March 2018 available at <https://www.news24.com/Video/SouthAfrica/News/in-depth-how-a-mysterious-cult-terrorised-an-eastern-cape-community-20180315> accessed 9 April 2019.

¹²⁵ Own calculations using data as described in Chapter 1.

¹²⁶ SA Government ‘Minister Bheki Cele launches Traditional Policing Concept in Eastern Cape, 7 Dec’ Press Release available at <https://www.gov.za/speeches/police-launches-traditional-policing-concept-eastern-cape-07-dec-5-dec-2018-0000> accessed 13 March 2019.

¹²⁷ Field M ‘Traditional policing project rolled out’ *Go! & Express Live* 8 February 2019 available at <https://www.goexpress.co.za/2019/02/08/traditional-policing-project-rolled-out/> accessed 13 March 2019.

¹²⁸ Field (2019).

¹²⁹ Field (2019).

from punishments he meted out to those appearing before his traditional court.¹³⁰ He regularly tried crimes and imposed punishments falling outside the jurisdiction previously conferred by the Black Administration Act and conferred by the Chiefs' Courts Act (Transkei) 6 of 1983.¹³¹ Dalindyebo was found guilty of arson, kidnapping, defeating the ends of justice, assault with intent to do grievous bodily harm and culpable homicide.

In his criminal defence, Dalindyebo argued that he was enforcing law and order and committed these crimes against his 'subjects' when they failed to make amends for offences in respect of which he had determined guilt and meted out punishment in his traditional court.¹³² Phathekile Holomisa, former president of the Congress of Traditional Leaders (Contralesa), maintained that Dalindyebo 'should be treated the same [way] other judiciary officers [are] when their decisions are overturned', claiming that 'he cannot therefore be criminally charged for executing his judiciary duties as king in a traditional court in line with customary law'.¹³³

Thus, this response of traditional leaders may be seen as yet another approach – one that accords them complete authority and indeed impunity for maintaining law and order and adjudicating in terms of customary law beyond the remit of provincial or national legislation. The North West provides an example of a further type of response – one only possible with significant resources.

9.5 North West Bafokeng runs its own police

In the North West, tribal mining wealth has resulted in a well-resourced quasi-police 'tribal force'. The Bafokeng ('People of the Dew') number roughly 300,000 people whose wealth has accumulated due to rich platinum reserves on their land. Although the Bafokeng are prominent in the North West and speak Tswana, they are not of Tswana origin and there was conflict between their leaders and former Bophuthatswana President Lucas Mangope.¹³⁴ The seat of the Royal Bafokeng Administration is located in Phokeng, which is a ward of the Rustenburg Local Municipality. The Bafokeng provide an important case study of a tribe – one with significant resources – assuming policing duties in the face of inadequate policing by the state.

Christopher Thornhill and Mocheudi Selepe record in 2010 that the Royal Bafokeng Administration had a tribal police force consisting of 85 police officials, with two helicopters and a fleet of patrol

¹³⁰ *Dalindyebo v S* (090/2015) [2015] ZASCA 144 (1 October 2015).

¹³¹ Weeks S 'The Traditional Courts Bill: Controversy around process, substance and implications' (2011) 35 *SA Crime Quarterly* 3.

¹³² Weeks (2011) describes the crimes further: 'One subject was found guilty by the king of permitting his goats to wander onto the king's land and fined R1 200. When he failed to pay, the king instructed that his family's belongings be removed and set their four rondavels, livestock and kraal alight. His wife and children were taken and held captive at the king's home until the following afternoon as leverage against the outstanding fine; he was then ordered to leave the king's area of jurisdiction. Another subject was allegedly guilty of murder and thus fined six cows; he argued that he had been charged with the same offence in the magistrate's court and the matter had yet to go to trial; the same punishment was meted out. The third group of subjects were three young men accused of rape, housebreaking and theft. These young men were arrested, stripped naked and beaten with sjamboks by the king who, when he got tired, was relieved by the persons who had assisted him in capturing the boys. One other boy was said to have been a remote accessory; he was captured by community members who, before delivering him to the king, beat him in the same way they had seen the king beating the other three. This beating resulted in the boy's death. The king subsequently fined the deceased boy's father 15 cows for the boy's alleged offences.'

¹³³ RDM NewsWire 'King Dalindyebo 'can't be charged for executing judiciary' duties' *The Sowetan* available at <https://www.sowetanlive.co.za/news/2015-10-08-king-dalindyebo-cant-be-charged-for-executing-judiciary-duties/> accessed 15 November 2019.

¹³⁴ Huffman TN 'Prehistory of the Rustenburg area' *South African History Online* 25 August 2017 available at <https://www.sahistory.org.za/article/prehistory-rustenburg-area> accessed 9 April 2019.

cars.¹³⁵ They further record that the SAPS are dependent on the Royal Bafokeng ‘reaction police force’ for law enforcement in the Royal Bafokeng area, and that the Bafokeng have their own police training academy accredited by SAPS, with police officers trained by the Royal Bafokeng Administration.¹³⁶ Louise Thomson reports on a Household Survey conducted by the Royal Bafokeng Administration in 2008 which found that 68 per cent of the sample believed that the Royal Bafokeng Reaction force has reduced crime and almost 70 per cent of the households believe the Reaction force is more effective than the SAPS.¹³⁷

Thornhill and Selepe further record that a tribal court is situated within the Royal Bafokeng Administration headquarters in Phokeng.¹³⁸ Tribal cases are heard and tried daily; tribal cases originate at village level, and if the headman is unable to resolve it, the matter is referred to the tribal court.¹³⁹ Should the tribal court fail to resolve the matter, it is transferred to the king for a verdict.¹⁴⁰ The tribal court consists of four assessors and a chairperson.¹⁴¹ The chairperson of the tribal court is vested with powers to make final decisions pertaining to all court proceedings.¹⁴² There is participative decision-making by all five members of the tribal court. The court proceedings are derived from the Bophuthatswana laws discussed in Chapter 8. Accordingly, the fine cannot exceed R200, two cows or 10 goats or sheep. If the crime is of a serious nature, it will be forwarded to the magistrates’ court in Rustenburg; community members may appeal to have the cases tried by the magistrate at the magistrate’s court.¹⁴³

The Bafokeng deployment of a police force is partly due to the very low deployment by the SAPS. Rustenburg had SAPS policing deployment of only 170 per 100,000 in 2016, which is strongly suggestive of under-resourcing. A further factor is that the Bafokeng have significant resources to protect. However, their practice in serving the broader community, and their ‘accreditation’ by the SAPS, suggest that they are far more than a glorified private security firm.

There are suggestions that the Bafokeng ‘police’ are a law unto themselves, and thus are tending toward the Dalindyebo case study (see Eastern Cape above). At a conference on the TCB held in Rustenburg in 2012,¹⁴⁴ Connie Modingwana of Magong claimed: ‘The Bafokeng chief sends in his police even in areas which do not fall under Bafokeng. His security threatens citizens who do not agree with him. On several occasions these tribal police threatened me on my life.’¹⁴⁵ Gadifele Tawana said, ‘Last week people were told by police in our non-traditional village to go to their chiefs

¹³⁵ Thornhill C & Selepe M ‘The role of the Royal Bafokeng Administration in the Promotion of Municipal Service Delivery’ (2010) 45(1) *Journal of Public Administration* 172 available at https://repository.up.ac.za/bitstream/handle/2263/14973/Thornhill_Role%282010%29.pdf?sequence=1&isAllowed=y accessed 13 March 2019.

¹³⁶ Thornhill & Selepe (2010) 172.

¹³⁷ Thomson LF *The Royal Bafokeng Nation, a Case Study for the Resource Curse* (Minor dissertation submitted in partial fulfilment of the requirements for the award of the degree of Master of Economics, UCT, 2010) 26.

¹³⁸ Thornhill & Selepe (2010) 172.

¹³⁹ Thornhill & Selepe (2010) 172.

¹⁴⁰ Thornhill & Selepe (2010) 172.

¹⁴¹ Thornhill & Selepe (2010) 172.

¹⁴² Thornhill & Selepe (2010) 172.

¹⁴³ Thornhill & Selepe (2010) 172.

¹⁴⁴ Bafokeng Land Buyers Association (BLBA) *Submission to the Select Committee on Security and Constitutional Development 15 February 2012* Annexure C2 Submission on the Proceedings of the Rustenburg Traditional Courts Bill Conference, Rustenburg, North West Province 12 February 2012 available at http://www.sll.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/bafokeng3_feb2012_ncopsubmission.pdf accessed 13 March 2019.

¹⁴⁵ BLBA (2012).

when there are disputes about stand allocations. We are not a traditional community.’¹⁴⁶ Johannes Mosime said, ‘Bafokeng Tribal Court is controlled by a gang which uses the tribal police to threaten the community during meetings.’¹⁴⁷

By 2018, the Bafokeng Royal Administration in its March Quarterly Report referred to its ‘Protection Services’, in the style of a local municipality, rather than ‘Tribal Police’; however, it still made reference to its ‘Reaction Force’ component.¹⁴⁸ It reported that in the first quarter of 2018, Bafokeng Protection Services attended to 837 crime incidents arresting 146 suspicious criminals.¹⁴⁹ It conducted 16 joint crime fighting operations with the SAPS, and it received 1,192 crime-related community calls to the reaction force control room during the first quarter of 2018. By way of comparison, Rustenburg SAPS police station, reported around 2,000 serious crimes per quarter in 2017, suggesting a significant proportion of crime is dealt with by the Bafokeng Protection Services. The Report also confirmed that the ‘newly established Protective Services Guarding Division’ – consisting of 66 guards of various gradings – had been operationalised since 1 July 2017.¹⁵⁰

The Bafokeng ‘tribal police’ may be distinguished from a private security operation because they operate with the veneer of legitimacy accorded by North West Traditional Leadership and Governance Act 2 of 2005 and the Bophuthatswana Traditional Courts Act. The former *obliges* traditional leaders to maintain peace and mediate disputes. Because the Bafokeng have independent wealth, they are able to bring considerable human and physical resources to the task of maintaining order and resolving disputes. In addition, they are ‘accredited’ by the SAPS.

Thus, in the North West a case study of an extraordinary situation of a traditional community operating a sophisticated policing service and court service – entirely outside of the Constitution – exists. This police service even conducts policing operations together with the national SAPS, with apparently no complaint from the SAPS itself regarding essentially a private police force carrying out police operations.

9.4 Conclusion

In former homeland areas the SAPS appears secondary to traditional leaders whom the SAPS itself suggests are primarily responsible for maintaining law and order. But traditional leaders do not have adequate means (with the exception of the Bafokeng) to do so. The lack of means is reflected in the fact that traditional leaders frequently lament the lack of SAPS support as they attempt to maintain law and order.

Furthermore, there is no oversight or monitoring of the way in which traditional leaders carry out their functions. While some traditional leaders maintain law and order and implement justice for the good of all, there is a risk in relying on them to do so, as illustrated by the Eastern Cape Dalindyebo case study, and to a lesser extent that of the Bafokeng. This can encourage rather than control criminality.

The attitude of the SAPS itself is contradictory to their own stance in relation to entities such as municipal police, curiously so, with statement after statement seemingly placing the SAPS in secondary rather than primary position in relation to policing. Some may argue this is a form of

¹⁴⁶ BLBA (2012).

¹⁴⁷ BLBA (2012).

¹⁴⁸ Royal Bafokeng Nation (RBN) *Quarterly Performance Report 1st Quarter 2018* (2018) 33 available at <https://www.rbnoperationsroom.com/files/display/id/14645> accessed 13 March 2018.

¹⁴⁹ RBN 33.

¹⁵⁰ RBN 34.

deference, which has no risk for the SAPS precisely because traditional leaders do not have the means to undermine SAPS authority in the same way that competing metro police could.

In KwaZulu-Natal, the impetus for SAPS under-provisioning in the early years of democracy may have been a desire to ensure elements of the former KZP would not pose a future threat. Indeed, some police stations were closed precisely for that reason, as discussed in Chapter 5.

The pattern of under-resourcing by the SAPS leads to future under-resourcing. This is because the formula employed by the SAPS in determining how many police officers to deploy depends to a significant degree on reported crime.¹⁵¹ If crimes are being reported to traditional leaders and not to the SAPS, then those crimes do not form part of the calculation used by the SAPS in determining the theoretical allocation. Many crimes may not be reported at all, if policing is too sparse to make reporting crime accessible. Consequently, the original police under-resourcing inherited in 1994 underpins the under-resourcing now. It may in fact be that the SAPS believes its own crime data to show that these areas do not need policing. The murder rate, and the 'real' murder rate discussed in Chapter 3, strongly suggests that the true incidence of violence is much higher than indicated by SAPS data.

Traditional leaders are unable to control the criminality emerging in the former homelands through customary policing methods as these areas lose their traditional way of life and become increasingly modern and urban. The ruling party has apparently been able to ensure electoral support in these areas despite not delivering policing services and failing to control crime. The evidence suggests this is partly through the support of traditional leaders, who while they appreciate the powers over land and decision-making accorded to them, are frequently less comfortable with 'law and order' obligations.

As crime remains among the top issues with which South Africans are concerned,¹⁵² the fiction that traditional leaders can and should maintain law and order in their areas remains unchallenged.

Municipalities in these areas are in no financial position to fill the gap, although some, like King Sabata Dalindyebo (Umtata), clearly have aspirations to do so (see Chapter 7). Provinces appear to collude with national government in maintaining the fiction, as their electoral support remains sufficiently high and their own safety budgets limit the ambit of engagement, although they are clearly aware of problems (see Chapter 5). Any model for the future of policing in South Africa cannot neglect these areas – as they have been neglected despite the intentions of the transformative, centralised model of policing adopted. Direct provincial influence is one of the mechanisms that could see provinces direct the SAPS to areas of real concern. An appropriate model for policing in South Africa is the subject of the next chapter.

¹⁵¹ For a more detailed explanation, see Redpath J and Nagia-Luddy F 'Unconscionable and irrational: SAPS human resource allocation' (2015) 53 *SA Crime Quarterly* 15-25.

¹⁵² Afrobarometer surveys consistently list crime as second only to unemployment as the most important challenge facing the country. See Afrobarometer Round 5 and Round 6 available at <http://afrobarometer.org/countries/south-africa-0> accessed 12 November 2019.

Chapter 10: Conclusion

10.1 Introduction

The principal aim of this thesis has been to interrogate South Africa's highly centralised policing arrangements within the overall federal-type structure of the South African Constitution. In particular, it sought to identify the reasons for the centralised policing framework, the extent to which it is implicated in policing failures, and the forms, mechanisms, drivers and impact of subnational policing that has occurred to date. Finally, it sought to use the findings to develop a multilevel model for policing which has the potential to meet the policing needs of South Africa.

This chapter draws together the previous chapters to argue that a model incorporating greater intergovernmental cooperation and devolution of policing coupled with de-politicisation of accountability institutions holds the potential to address the failings of policing in South Africa. The chapter will argue that the principle of subsidiarity in context should guide policing arrangements. Consequently, the chapter proposes that a partially decentralised model of policing is what is the most likely to deliver improved public security outcomes in support of development in a country with diverse policing challenges.

10.2 Findings

10.2.1 Policing arrangements in federal states matter

This thesis is concerned narrowly with policing. Policing embodies the primary role of the state, which is to use force in order to protect its citizens. Bad policing may worsen public security, while good policing should be accompanied by improving crime trends. Once it is established that good policing protects, the question arises whether policing is better delivered or controlled locally or centrally in federal-type states.

It may be argued that the locus of delivery of policing in terms of the controlling sphere of government is immaterial, and that policing outcomes depend entirely on the probity and capacity of the government entity responsible for policing. It may also be argued that centralised policing offers advantages (preventing regional partisanship, improving equitable distribution, implementing democratic transformation, and creating the efficiencies and economies of scale for associated functions such as training) that make it the preferred choice for policing delivery in developing states.

The comparative evidence in Chapter 2 suggests, however, that decentralised arrangements may be better at achieving some goods, such as efficient, equitable and rational resource distribution. The attempts by subnational governments in federal states with centralised arrangements to engage with policing – by attempting to direct, by providing additional capital and human resources, by fielding their own 'force multipliers' – suggests too the lack of responsiveness of centralised policing to subnational concerns.

Not only may centralisation fail to bring with it needed transformation, but in developing countries, it may bring the protection of political elites at the expense of citizens and the inefficiencies of large bureaucracies; if corrupted or abusive, a centralised arrangement ensures that these negative qualities

impact on policing in the entire country. This strongly suggests a degree of devolution is ideal for policing delivery.

In South Africa, however, the constitutional framework settled upon in 1996 was highly centralised – and while the ruling party calls for more centralisation, in practice a weak intergovernmental model is emerging in response to central failure.

10.2.2 Centralised and centralising policing

Why centralised policing persists

The arrangements for policing are driven by political considerations, such that the level of centralisation or decentralisation is profoundly tied with up with the politics of the day. Political considerations drive both the initial choice of a federal-type arrangement for government, and of a central arrangement for policing. The comparative evidence from Nigeria and Kenya suggests that the fear of regional separatism or partisan policing may be the primary driver of centralised policing arrangements in developing federal-type countries.

Similarly in South Africa, the imperatives of the negotiated political settlement saw the African National Congress (ANC) reluctantly concede to a federal-type arrangement for South Africa in order to ensure the participation in the first democratic election of the Inkatha Freedom Party (IFP), the key political actor in the then largest province of KwaZulu-Natal. However, once the national election was won, the ruling ANC negotiated a profound shift in the arrangements for policing toward almost complete centralisation in the 1996 Constitution, aimed largely at preventing the IFP, which had won KwaZulu-Natal, from continuing to field its partisan KwaZulu Police (KZP) in the province. While separatist policing in the province was prevented, partisan and abusive policing persisted, and the province still records disproportionate levels of violence and police complicity in violence – with relative impunity.

More recently, the loss of subnational political control in a province (2009) and in metropolitan municipalities (2006 and 2016) has tended to drive further calls for centralisation in South Africa. ANC policy documents call for even greater centralisation of policing, with these calls being most apparent after the ANC lost political control of an additional three of the major metropolitan municipalities – which all (now) field metropolitan police – in 2016. Subnational governments which do seek more control over policing perceive that crime affects their ability to deliver and hence their electoral performance. Provincial calls for greater provincial control of policing are most vocal in the current opposition province. Political homogeneity in provinces has permitted some degree of de facto provincial control of policing at various times, but even politically homogenous provinces feel the need to intervene in policing. The relative neglect of policing in rural traditional areas, in which the vast majority of ANC supporters live, seems counter-intuitive until the role of traditional leadership in delivering electoral support is understood and, consequently, the continued empowerment of traditional leaders in both provincial and national legislation and rhetoric – and abdication of responsibility by the South African Police Service (SAPS).

The ANC has been relatively insulated from the effects of crime at national polls. Although the evidence suggests a strong relationship between changing crime rates and the ANC's performance in national elections, the large margin of its original support and the improving crime trend prior to 2009 worked in the ANC's favour. However, worsening crime and violence since 2009 continues to be closely associated with decreasing support for the ruling party. The push for greater centralisation of policing through the subsuming of subnational (largely but not exclusively opposition) policing

entities is likely to work against bringing crime under control, as it is precisely national central control of the SAPS which has been implicated in the deteriorating trends.

The broad issue of choice in the arrangement of policing is therefore frequently driven by narrow party political concerns. Such narrow considerations are likely also to shape the future of decentralisation of policing: where it becomes in the interest of a ruling party, further decentralisation may be possible. The evidence suggests the safety and security vacuums are partially caused by centralised policing.

Centralised policing creates safety and security vacuums

Transformational needs were mooted to require a centralised framework at the time of the transition: the transformation of policing, in particular, the legitimisation of a force previously involved in imposing an unjust system, was an imperative of the transition. Centralisation was seen to be required to ensure political and demographic realignment, to effect a degree of demilitarisation, to address police violence and the use of force, to effect restructuring and to ensure inequalities of policing were addressed. The findings suggest that although centralisation has seen an expansion of policing and change in the composition of the SAPS ranks, it has not resulted in the full legitimisation of policing, nor has it effected demilitarisation, while police violence and the use of force remain of concern. Neither the current national structures of 'civilian oversight' (Civilian Secretariat for Policing, CSP) and accountability (Independent Policing Investigative Directorate, IPID) nor the oversight mandate of the provinces has been able to effect the necessary change in the police. Possibly of most concern is that inequality in the distribution of resources persists strongly. This, it is argued, is more likely in a centralised framework, which, particularly in developing countries, may be top-heavy and tend toward the protection of the political and economic elite; where centralised policing is captured by corruption, these effects are stronger still.

The centralised policing framework initially appeared to be successful in reducing crime, due to the cessation of most political violence coupled with unprecedented increases in policing numbers and budgets. Furthermore, in May 2004, FIFA announced that South Africa would host the 2010 World Cup. This created the necessary political will for an unprecedented degree of intergovernmental cooperation and political toleration of both the expansion in municipal policing and provincial engagements with policing by SAPS, toward the common goal of securing a safer South Africa for this event on the world stage. However, the preceding decade of rapid recruitment, loss of skills due to restructuring, poor central decisions, top-heaving management structures, the failure to equalise policing, state capture and corruption, and the ending of productive intergovernmental cooperation saw the trends begin to reverse after this event as the results of these effects began to take hold. While those living in still relatively well-policed suburbs and the political elite enjoy a degree of protection and police responsiveness, such safety is easily punctured when crime and violence are prevalent and unpoliced in most places and for most people.

The evidence suggests that as the performance of the SAPS deteriorates in its ability to police visibly, to respond to crime, to investigate, to police public order incidents, so are safety vacuums created. These vacuums are of three types, which are interlinked. First, the vacuums are geographical, with rural traditional areas being the least policed, closely followed by urban township areas. Secondly, the vacuums are in relation to particular crime types or priorities, as policing fails adequately to meet local priorities, such as high levels of homicidal violence, or seasonal safety demands. Thirdly, the vacuums are in relation to adequacy of response, with investigatory skills, public order control capacity, and emergency response being inadequate or sparsely distributed. These vacuums overlap in ways that exacerbate the situation, and have drawn a response from subnational governments.

The challenge of a geographically large and populous country with diverse needs results in failure adequately to match policing to local or provincial challenges. In particular, matters affecting local governments most acutely – such as land invasions, copper theft and damage to essential infrastructure, violent protest, and the protection of tourism – are not adequately prioritised. Vacuums are created by the failure of the centralised system to adapt policing to local needs, as uniform policing does not result in uniform results in a diverse country.

The specific vacuums in policing have created the space for subnational governments to step into the breach to the extent that it can, but the SAPS' central failures, with its near-monopoly on funding for policing, continues to drive the current trend, which is likely to see the murder rate exceed 40 per 100,000 in five years, implying in excess of 25,000 people murdered yearly. This murder rate will reflect a range of rights violations and suggests that crime is spiralling out of control – triggering an obligation on other spheres of government.

The evidence indicates that the SAPS alone is unable to meet this crisis in the current framework, suggesting there is a need for a stronger intergovernmental approach to assist it in addressing this crisis. The findings suggest ways in which other spheres of government may contribute to the intergovernmental approach. For provinces, the findings suggests this should involve an increase in their ability to influence national policing.

10.2.3 Provinces – what works and what doesn't

The provinces are saddled with the almost impossible task of holding a national police service to account yet without any direct powers over policing as such. The provincial mandate in the absence of intergovernmental cooperation and political influence is extremely limited. Oversight is toothless, and recommendations from a province can simply be ignored with impunity by national government and by the national SAPS. Although all of the provinces have demonstrated some attempt to intervene in policing, particularly in relation to province-specific failures of the SAPS, only the three largest provinces have exhibited significant interventions. Limited provincial safety budgets, which are in turn a function of the 'financial constitution', further constrain the provincial role. While provincial political influence of policing facilitated by political homogeneity has had some success, provincial oversight on its own, in its current incarnation, has failed to improve policing, suggesting a change to the policy framework is necessary.

Provinces can do and are doing little

A strong centralised national police service was the correct choice for South Africa at the time of the transition, as evidenced by the initial KwaZulu flag-waving at police stations in KZN and the corrupt and violent quasi-policing emerging in the Eastern Cape at the time of the transition. Nevertheless, the evidence suggests that provinces have attempted in various ways to ameliorate the shortcomings of national policing, by encouraging greater responsiveness (exerting political influence or stretching the boundaries of oversight), providing support (policing resources such as training and vehicles), providing additional policing (quasi-policing patrolling, supporting other forms of law enforcement and extending other mandates, and harnessing the authority of traditional leaders), and securing their own assets (guarding of provincial assets). Overall, however, given the constraints of the provincial safety budgets and the limited mandate, the role has been limited, with the three larger provinces demonstrating the most attempt to intervene in policing.

The evidence does suggest, however, that provincial leadership in an environment of intergovernmental cooperation with SAPS by relatively capable provinces can improve policing and

safety outcomes. Examples include Gauteng (ANC) MEC Cachalia's engagement on aggravated robbery at the time of the World Cup, associated with a drop in number of murders of 22 per cent over 2006 to 2012, the engagement of Western Cape (ANC) MEC Ramatlakane, whose tenure from 2001 to 2008 was associated with a drop in number of murders of 20 per cent; and the engagement with policing in the (ANC) Northern Cape by the province, which has seen the number of murders halve since 2000 – in spite of population growth in these provinces.

In these instances de facto control or cooperative influence of policing by the province is enabled through political will and political homogeneity between the province and national government, and is characterised by cooperation and submission to provincial political instruction by SAPS. In the former two examples, the strategy adopted was explicitly one which sought to enable SAPS to better investigate, arrest and convict prolific offenders, making extensive use of crime intelligence, and cooperation among a range of agencies, including in Gauteng, metro police. The cooperation of the National Prosecuting Authority (NPA), also a centralised national structure, was key to the success of these strategies.

The question is whether such productive intergovernmental cooperation could be recreated through changes to the framework for policing, to provide greater provincial control over the SAPS, or whether this kind of intergovernmental cooperation is entirely dependent on political homogeneity. The provincial oversight role on its own is inadequate to the task.

Provincial oversight of national police does not work

The evidence in relation to provinces suggests that the constitutional and legislative scheme of provinces being required to exert oversight over SAPS as a national organ of state, without any means of holding SAPS to account, is ineffective in practice. It is simply politically unfeasible for junior politicians and civil servants to hold more senior politicians and civil servants to account, particularly where no provincial powers are provided for the implementation of findings and recommendations. This futility of oversight is exacerbated where there is political heterogeneity between a province and national government.

Indeed, the fact that a very similar mandate was originally contemplated for Community Police Forums (CPFs) in the Interim Constitution is illustrative of how weak these powers are. As an obligation, oversight is experienced as a burden and as an unfunded mandate for most of the smaller provinces. The example of the various Provincial Commissions of Inquiry in KwaZulu-Natal illustrates how SAPS was able simply not to cooperate, and ignore recommendations, with the possible exception of the most recent Commission into political killings of mostly ANC politicians.

The Khayelitsha Commission, a commission instituted by a province under opposition control, resulted in a legal victory for provinces, in the form of the affirmed power to subpoena members of SAPS to give evidence at a Provincial Commission. However, in terms of outcomes, the SAPS has largely ignored the findings and recommendations, and while the Commission saw murder in Khayelitsha stabilise (reduce by nine per cent) while the spotlight of attention was on the area during the life of the Commission, a large (38 per cent) increase in number of murders in four years has followed the conclusion of the Commission. The provincial model of oversight in its current incarnation is clearly ineffective in effecting long-term change. The policy framework thus must recognise that the mandate must be accompanied by means of holding police leadership to account.

10.2.4 Local policing steps into the breach – when it can

The findings suggest that most (90 per cent) local municipalities field public safety positions, with the total number of posts equalling about a third of SAPS Police Act members employed at local level, thus increasing policing to a significant degree. Furthermore, public safety deployment in local municipalities increases in tandem with SAPS under-resourcing and with high violent crime – as constrained by municipal finances, suggesting municipalities respond to a vacuum and to safety need, within available resources. The qualitative evidence shows the ways in which municipalities, particularly those with means, seek to fill the gap in SAPS provision, with these relating to issues SAPS finds difficult to police or which affect local municipalities, including inter alia public order, land invasions, copper theft, and policing on trains. Specialised units of various kinds have emerged among municipal police services (MPS) and law enforcement (LE) to address particular local problems not addressed adequately by the SAPS, including drugs, marine poaching, and copper theft.

The regulatory mandate of municipalities' MPS and of the incidental function of LE, and to some extent local traffic policing, has expanded, such that these may usefully be employed in relation to crime generally, where there is capacity to do so. This incremental empowerment is driven by three conflicting motivations: the need for force multipliers to assist in addressing intractable crime problems, the disinterest of SAPS in policing certain kinds of crime, and the desire of the SAPS to continue to retain overall control over policing. The evidence furthermore suggests that MPS and LE in practice have an impact on crime. However, the potential of MPS and LE to have more of an impact is curtailed by the insistence on onerous requirements, and SAPS' primary mandate in maintaining public order and, in rhetoric at least, the exclusive mandate in the investigation of crime. Thus powers of arrest are accorded, but suspects must be brought to SAPS for custody, charging and further processing. Similarly, while municipal services are required to be 'first responders' in public violence incidents, their duty is frequently limited to 'containment,' which requires them to stand aside as infrastructure is damaged, awaiting the arrival of Public Order Police (POP).

MPS' potential to relieve SAPS and have a greater impact on crime is thus constrained; in particular, the continued ownership by SAPS of the investigation process means that even where metropolitan police have responded to crime, followed up ('investigated'?), and carried out an arrest, they must rely on SAPS processes for charging and prosecution. Further constraints to the expansion of MPS are the requirement to run a 24-hour service, and the requirement that the MPS be funded entirely from municipal funding. Furthermore, the incremental empowerment by way of regulation leaves a great deal of uncertainty for MPS and LE, as a minister may just as easily withdraw an empowering regulation as authorise one; furthermore, for citizens the varying agencies and their relevant (and changing) powers are sources of confusion.

This suggests the potential of local policing has been constrained. Local policing is preferred in developed federal states, in line with the subsidiarity principle. South Africa's constitution, however, does not permit municipalities to claim the policing function in its entirety from SAPS – however, they may operate alongside SAPS. The findings show that municipalities have already stepped into the breach in various places and sectors. Their ability to impact on safety should be further leveraged.

Many smaller municipalities and most district municipalities field little or no LE and thus are unable to leverage this function in the direction of crime prevention – unfortunately, these tend also to be municipalities where SAPS' policing is poor, and there is reliance on traditional leaders.

10.2.5 Traditional area neglect

In traditional areas, extremely low rates of SAPS policing are evident, and municipal law enforcement is almost entirely absent. This is often accompanied by high rates of violent crime. The findings show that both national and provincial legislation effectively compels traditional leaders to fill the gap in policing in traditional areas. The impetus for the empowerment of traditional leadership in law and order is less about filling in for SAPS services and more about political control and the garnering of electoral support. Although legislation empowering traditional leaders exists for political reasons, the focus on the maintenance of law and order and dispute resolution speaks to the recognition of the absence of national policing in those areas.

But traditional leaders are ill-equipped and do not have adequate means (with the exception of the Bafokeng) to carry out their functions; furthermore, it is constitutionally inappropriate for them to do so. The lack of means is reflected in the fact that traditional leaders themselves frequently lament the lack of SAPS support as they attempt to maintain law and order. There is no oversight or monitoring of the way in which traditional leaders carry out their functions and while some traditional leaders attempt to maintain law and order for the good of all, the risk of abuse exists and has played out in practice. Furthermore, there is simply no constitutional basis for the otherwise closely-guarded national function of policing effectively to be delegated to persons who are not organs of state. The extremely high levels of violence in some traditional areas furthermore demands an appropriate response from SAPS.

10.2.6 Conclusion

In a climate of increasing insecurity, a weak system of cooperative policing is emerging. Policy should take account of the emerging trend and support it where appropriate, and seek to reform the framework to support the emergence of a more devolved and accountable system of policing. This is explored in more detail below.

10.3 Policy implications

10.3.1 Introduction

The Constitution provides that all spheres of government and all organs of state within each sphere must secure the well-being of the people of the Republic.¹ The Constitution further imposes a duty on the state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights² and provides that the Bill of Rights binds all branches of government,³ providing for the rights to life, human dignity and freedom and security of the person. This imposes positive obligations. In *Carmichele*⁴, the court opined:

In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.⁵

¹ Section 41(1)(b) Constitution.

² Section 7(2) Constitution.

³ Section 8(1) Constitution.

⁴ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC).

⁵ *Carmichele* at 44.

In *Glenister II* the court read in to the constitutional scheme, through the binding nature⁶ of international covenants⁷ which Parliament had ratified, an obligation on the state to establish an independent corruption-fighting unit.⁸ In *Carmichele* the court developed the law of delict finding that under international law⁹ as well as the Bill of Rights the state has a duty to take reasonable and appropriate measures to prevent the violation of the rights and freedoms of women in particular, with the police being ‘one of the primary agencies [emphasis added] of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime’.¹⁰ The SAPS, although one of the primary agencies, is manifestly not the only agency tasked with ensuring safety through policing. In *Rail Commuter* discussed above the court found that the complementary function of Metrorail to ensure safety on trains triggered a positive obligation on Metrorail, to the extent that was reasonable and it was capable, when the SAPS was unable to provide the necessary service. Consequently, this suggests there is an obligation on all spheres of government to step in to a reasonable degree where they have the capacity, if the SAPS is failing to provide the necessary service. Policy should recognise this and promote a stronger intergovernmental approach to crime.

The worsening crime situation, exacerbated by failings from the centre, is affecting the further development of South Africa, and other spheres of government are currently constrained in their involvement in policing. What are the policy implications for an improved intergovernmental approach to address the crime crisis? In a strengthened intergovernmental relations framework, policy would need to address relationships among the national, provincial and local level, and pay particular attention to ameliorating the situation in areas under traditional leaders.

10.3.2 Strengthen the centre through de-politicisation

The SAPS is the only policing organisation with presence across the country, and it is inevitable that it will continue to provide the majority of policing in the country. However, there is a great deal that is wrong with policing in South Africa. These problems include a lack of effectiveness and efficiency, including an overly top-heavy structure; inequity in the distribution and application of policing; and a largely non-professional policing. Policy instability exacerbates the situation. These problems are encouraged by the inadequate structural framework for policing. To address these issues de-politicisation is required in a number of arenas, as these problems have their roots in over-politicisation. De-politicisation would improve the situation in respect of issues of integrity, equity and professionalisation of the national SAPS.

Three measures are clearly necessary in relation to national policing, apart from those related to subnational government, to address the shortcomings of policing within the crime crisis.

⁶ Section 39(1)(b) Constitution 1996.

⁷ The UN Corruption Convention, the AU Convention, UN Convention Against Transnational Organised Crime, the SADC Corruption Protocol, and the SADC Protocol on Combating Illicit Drugs.

⁸ *Glenister v President of the Republic of South Africa and Others (Helen Suzman Foundation as Amicus Curiae)* 2011 (7) BCLR 651 (CC) at 197.

⁹ The Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, adopted in General Assembly Resolution 34/180 on 18 December 1979. See articles 1, 2, 3, 6, 11,12 and 16. The Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. The United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, recommended in 1992 that ‘States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’.

¹⁰ *Carmichele* at 62.

First, there is a need to improve the integrity of the police. Internal discipline has collapsed and the IPID is reliant on a troubled NPA to prosecute the cases it investigates, and the SAPS disciplinary system to carry out disciplinary enquiries it recommends. It is necessary for IPID to have greater, more independent, powers. The IPID should have a larger role, including the power to conduct prosecutions of errant police officers, and to recommend dismissal directly. It should not be reliant on the NPA, whose prosecutors work with police officers in prosecuting ordinary criminal cases, nor on the SAPS disciplinary system. Both proposals can easily be achieved by delegation of prosecutorial powers to qualified IPID officials by the NPA or by SAPS of its disciplinary powers; preferably, the legislation should be amended to accord the IPID the necessary powers. The IPID should be adequately resourced to carry out this role.

Secondly, greater professionalisation of policing is necessary. One measure suggested is an independent body which should set minimum standards for recruitment, training and promotion, and oversee ongoing professional development of police officers; it should have a veto in the appointment of senior police officers. While the national CSP is a possible candidate for such a role, there are reasons to be cautious in recommending it in its current form. Its double role of providing advice to the Minister and providing 'oversight' without any power to make binding recommendations, coupled with its composition of relatively junior civil servants, means it is not structurally sufficiently independent, nor does it have sufficient political weight, while it has been overly politicised itself. The advisory and oversight roles should be separated so that the CSP may step more strongly into the role of oversight which should include measuring performance of the SAPS. In setting minimum standards through the CSP, a mechanism should provide for external independent input into these standards, while also being binding on the SAPS and other police agencies.

Thirdly, in order to ensure improved equity in policing, a mechanism for the setting of minimum standards for SAPS deployment per capita across the country should be determined. This should be an open and transparent process. This mechanism may involve the SAPS and CSP, but should include independent external input. All except the first of these three measures will require legislative amendment, but not constitutional amendment.

The evidence further suggested an empowered provincial role has the potential to improve policing.

10.3.3 Empowering provinces

The findings above show the problems with provincial oversight and the limited potential for greater provincial involvement in policing. Four possibilities for empowering the provinces present themselves for consideration: improved oversight; greater ex ante provincial political control of policing; 'provincial police services'; or expansion of existing provincial mandates in quasi-policing roles. The first and last of these are preferred.

10.3.3.1 Strengthened provincial oversight

The international case studies suggest that in relation to oversight, a suitable model for policing in South Africa should (1) create or empower independent bodies with real powers, as detailed for national policing above (2) strengthen provincial oversight with real powers of sanction enabled through political control. For provinces, this would suggest that the provincial obligation to exert oversight over the national SAPS should be buttressed with the ability to hold senior SAPS members to account. The findings on the failure of provincial oversight strongly suggest that to ensure the necessary co-optation of the SAPS in oversight, that provincial powers should be extended in three ways: first, a stronger role of veto rather than concurrence in the appointment of the Provincial

Commissioner; second, an ability to force dismissal of the Provincial Commissioner (from the position of Provincial Commissioner) for loss of confidence, in a clearly-defined set of circumstances, including failures to adhere to standards set by the CSP, as detailed above; third, powers to refer for investigation any policing matter, to an adequately empowered IPID.

The first two of these will require legislative amendment (to replace concurrence with veto and to simplify the current disciplinary process in the SAPS Act, which leaves the ultimate decision to the SAPS). Improving IPID's powers will see to the third measure: the IPID is already obliged to investigate any policing matter referred to it by the provincial MEC,¹¹ as well as corruption matters within the police if so requested by an MEC;¹² if this were to be buttressed by the proposed prosecutorial power and disciplining power of IPID, these provisions may provide real powers of sanction. Coupled with existing oversight powers, these three measures may result in an appropriate balance of powers to ensure SAPS complies with appropriately exercised forms of oversight, or any allocation of functions by the Minister.

10.3.3.2 Greater ex ante provincial control?

The findings suggest greater provincial political control of the national SAPS can result in improved outcomes when there is intergovernmental cooperation. Would a model which would see policing functions being exercised by the Provincial Commissioner subject to the directions of the provincial MEC, be preferable? The findings suggest an environment of intergovernmental cooperation is required for this to work well. This cooperation is most evident when there is political homogeneity between national and provincial government – and the necessary political will. If provincial MECs were to be empowered to direct Provincial Commissioners, and to hold them to account as detailed above on oversight, would better policing necessarily be the result? Certainly it is possible that some provinces would exercise such powers appropriately, but it is by no means clear that such provincial empowerment does not open the door to the same risks of over-politicisation evident at national level, at the provincial level. Further, it is possible that where there is political heterogeneity, that the SAPS may continue to be immune even to good faith provincial attempts to influence policing toward provincial priorities.

Constitutionally, empowerment of provincial MECs is in the gift of the national government: the Constitution provides that a provincial executive 'is responsible for' policing functions vested in it in terms of the Constitution, assigned to in terms of national legislation, or allocated to it in terms of national policing policy.¹³ The wording 'responsible for' suggests political direction, as it echoes the wording used in relation to the Minister, who is 'responsible for' policing. Thus it would be possible for national policy, determined by the Minister, to allocate some or all policing functions in a province, to a province.¹⁴ The Constitution provides for asymmetry, allowing for different policies for different provinces.¹⁵ This suggests what was intended here is the possibility of the Minister allocating political direction of the SAPS in relation to functions of the SAPS within the province.

Two questions remain: in such a scenario, would the required intergovernmental cooperation be received from the SAPS, and on the basis of what criteria would the Minister allocate political direction to any or all the provinces? The difficulty of determining objective criteria make such a

¹¹ Section 28(1)(h) IPID Act.

¹² Section 28(1)(g) IPID Act..

¹³ Section 206(4) Constitution.

¹⁴ Section 206(1) Constitution.

¹⁵ Section 206(2) Constitution.

move not feasible – in the same way that provincial policing, as demanded by the Western Cape, is also not feasible.

10.3.3.3 Provincial policing?

The current level of development of the provinces suggests that a move to provincial own policing may be premature for South Africa. Furthermore, given the extreme variability of the capabilities of provinces, such a model would require asymmetry; in other words provinces should have these functions only if subsidiarity principals are met i.e. the province has the capacity and it would be better carried out at that level. Determining which provinces are capable is likely to be fraught with difficulty, both in practice and politically. Provincial policing as such is absent from the current framework, with the exception of traffic policing, and some powers over alcohol law enforcement in some provinces. There is thus no provincial policing tradition on which to build, and nor does the constitutional framework permit the emergence of fully-fledged provincial policing. The evidence does support the notion of more capable provinces engaging in policing in an asymmetrical fashion. The problem of determining which provinces are considered capable, and thus the recipients of the power to run an own provincial police force render the notion of an own ‘provincial police service’ unworkable – in addition to its unconstitutionality discussed in Chapter 5.

The possibility does exist, however, for the provinces to support local governments in their efforts at policing, to take on a co-ordinating role for the various kinds of policing in the province, and to exercise sanctions-supported oversight over both national and local policing. Policing is often argued to be ultimately local, and local policing is where the strongest attempt to fill the gaps created by SAPS policing has occurred, and in which lies the most potential for policing.

10.3.3.4 Options for other forms of policing

There are a number of options for provinces seeking to carry out more quasi-policing, which are likely to bolster policing in the current constitutional framework. Their desirability and feasibility will briefly be considered.

First, provincial traffic policing can be expanded and the mandate stretched, as has occurred in Gauteng, in cooperation with SAPS and municipal police and enforcement. This is likely to be particularly effective measure in more urbanised provinces, where crime frequently plays out on roads, and if deployed in cooperation with SAPS and MPS. Funding of such traffic policing may be through provincial motor vehicle licensing. Secondly, provincial powers over alcohol regulation could see more provincial liquor inspectors, who in the Western Cape and KwaZulu-Natal have been accorded powers of arrest in relation to their respective provincial liquor laws, being deployed. Such provincial laws include offences which can be used strategically and pro-actively to prevent crimes often associated with alcohol use, if inspectors are deployed in the vicinity of liquor establishments which the evidence suggests are disproportionately associated with crimes. Accreditation of the provincial liquor board as an ‘official institution’ in terms of the Firearms Control Act¹⁶ would see such officers, with the necessary competence and permit, being armed. Funding of an expansion in liquor inspectors may be through liquor licensing.

Thirdly, *upward* delegation may be employed. As outlined in Chapter 6, municipal police and law enforcement have been accorded an increasing range of powers of arrest, and search and seizure, in relation to crime generally, some of which extend beyond the borders even of the municipality concerned. Thus the possibility exists that municipalities in a province might delegate their law

¹⁶ Section 95(a)(vi) Firearms Control Act 60 of 2000.

enforcement function upwards to a provincial Department – particularly where they are unable currently to carry out this function themselves. If the requirements for MPS too are relaxed (to remove the own-funding requirement), this could apply to municipal policing too, with subsidisation by the province. This would be analogous to the Canadian situation where municipalities contract policing to the relevant provincial police service – except that in South Africa, no such provincial police service currently exists in South Africa; consequently, the role may more appropriately be more supportive in nature. The Constitution obliges national and provincial government to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers, and to perform their functions.¹⁷ Thus an appropriate model may be one where the province provides supportive funding, training, and oversight – or one in which a province takes over the function entirely, only where the municipality is not at all capable. This forms part of the policy proposal for local policing to be expanded.

10.3.4 Expand local policing

The international examples of developed federal states suggest that it is not remarkable for large cities to run their own police forces, including with investigative capacity; in the US, local policing far exceeds state policing. Building on the emerging trend of MPS carrying out more and more policing including the investigation of crime, a suitable model for policing for South Africa should permit metropolitan and local municipalities to choose to police, in addition to the SAPS service, and to expand the role of metropolitan police in particular, explicitly to include the investigation of crime. Such metropolitan MPS' investigations should result in cases being referred directly to the NPA and not rely on SAPS processes (although custody management may still need to reside with SAPS). However, the precedent of developed federal states also suggests that attention should be paid to the problems of local corruption and abuse of the use of force. This can be addressed through oversight measures with adequate powers, applying the same oversight and accountability mechanisms which apply to SAPS, to MPS and LE. Provincial oversight, within an overall nationally legislated framework, should apply. In a province such as Gauteng, where there are three metropolitan agencies, the model should provide for provincial co-ordination of all the policing agencies operating in the province, including SAPS. The model should permit provinces to take on local policing functions by way of delegation to them, or to support local or, where appropriate, district municipalities in their policing functions.

10.3.4.1 Metropolitan municipalities' role should expand

Metropolitan municipalities are already carrying out a range of functions and that trend should evolve further. More MPS should receive the relevant training in public order policing, and the role should more clearly mandate trained MPS to intervene in public order incidents. MPS and LE have been accorded investigatory-type powers, and this trend should continue. This would not initially exclude the jurisdiction of SAPS, but would over time involve a clear delineation of the relevant jurisdictions, to allow the development of capacity within MPS over time. For example, an initial appropriate delineation may be crimes in which the municipality is the putative victim, or which the SAPS by way of agreement cedes to the metropolitan municipalities – affirming much of what is already occurring in practice. Indeed in the absence of any change to the current regulatory framework (i.e. no further delegation or legislative amendment), MPS and LE already have a range of quasi-investigatory Criminal Procedure Act (CPA) powers of arrest, entry, serving of warrants and search and seizure, and there appears to be nothing in law preventing an MPS or LE from handing a completed docket to

¹⁷ Section 154(1) Constitution.

the NPA, for it to prosecute – as it is the NPA which has the power to institute prosecution.¹⁸ Ultimately, SAPS could delegate responsibility in relation to designated categories of matters, to MPS and LE.

Is this possible in the current constitutional framework? In relation to municipalities, delegation from SAPS to municipalities is constitutionally permissible although there are practical impediments: SAPS is not structured in a way which aligns with municipalities and there is no easily identifiable set of ‘local functions’ or geographical areas matching local boundaries. This is easily remedied, with changes to SAPS boundaries and clear delineation of matters ceded in regulation. Unlike the situation in relation to provinces, this would not run into constitutional problems. Just as it is constitutionally permissible for municipalities to prosecute traffic offences notwithstanding the ‘single national prosecuting authority,’ so too MPS and LE may prevent crime – and, it is argued, maintain public order and investigate, notwithstanding the ‘single police service’.

Indeed the obligation on all spheres of government referred to above suggests that if MPS or LE have been empowered to prevent crime, including through acts of arrest, search and seizure, which are investigatory acts, and if they have the relevant capacity, there is an obligation on them to take reasonable steps and investigate where SAPS is manifestly failing to do so, especially where it is apparent that serial or prolific offenders are responsible for acts of violence, and investigation would be the only means of preventing further violence.

Local and district municipalities are far more limited in their offerings; their policing should be expanded.

10.3.4.2 Local and district non-metropolitan municipalities

Local municipalities other than those in the metropolitan municipalities employ 20 percent of the total of local government public safety officials, and although some wealthier municipalities are having a clear impact in their policing-type interventions, others are not policing at all. Local municipalities are constrained by finances and by onerous requirements in establishing MPS. The creation of policing agencies at this level can be encouraged through the development of a differentiated set of standards for the establishment of MPS in local municipalities, which would see more municipalities be able to participate in carrying out their own local policing by providing a more amenable framework.

First, the own funding requirement and the 24-hour service requirement should be removed for local municipalities. This would require legislative change only. In the absence of such a change, local municipalities could continue to make use of their LE function in carrying out a form of policing, with the relevant powers that have been assigned to LE.

Second, to assist poorer municipalities in carrying out these functions, provinces may accept a delegation from municipalities either to support them in carrying out this function, or to have them take on this function on their behalf. Nothing prevents provinces from accepting such a delegation and choosing to subsidise it – other than the constraints of its own revenue. In poorer municipalities in poorer provinces with little own revenue at either level, even this may not be possible. This is often the case in traditional areas.

¹⁸ Section 20 NPA Act 32 of 1998.

10.3.5 Normalise policing in traditional areas

Many poorly resourced municipalities are in areas where traditional leaders have been empowered to maintain 'law and order' in the absence of adequate SAPS policing. Three measures to address this, already covered in the preceding proposals, are required: first, national policing must be normalised through measures to equalise policing through the application of the proposed minimum standards on per capita policing; second, provinces must have powers of sanction over the failure to equalise policing within the province; third, the possibility of an upward delegation of local LE or MPS must be entertained. While the role of traditional leaders in *voluntary* customary dispute resolution is not disputed, the expanding legislative framework and *de facto* reliance on traditional leaders for policing is in practice associated with high rates of violent crime and impunity, and the continued neglect by SAPS in poor, high violence municipalities cannot be constitutionally justified.

It is expected that the proposed minimum standards for deployment would ameliorate the most egregious cases of policing neglect. The evidence further suggests that provinces are acutely aware of the extreme neglect of policing in traditional areas and that the expanded influence of the provinces, through sanctioning powers over the Provincial Commissioner, would assist in equalising policing provision, in both quantity and quality. Politically, this need not be presented as a diminution of traditional leaders' power but as an expansion of services to traditional areas. In Kenya, the practice of deploying armed reservists in analogous areas has created risks, and although trained reservists working under the supervision of SAPS officers are preferable to untrained headmen being accorded peace officer powers, as they currently are, the risks in such a measure are great, given the weakness of existing SAPS policing. SAPS policing must first be improved to oversee any such reservist deployment.

The constrained finances of some municipalities, which prevent any public safety officials at all from being fielded suggests funding or provision from another sphere of government is necessary. These areas are frequently located within poorer provinces, thus delegation upward to the province may not be an option. Adequate provision of policing – in quality and quantity – must therefore be allocated from national government.

10.3.6 Conclusion

The worsening crime situation, exacerbated by failings from the centre, is affecting the further development of South Africa, and other spheres of government are currently constrained in their involvement in policing. How might the intergovernmental approach be expanded to address the crime crisis? The evidence suggests an incremental approach to increasing local policing in an asymmetrical fashion would be appropriate for South Africa. In a strengthened intergovernmental framework, national policing would be improved through being subject to external standards and accountability structures, provinces would have stronger oversight powers and deploy more 'force-multipliers', and local government would build on the record of local policing, with the support of provinces.

The national governance structures over national policing must see IPID strengthened with prosecutorial powers, and the independence and mandate of the Civilian Secretariat expanded, to include the development of binding minimum standards with which SAPS must comply, and the ability to investigate complaints. While the IPD empowerment may be effected by delegation from the NPA, the changes to the Secretariat would require legislative amendment.

Provinces should have stronger powers of oversight buttressed by a veto over the appointment of the Provincial Commissioner and power to institute proceedings for his or her dismissal in defined circumstances. Provinces should have a say in the location and distribution of police stations and resources within provinces subject to minimum standards, determined by the CSP, through a transparent process. Provinces should support the development of local policing and also exert oversight over the various forms of municipal police and law enforcement operating in the province, which is within their current mandate.

Metropolitan policing should be expanded to include investigation of crime and a greater role in public order, in a cooperative arrangement with SAPS – as is currently largely the case. Investigation is the key to prevention in relation to many types of crime. There is an argument that where SAPS is failing in this regard, metropolitan police with capacity *must* take reasonable and appropriate steps within their capacity to fill the vacuum, particularly where lives are being threatened. Ideally, however, legislative or regulatory amendment would clearly delineated jurisdictions, or processes for determining jurisdictions, to facilitate the parallel operation with SAPS in an initial period, with a view to eventual sole jurisdiction. This would not require constitutional amendment, but legislative amendment and policy changes to align SAPS boundaries with those of municipalities. IPID retains jurisdiction, and provincial oversight should apply, along with existing local oversight structures, such as civilian oversight committees and the relevant municipal council.

Other forms of local municipal policing should also be supported by loosening the constraints of the current framework, and permitting provinces to carry out this policing under delegation where appropriate. A limited form of this would be possible through using the powers currently accorded to law enforcement, but the ideal scenario would see legislative amendment. With provinces and towns taking more of the load in some areas, the national SAPS could improve policing in rural traditional areas, which would also be encouraged by minimum standards and greater provincial control.

Appropriate and effective policing is a *sine qua non* for the further development of South Africa. The country's current level of development suggests a full decentralisation of policing is premature. Yet the centre cannot hold in the face of the current crisis and is not currently adequately responsive to the diverse policing needs of South Africa. The evidence suggests the policy adjustments proposed here have the potential to expand and improve the weak intergovernmental arrangements in policing, with improved safety outcomes.

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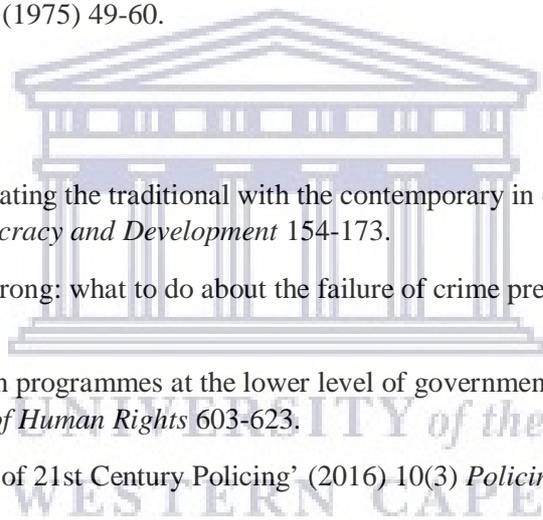
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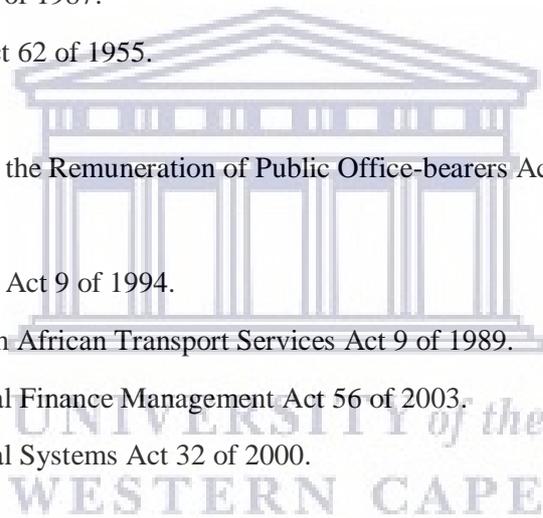
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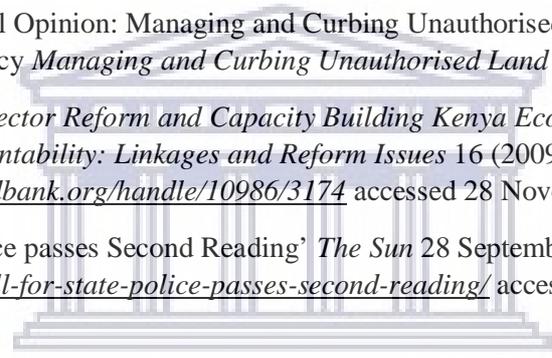
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