

THE POLICE – POLITICIAN PARADIGM

The Executive - Police Relationship

The Issue

By its very nature, policing is a highly controversial and very important aspect of governance, and its relation to politics is both close and complex. There is a commonly held misconception that any buffer between the police and the political executive (that is the bureaucracy and the people's representatives) will create an entirely independent and out of control police force.

This paper seeks to add clarity and enhance debate as to the relationship between the political executive and police, particularly how it can be delineated in statutes. Using international examples, it sets a conceptual framework for understanding how police agencies are held accountable in democracies, with a focus on the role of the political executive in police accountability.

In any democracy the ultimate responsibility for ensuring public safety and security lies with the people's representatives, specifically the Home Minister or his/her equivalent depending on the jurisdiction. The police are implementers. As such, the police and political executive are both bound together in the common endeavour of preventing and investigating crime, maintaining law and order and ensuring that the people have a well functioning essential service that protects life, property and liberty. However, for policing to work in an efficient, unbiased, responsive manner, the roles, powers and responsibilities of each entity involved has to be properly articulated. **A careful balance has to be struck between legitimate 'supervision' of the police by the political executive and illegitimate interference and influence. Conversely, the police must always remain accountable to elected politicians for enforcing the law and to perform its duties in accordance with the law.** The political executive must be able to craft policy and seek accountability for poor performance or wrongdoing by an essential public service paid for by taxpayer money.

The Problem

There is no dearth of literature, of all hues and from many quarters, of the extent of the problem of politicization of the police in India. In August 1979, the National Police Commission stated that transfer and suspension are two weapons frequently used by the politician to bend the police officers down to his will.¹ The Supreme Court has observed that frequent and arbitrary transfers, besides "demoralizing the police force" and "politicizing the personnel" constitute a practice that is "alien to the envisaged constitutional machinery".² As a result, 'political control' of policing

¹ National Police Commission (1979), Second Report, page 24

² In the judgement of the Supreme Court of India, 1997, Writ Petition (Criminal) Nos. 340-343 of 1993, popularly known as the Havala case



has eroded internal chains of command, obstructed police functioning, and ensured that responsibility for wrongdoing is hard to pin on any one body or individual. The 'business' of policing in India today revolves around partisanship, currying political party favours and interests, and influence peddling, entirely overshadowing the real duties of the police. The powers to transfer, appoint, and promote police officers are being exploited as weapons and rewards for compliance or not, and have come to represent something entirely different from the original intent of basic administration and healthy career growth. The current debate has also been hampered by calls for 'ultimate control by the people' on the one hand and police 'independence/autonomy' on the other. The dysfunctional Police-Executive relationship has paradoxically resulted in substantial political manipulation of the police *and* a police force with very few limits on its power.

It is commonly argued that the terms 'superintendence' and 'control' have never been clearly explained in legislation such as the Police Act of 1861 or state Police Acts, and this legislative ambiguity is a significant factor in facilitating political manipulation. It is true that these crucial terms are not defined in the central and state legislation, but it is not accurate to say that important elements of 'superintendence' and 'control' are not defined anywhere. Provisions in state Police Manuals fill the gaps left empty by central and state Police Acts. For instance, with regard to the power to transfer for instance, many state Police Manuals clearly stipulate *who* - whether the political executive or the designated senior officer within the police, can transfer officers, and even more, this power is classified according to officers' ranks.

Further, almost all Police Manuals contain provisions which set benchmarks for the duration of certain postings.

Provisions in the state Police Manuals reveal the level of detail provided by the Manuals in terms of jurisdiction and general rules regarding transfers. The power and jurisdiction of the executive on one hand and of the police leadership on the other, relating to transfers are clearly delineated. Thereby, it is not accurate to argue that there is no legislative guidance, at least on this important aspect of 'superintendence'.

In this light, with the continuation of political manipulation of police transfers and postings at all levels of the police, it becomes clear that the political executive has taken all the power around transfers onto itself, in blatant violation of the rules laid down in Police Manuals.

The Solution

Countries continue to experiment with solutions, responding differently based on their level of political development and specific socio-political contexts. At a bare minimum, Stenning argues that in the last 20 years or so, "attempts have been made in many Commonwealth countries to clarify, and in some to codify, the essential principles that should govern the police/executive relationship in a democracy".



Scholars and academics explaining the Police/Executive balance in a modern democracy have stated the following:

Political Superintendence

- The general principle is that the police, no less than any other state employee, must be subject to democratic superintendence, control and accountability for their activities, through the usual political, judicial and administrative processes.
- Police, politicians and the public must understand that: (a) legitimately and democratically-elected governments serve as the principal guardian of the public interest; and (b) the exercise of democratic governmental supervision, oversight and accountability of the police are an essential aspect of a free society, and these do not *prima facie* constitute “improper political interference”.
- ‘Independence’ from normal governmental direction and control is an exception to the general principle, rather than the norm. These exceptions should be kept to a minimum.

Administrative Responsibilities

- The areas in which the police must be able to act independently relate to both **law enforcement and administration**.
- Regarding **law enforcement**, the police must be independent in their decision-making with respect to enforcing the law in individual cases. This includes important decisions about whom to investigate, search, question, detain, arrest and prosecute in a particular case.
- Governments are not precluded from advising police of their views with respect to police decisions that may have significant public policy or public interest implications (e.g. matters of national security, or matters that have repercussions for international relations). However, in all such cases the government:
 - Must not seek to exert undue pressure;
 - Should acknowledge that the ultimate decision in such cases rests with the police; and
 - Must keep a written record of any such intervention which must be made public and available for judicial review as early as possible.
- Regarding **administration**:
 - Communications from government must always be through the Home Minister to the DGP;
 - Governments must never be involved in decisions regarding the appointment, assignment, deployment or promotion of officers, other than the DGP. The DGP must have ultimate responsibility and accountability for such decisions; and
 - The DGP must be given suitable protection against arbitrary removal (i.e. removal should not be permitted unless there is evidence of misconduct/incapacity or until after the expiration of a fixed term.



- The principle of police accountability for their actions (through standard political, legal, and administrative processes) applies in all cases, regardless of whether such actions are exclusively within the purview of the police.

How to clarify the Executive-Police relationship

The precise contours of the Police-Executive relationship merit clear delineation within legislation, particularly police legislation, so that both the police and the Home Minister have a clear understanding of the limits of their respective jurisdiction.

The distinction between *appropriate political direction* from a government to the police, and *inappropriate political interference* in operational policing matters is an immensely significant one, both in terms of the way it is expressed in law and policy, as well as in practice. One important step in establishing truly appropriate political direction to the police is to define, in law, the parameters of government's role in relation to the police. A key signal of lesser developed legislation is when government's legitimate role is not always fully articulated, or at all. A clear delineation of roles, responsibilities and relationships between the police and the executive that are laid down in law pinpoints accountability. It also minimises the possibility of unfettered interference seeping into policing matters and influencing its functioning. Importantly, executive control must be kept out of police operational matters to protect the police's operational autonomy, and the law must reflect this distinction. Requiring public participation in framing policy also inhibits partisan impositions on policing.

International Best Practice

In varying ways, depending on context, good international examples reflect **constitutional and legal provisions which cement police independence from politics, but also provide a framework for broad control by the political executive and other branches of government.**

Modern Police Acts frame a policy-directing role for government in a variety of interesting ways. In this context, policy for the police broadly includes preparing policing plans, setting standards and performance measuring indicators, and establishing strong accountability mechanisms. Some modern Police Acts refer to the guiding or directional role of government in terms of the *.responsibilities of Ministers.* and lay down (more or less clearly) how these responsibilities should be discharged.

United Kingdom³

³ Due to changes in the policing law in 2011 in the United Kingdom, the tripartite structure of accountability has changed significantly. Local police Authorities have been replaced by single elected police and crime commissioners for each local area. While the modalities of planning for the police have changed, the new system retains multiple levels of planning and in-built checks and balances.



Among the most developed legislative formulations of government's role come from the United Kingdom. For example, the system of control and accountability that governs the 43 forces of England and Wales is often called the tripartite structure of police accountability which rests on a separation of power. This complex system, laid down in the *Police Reform Act 2002*, distributes governance and policy setting responsibilities over the police between the Home Office, the local police authority, and the chief constable of the force, precisely to create buffers between the police services and the state. It provides accountability to Parliament through the Home Secretary and to local communities through the local Police Authorities, which are local public bodies. In fact, Section 1 of the *Police Reform Act 2002*, entitled Powers of the Secretary of State, establishes the very specific responsibilities of the Home Secretary, and thereby the executive branch, in relation to the police. The law makes it the *duty* of the Home Secretary to frame a National Policing Plan every year - a policing policy plan in other words - by formalising centrally imposed key priorities - within a national plan. Using this device, the Home Secretary determines universal policing objectives, directs police authorities to establish performance targets, and determines cash grants for police authorities.

As defined by the *Police Reform Act 2002*, the powers of the Home Secretary include:

- The power to prepare a National Policing Plan (S1)
- The power to issue 'codes of practice' relating to the functions of 'chief officers' of any England & Wales police force, this can only be done in consultation with the Central Police Training and Development Authority, and any code of practice issued must be laid before Parliament (S2)
- The power to order an inspection by the inspectors of the constabulary of any police force in England, Wales, and Northern Ireland (S3)
- The power to direct a police authority to take specified measures where the inspectors of constabulary reports that the force is not efficient or not effective (S4)
- The power to regulate equipment used by any police force (S6)
- The power to regulate police 'procedures and practices' in consultation with chief constables and the Central Police Training and Development Authority (S7)

Similarly, the *Police (Northern Ireland) Act 2000* carefully apportions responsibility for policing between the Executive (through the Secretary of State), police leadership (represented by the Chief Constable) and the Policing Board (an independent public body). The law explicitly assigns the duty to develop long-term objectives and principles to the Secretary of State, for medium-term objectives and priorities to the Policing Board, and for shorter-term tactical and operational plans to the Chief Constable.

The Board is an independent public body made up of 19 members, whose broad objective is to secure for the people of Northern Ireland an effective, efficient and impartial police service. The Board has a comprehensive charter that monitors police performance not merely for ensuring the efficiency and effectiveness of the organization but also to see that the police do not violate human rights of citizens. By holding the head of police to account for his actions and those of his staff and



by overseeing the working of the internal police complaints and discipline system, the Police Board performs a very active management and oversight role.

Importantly, and in addition the 2000 Act establishes key principles to shape the duty of the Secretary of State relating to policing, by stating in Section 69:

69 General duty of Secretary of State

(1) The Secretary of State shall exercise his functions under the Police Acts in such manner and to such extent as appears to him to be best calculated to promote the efficiency and effectiveness of:

- (a) the police;
- (b) the police support staff; and
- (c) traffic wardens.

(2) In carrying out those functions, the Secretary of State shall have regard to the principle that the policing of Northern Ireland is to be conducted in an impartial manner.

South Africa

A few other examples include South Africa, where the Constitution makes it the political responsibility of the Cabinet Minister responsible for policing to *determine the national policing policy* after consulting the provincial governments and taking into account the policing needs and priorities of the provinces.⁴

Uniquely, South Africa's Constitution is emphatic that the police and other security services should be politically impartial. Section 199(7) states:

"Neither the security services, nor any of their members, may, in the performance of their functions -

- (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
- (b) further, in a partisan manner, any interest of a political party"

This is undoubtedly motivated by the decades of partisan policing perpetuated by apartheid, which was led by one political party.

In addition, the South African Police Services Act also states in Section 46(1) that members are forbidden to "publicly display or express support for or associate" themselves with or "hold any post or office in" or "wear any insignia or identification mark" with respect to any political party, organization, movement or body, or "in any other manner further or prejudice party political interests". Though it must be added here that the Act also contains a proviso that does not prohibit members from joining a political party, organization, movement or body of his or her choice, exercising their right to vote, or attending meetings of such groups, provided that they do not do so in uniform.

⁴ Article 206(1), The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)



Nigeria

Nigeria's Police Service Commission is a unique hybrid oversight body having the potential of being one of the most powerful and autonomous civilian oversight institutions in the world, if strengthened and allowed to function as an independent organisation as laid down in the 1999 Nigerian Constitution.

The Commission has been in existence since 1960, but was awarded wider powers with a broader membership in the 1999 Constitution of the Federation. The membership of the Commission includes representatives of the human rights community, the organised private sector, women and the media, as well as a retired justice of a superior court, and only one retired police officer.

According to the Constitution, the Commission has the power to appoint persons to offices (other than the office of the Inspector General of Police) in the Nigeria Police Force, (NPF) and to dismiss and exercise disciplinary control over persons holding police office. Section 6 of The Police Service Commission (Establishment) Act 2001 further charged the Commission with the responsibility of formulating the guidelines for the appointment, promotion, discipline and dismissal of officers of the NPF; for identifying factors inhibiting and undermining discipline in the NPF; for formulating and implementing policies aimed at efficiency and discipline within the NPF; for performing such other functions as, in the opinion of the Commission, are required to ensure optimal efficiency in the NPF; and carrying out such other functions as the President may from time to time direct.

The power to dismiss and discipline individual police officers, coupled with the statutory obligation to establish an investigative department, provides the Police Service Commission with the ability and legal powers necessary to receive complaints on police conduct, investigate these complaints, and enforce any disciplinary measures it deems fit. It also has the powers to develop and implement policy for the police force, making a significant contribution to setting higher standards in the force as a whole.

Members and Selection Process

According to the PSC Establishment Act 2001, the following are the members of the PSC:

- Chairman is the CEO of the Commission
 - Retired Justice of the Supreme Court / Court of Appeal
 - Retired police officer not below the rank of Commissioner of Police
 - One representative of the following: women's interest, the Nigerian press, NGO, organised private sector (all these representatives are part time members)
 - Secretary to the Commission
- Appointment of members:
- Chairman and members of the Commission to be appointed by the President, subject to confirmation by the Senate.
 - Must be persons of proven integrity and ability



Function/Mandate

- According to the PSC Act 2001, the Commission has the following functions:
 - o Responsible for the appointment / promotion of persons to office (except for IGP) in the Nigeria Police Force.
 - o Dismiss and exercise disciplinary control over officers of the NPF (except IGP).
 - o Formulate policies and guidelines for the appointment, promotion, discipline, and dismissal of NPF officers.
 - o Identify factors inhibiting / undermining discipline in the NPF.
 - o Formulate and implement policies aimed at the efficiency and discipline to the NPF.
 - o Perform such other functions as required to ensure that the NPF operates at optimal efficiency.
 - o Carry out any other functions as the President may direct.
- The Commission is not subject to the direction, control, or supervision of any other authority / person except as prescribed by this Act.

Powers

- Can appoint, promote, discipline and dismiss all officers of the Nigeria Police Force, except for the Inspector General of Police (IGP).
- Powers of delegation
 - o Commission may delegate any of its powers to any officer of the NPF;
 - o To a committee as prescribed by the Commission.

Canada

An idea that has gained ground internationally during the last few decades is the idea that policing is too serious or important a business to be left to the policemen or politicians alone and that it is necessary to exercise some form of civilian control or oversight over the police.

This idea has led not only to the setting up of independent mechanisms to inquire into complaints against police personnel but also to the establishment of autonomous police commissions or boards. The Commission model serves two different purposes- one, to insulate the police from illegitimate influences of partisan politics by acting as a buffer between the police and elected governments; and, two, to involve community members in providing direction to the police and help improve police administration and management. The Board or Commission model of police governance exists widely in some developed countries, like Canada. Canada has police forces at the municipal, provincial and federal levels. The role that the Police Boards or Commissions play in governing the police forces, particularly at the municipal level, is very significant, as they involve community members in providing direction to the police. For example in British Columbia, every municipality with a population of 5000 or more has to provide for police service. Municipalities with their own police forces are required to set up police boards to act as civilian oversight bodies. The Municipal Police Board in British



Columbia consists of the Mayor of the Council, one member appointed by the Council and not more than five persons appointed, after consultation with the director, by the Lieutenant Governor in Council. The municipal police board, in consultation with the chief constable, must determine the priorities, goals and objectives of the municipal police department.

Municipal police board

23 (1) Subject to the minister's approval, the council of a municipality required to provide policing and law enforcement under section 15 may provide policing and law enforcement by means of a municipal police department governed by a municipal police board consisting of:

- (a) the mayor of the council,
- (b) one person appointed by the council, and
- (c) not more than 5 persons appointed, after consultation with the director, by the Lieutenant Governor in Council.

(2) Subject to the approval of the minister, the councils of 2 or more municipalities may enter into an agreement to establish a joint municipal police board under subsection (1).

(3) An agreement under subsection (2) must contain terms respecting the establishment of the municipal police board, membership on the municipal police board and division of expenditures.

Membership of Municipal Police Board

24(1) A person who is a councillor or is ineligible to be elected as a councillor must not be appointed to a municipal police board.

(2) A person appointed to a municipal police board under section 23

(a) holds office for a term, not longer than 4 years, that the Lieutenant Governor in Council determines, and

(b) may be reappointed, subject to subsection (3).

(3) A person is not eligible to hold office as an appointed member of a municipal police board for a period greater than 6 consecutive years.



Chair of Municipal Police Board

25(1) The mayor of a council referred to in section 23 is the chair of the municipal police board.

(2) If the mayor is absent or unable to act, the municipal police board members present at a meeting of the municipal police board must elect from among themselves a chair to preside at the meeting.

(3) In case of a tie vote at a meeting of a municipal police board, the chair may cast the deciding vote.

Board to establish Municipal Police Department

26(4) In consultation with the chief constable the municipal police board must determine the priorities, goals, and objectives of the municipal police department.

(5) the chief constable must report to the municipal police board each year on the implementation of the programs and strategies to achieve the priorities, goals and objectives.

New Zealand

In New Zealand, the Policing Act 2008 was passed only after a rigorous pre-legislative scrutiny, and widespread public consultation. The 2008 Act clearly delineates 1) the New Zealand Police's responsibilities to the political executive (through the Minister in charge) and also, importantly, 2) what duties and functions the police are *not* responsible to the executive to and which must be acted on independently by the police.

16 Responsibilities and independence of Commissioner

- (1) The Commissioner is responsible to the Minister for:
 - (a) carrying out the functions and duties of the Police; and
 - (b) the general conduct of the Police; and
 - (c) the effective, efficient, and economical management of the Police; and
 - (d) tendering advice to the Minister and other Ministers of the Crown; and
 - (e) giving effect to any lawful ministerial directions.

(2) The Commissioner is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instruction of a Minister of the Crown) regarding:

- (a) the maintenance of order in relation to any individual or group of individuals; and



- (b) the enforcement of the law in relation to any individual or group of individuals; and
- (c) the investigation and prosecution of offences; and
- (d) decisions about individual Police employees.

30 Command and control

- (4) No Police employee may, when exercising any power or carrying out any function or duty, act under the direction, command, or control of:
 - (a) a Minister of the Crown; or
 - (b) a person who is not authorised by or under this Act or any other enactment or rule of law to direct, command, or control the actions of a Police employee.

Australia

In Queensland, for example, Section 4.6 of the Police Service Administration Act 1990 requires the Commissioner of Police to furnish to the Minister reports and recommendations in relation to the administration and functioning of the police service, when required by the Minister to do so and otherwise when the Commissioner thinks fit. It also authorizes the Minister to give directions to the Commissioner about:

- a) the overall administration, management, and superintendence of, or in the police service;
- (b) policy and priorities to be pursued in performing the functions of the police service; and
- (c) the number and deployment of officers and staff members and the number and location of police establishments and police stations.

Two conditions are prescribed. The directions have to be in writing and given “having regard to the advice of the Commissioner first obtained.”

The Minister is required to keep a register of all directions given to commissioner and is required to submit the register on an annual basis to the Crime and Misconduct Commission⁵ and Parliamentary Crime and Misconduct Committee. The Minister can also require the commissioner to submit reports to him/her.

The responsibilities of the police commissioner are set out in Section 4.8 of the Act, though the section states that it is not intended to limit the extent of the commissioner’s responsibility.

In a similar manner, Section 6 of the Police Act 1998 in South Australia provides that, 'Subject to this Act and any written directions of the Minister, the commissioner is responsible for the control and management of the police', while Section 8 provides that the Minister, 'must cause a copy of any direction given to the commissioner to be:

- (a) published in the *Gazette* within eight days of the date of the direction; and

⁵ This is the external oversight body with jurisdiction over all public bodies in Queensland, it has the power to investigate complaints of misconduct against any public servant.



(b) laid before each House of Parliament within six sitting days of the date of the direction if Parliament is then in session, or, if not, within six sitting days after the commencement of the next session of Parliament.'

Importantly, Section 7 of the Act prohibits the Minister from issuing directions to the commissioner 'in relation to the appointment, transfer, remuneration, discipline or termination of a particular person'.

In addition to defining the scope of ministerial direction on police matters, setting out the responsibilities of the commissioner, and setting out the terms of parliamentary or other oversight of police/government relationships, legislation in various Australian states also regulates the terms of appointment and dismissal of the police commissioner.

Suggested Model for India

Taking guidance from examples mentioned above the following scheme which clearly delineates the Chief of Police's responsibilities to the political executive (through the Minister in charge) and also, importantly what duties and functions the police are *not* responsible to the executive and which must be acted on independently by the police is listed below.

“Responsibilities and independence of State Police Chief”

The supervision, direction and control of the police throughout the State shall, be vested in an officer of the rank of Director General of Police designated as the State Police Chief.

- 1.) *The State Police Chief shall be responsible to the Minister for*
 - (a) carrying out the functions and duties of the Police;
 - (b) the general conduct of the Police;
 - (c) the effective, efficient, and economical management of the Police;
 - (d) tendering advice to the Minister;
 - (e) giving effect to any lawful ministerial directions.

- 2.) *The State Police Chief shall not be not responsible to, and must act independently of, the Minister regarding:*
 - (i) the maintenance of order in relation to any individual or group of individuals; and
 - (ii) the enforcement of the law in relation to any individual or group of individuals; and
 - (iii) the investigation and prosecution of offences; and
 - (iv) decisions about individual Police officers.

- 3.) The Minister may give the Director General of Police directions on matters of Government policy that relate to-
 - i) the prevention of crime;
 - ii) the maintenance of public safety and public order;
 - iii) the delivery of police services; and
 - iv) general areas of law enforcement.



4.) No direction from the Minister to the Director General of Police may have the effect of requiring the non-enforcement of a particular area of law

5.) The Minister must not give directions to the Director General of Police in relation to the following:

- i) enforcement of the criminal law in particular cases and classes of cases
- ii) matters that relate to an individual or group of individuals
- iii) decisions on individual members of the police

6.) If there is dispute between the Minister and the Director General of Police in relation to any direction under this section, the Minister must, as soon as practicable after the dispute arises,

- i) provide that direction to the Director General of Police in writing; and
- ii) publish a copy in the Gazette; and
- iii) present a copy to the Legislature

Conclusion

It is well known that in any society, the police enjoy immense powers, which must be controlled to prevent their misuse. However, controlling the police itself becomes a source of tremendous power that can be misused to serve partisan interests. Balancing these conflicting ideas of how is the control exercised and the type of relationship that should exist between the police and the political executive that establishes and controls them is what will lead to an accountable and transparent police service.

In the manner discussed above, the need to condition the relationship between the police and the political executive seeks to work toward strengthening democracy, not limiting it. The basic truth is that for policing to transform, it is necessary for the government - to whose authority police are subject to, itself be committed to democratic norms and checks and balances, and importantly see the police as an instrument for protecting the safety and democratic rights of the people.

