

The role of the ICD in dealing with crime and human rights within the SAPS

RIAZ SALOJEE

Regional Director, Independent Complaints Directorate, Western Cape

1 INTRODUCTION

I am delighted to be able to participate and hopefully contribute to this very important discourse on crime and human rights. This discourse is always timely, but more so in South Africa, at this time in our history, when we bask in the international glow of admiration for the gains we have made in the advance of human rights. Let us not forget through complacency or opportunism the pledge we made to the thousands of our generation and those before us who lived and died resisting oppression, that we shall tirelessly exert to the fullest to realise the dream of a dignified life for all, the dream of democracy for the people of this part of the world.

In any society it is always the critical needs and resources of that particular society that determine the emphasis it places on rights, which rights are particularly protected, and the nature of the trade off or balance struck between rights. Some may argue that “culture” or “religion” is also an additional determining factor.

Conveniently, in South Africa, however, our political ideologues today speak about “empowerment within a context of globalisation”. The presumption that human rights for all can only be achieved within a context of prosperity and if it is affordable. As if to demonstrate this point and not surprisingly, our business districts, with the benefit of the latest technology, enjoy an unparalleled climate of safety and security. The right to an environment that is not harmful to health and well-being, translates in the first instance to healthy business environments.

It is said within this understanding of first “generating prosperity” that partnerships must be established and that citizens must understand their legal rights and responsibilities and those of the police and vice versa for crime to be effectively dealt with. As if the human rights of police are any different to that of citizens. As if the vision of democracy for the police is different to that of citizens. Of course, non-South Africans are considered to be either “tourists” or “illegal aliens” and the extent to which our Bill of Rights extends to them is a subject for another discussion.

An examination of every “criminal offender” will reveal a constant tension between the survival needs of that person and a society that cannot satisfy them all. There is a contestation of basic rights within that individual.

2 BACKGROUND TO POLICING IN SOUTH AFRICA

It is in societies where social, political and economic inequality and tension are rife and remain unaddressed, where governments really represent cliques and cabals, that the police become instruments of state power and rely on coercion or, as we knew it, *kragdadigheid*. It is essentially within scenarios such as these that there is a direct correlation or inverse proportionality between “coercive/force policing” and “accountability”. Police forces that rely on *kragdadigheid* operate within police cultures of closed ranks and secrecy.

A cursory glance at our police force some five or six years ago will show an outfit that was designed to serve a particular ideological premise where accountability, just like service delivery, was the preserve of a minority. Here, the definition of policing was simply the “police force”, and within this police force the militaristic hierarchy was all. Senior officers did all the thinking and management at all levels and, whether consciously or unconsciously, had the task of producing and reproducing the dominant culture of Afrikanerdom, white male patriarchy and racism. It was thus not surprising that black police officers were as racist and brutal as their white counterparts in the exercise of power. Black people who despite the inequities of the organisation remained there, with the exception of the Gregory Rockman, having firmly internalised an “us-them” culture, acutely estranged themselves from their own communities.

Within the police force, as long as you did not “rat” on the police and brought in, whether by arrest or abduction, the criminals and terrorists, the force was with you and would look after you. It is arguable whether a deterrent for police misconduct ever existed. When a police officer acted as police, judge and executioner, (of course making the fairest legal procedures irrelevant), it was not uncommon for our courts to register the official cause of death in detention of particularly political activists such as Nicodemus Kgoathe, Solomon Modipane and Mathews Malebane, to name but a few, as having slipped in the shower, slipped on soap or having fallen from the tenth floor of John Vorster Square.

Policing today, however, has to take place within a context after apartheid, which was described by the United Nations in 1988 as “the most pernicious and extreme manifestation of racism”.

Democracy is a big word that means different things to different people. In my view, in the policing context it means simply that policing has to take place within a context and culture of respect and tolerance for human rights regardless of station, colour, religion, creed, gender or any other superficial difference.

It means that through our dealings with each other we affirm each other’s right to exist in a dignified manner, and continuously strive to deter the violation or rejection of the rights of others.

It means engaging in processes of healing, affirmation and transformation of all the survivors of the apartheid era. The task, I need not tell you, is immense and for those who doubt this, let me briefly remind you with a few examples of how we measured up to a rights dispensation not so long ago:

- *The right to life*: The right to be protected from arbitrary death is the first in the Universal Declaration of Rights. Some argue it is the most important human right without which other rights are meaningless. Between September 1984 and June 1986 the police killed some 851 persons in “unrest events” alone. A commentator in 1987 remarked “this lack of restraint is evidence not only of ignorance of legal limitations on the use of lethal force, but also of a profound disregard for the sanctity of life in general and in particular of the lives of blacks”. The Emergency Regulations practically gave the South African Police of the time broad discretion to kill and injure without legal consequences. Between 1997 and the end of April 2000 the total number of deaths in police custody or as a result of police action registered by us in the ICD stands at 2 217.
- *Freedom from arbitrary arrest and detention*: In October 1987 three newspapers were shut down and 18 political organisations banned.
- *Freedom of movement*: There were the frequent imposition of curfews, the use of gangsters to inhibit political activity. The violations and excesses are well documented. The challenge now and since 1994 is how to move forward; how to take the SAPS and policing into a human rights dispensation; how to impact on a mindset that says human rights disarms the police and is soft on criminals; and how to demonstrate that the only effective and lasting way to resolve and beat crime is to embrace a human rights dispensation and ensure a dignified life for all.

3 TRANSFORMING POLICING

To me, transformed policing in our current context essentially means accepting three things:

1. It is not a party political activity.
2. It is not solely the domain of the police and the state.
3. The police need to be effective, efficient and service orientated.

The first point is self-explanatory, calling upon police to be impartial, objective, focused and fair. The second point is that every citizen, structure and state institution committed to peace and democracy has a role to play and a stake in policing.

This implies a recognition that the roots and causes of crime have to be addressed holistically. We can no longer glibly talk about *combating* crime, we have to start *resolving* it, recognising that the arrest-detention methodology of policing is short sighted and costly and will remain a “band aid” unless it is tied to a whole range of socio-economic, spiritual, moral and technological interventions. Section 152(d) of our Constitution recognises this and calls upon local authorities to promote a safe and healthy environment to create the kind of security infrastructure that discourages crime and guarantees peace of mind. This includes proper roads, lighting, education, support services and clinics. The point is that safety and security has to be managed by a whole range of actors and aligned safety systems geared to tackling the underlying causes of insecurity. A failure to holistically address social, political and economic problems will undoubtedly result in increased crime.

Thirdly, the police need to be effective, efficient and service orientated. Here we focus on “control”, service delivery and preventative strategies.

By renaming the “law and order” of the old dispensation “safety and security”, we were saying that control of the police and policing needs to shift to the people. In autocratic or despotic regimes, the state alone has control of the police. Parliament used to be supreme and could enact any laws it pleased. The police were there merely to enforce these laws. Police had wide discretionary powers and could arbitrarily deny basic human rights.

In a democracy, ultimate control of the police lies with the people through their elected representatives. The powers of the police must be exercised with circumspection, and subjected to checks and balances.

Accountability by the police, with all that it implies, thus becomes central to policing within a democracy and for the preservation and maintenance of human rights. Accountability implies, *inter alia*, that the police become answerable for their actions, policies and practices to the people through their elected representatives. It implies continuous consultation with the people on their needs, priorities and expectations. It implies that the powers of the police – the rules, regulations and procedures – are clearly defined and laid down in law. It imposes a responsibility on us to ensure that police are selected on the basis of integrity and commitment to human rights, and that they are properly led, trained, supported and equipped to understand the framework of their operation and how to exercise their discretion within the law.

An effective service is one that is sensitive to human rights, accountable for its actions, well resourced, highly skilled and *au fait* with the latest technology. It will need on occasion to have an intrusive capacity to deal with organised and sophisticated criminals. The apparent contradiction here between the right to privacy of individuals and invasive techniques requires appropriate checks, controls and parliamentary or judicial oversight.

Police need to feel convinced and confident that they can be agents of democracy and promoters of human rights at the same time as they discharge their crime control, prevention and protection function. They need to exercise legitimate state power in the interest and affirmation of human rights.

These two tasks may sound contradictory, particularly within the context of organised crime and certain cultural environments that glorify in violence, guns and gangsterism. It may call on the one hand for an “iron fisted” approach which implies a suspension of rights while, on the other, it must take on the task of promoting human rights. It is my contention that, within a human rights dispensation, it is possible with appropriate accountability processes to do both effectively. As long as it is possible to reach the basic humanity in each person, the dream of obtaining a free and civilised society stays alive and the effort to establish a democracy will not have been in vain.

Levels of accountability must reflect:

- the social and political values and arrangements of the time
- the religious and political will to achieve development
- the commitment of the institution to the order of the day.

4 THE INDEPENDENT COMPLAINTS DIRECTORATE (ICD)

Even in a democracy, it is necessary to ensure that police practices are concordant with human rights, and that people do not turn a blind eye to excesses because crime is increasing and police work is dangerous. The one dimensional “arrest-imprisonment” approach to policing is clearly a cheaper option, but it does not address the root cause of the problem.

The ICD is a police accountability structure that should ideally be completely independent of the police and state, sufficiently empowered, and capable of effectively and efficiently dealing with complaints lodged against members of the SAPS. In addition, it should also be able to express itself on policies, procedures and practices of policing to ensure consistency with the Constitution and to be able to jealously guard the integrity of the police service.

The ICD was conceived in 1992 within a policing context characterised by race, class, creed and gender domination; by a culture of insensitivity, closed ranks, macho attitudes and any form of chauvinism and arrogance you care to think of.

Independence and civilian oversight is critical for many reasons:

1. To dispel perceptions that investigations into police misconduct are partial because they are conducted by the police themselves. In other words, to get rid of cover-ups.
2. To build the credibility of the SAPS because it allows ‘outsiders’ to investigate its members. Providing the essential checks and controls engenders public confidence and provides a sense of police accountability to the people.
3. To ensure that the ‘rotten apples’ are effectively removed or, as our Minister of Safety and Security said¹ “there is a small pocket of rotten potatoes. It is our task to rout out these hyenas from the police services”.
4. To serve as an effective strategy to prevent abuse.
5. To ensure police members have a credible complaints mechanism.
6. To provide an objective overview and evaluation of the efficacy of police policy and systems as possible.
7. To commend, encourage and constructively support best practices in the service where there are demonstrable police efforts to deliver service and efficiency.

¹ On 27 August 1999.

Of course, what all this says is that our operations need to be creative and our focus needs to be much wider than just conducting investigations or uprooting misconduct. Uprooting misconduct through investigations is but one component of our package. Our real task is to impact on the mindset, culture, ethos and systems of policing. We do this via: investigations, active monitoring of investigations and recommendations.

4.1 Establishment, mandate and powers

The ICD was established under the Constitution as a civilian oversight body over the police service. Its mandate is primarily to investigate deaths that occur either in police custody or as a result of police action. We have a broad discretion to investigate any misconduct by any member of the SAPS. The ICD accounts directly to Parliament, it has a separate financial vote in Parliament, and it is located within the Department of Safety and Security. The Minister of Safety and Security has a responsibility to assist in its establishment, but operationally the ICD is completely independent of the SAPS and the government. It is encouraging that Cabinet ministers have on numerous occasions stated emphatically that there will be no political interference in the work of the ICD.

There are two legal provisions to ensure co-operation with the ICD, namely:

- any wilful interference in the work of the ICD constitutes a criminal offence
- all state organs are obliged to provide reasonable assistance on request.

The ICD has all the powers of any police officer. It can act:

- (a) on its own initiative or
- (b) on receipt of a complaint by:
 - (i) an aggrieved person acting in such a person's own interest
 - (ii) a third party acting on behalf of an aggrieved person.

The ICD's focus is exclusively on the SAPS, but what sets it apart from civilian oversight institutions in other countries is the fact that it has its own independent investigative capacity. Most comparable oversight bodies either investigate or make recommendations. The ICD has a fairly extensive mandate and can deal with virtually all human rights violations by members of the SAPS. Technically its powers to take action are limited to making recommendations to the "appropriate authorities" to take remedial measures.

4.2 Interpretation of mandate

However, the ICD has chosen not just to make recommendations or view its mandate or role narrowly, that is, just to investigate misconduct. It has given a human rights activist interpretation to its mandate and, at its first strategic planning conference, outlined its vision as "as assisting in the *transformation* of the police services within the scope and purport of the constitution".

What this has done is throw the door wide open for the ICD to intervene *directly* and contribute to the transformation of the police force into a service and, through impacting positively on the transformation of the SAPS, to contribute indirectly to the safety and security of the country and the ability of all our people to exercise their hard-won rights.

The ICD has in its three years of existence established a capacity to (a) investigate, (b) monitor police investigations fairly effectively and to (c) make comprehensive recommendations.

4.3 Investigations

It is because we in the ICD in the Western Cape have the capacity to conduct full investigations and a limited independent forensic capacity that we have been able to reveal cover-ups. A police officer who shot an alleged suspect frontally six times, thrice while lying prostrate, and a few of his colleagues who attempted to conceal his alleged criminality thereafter, are currently being prosecuted in court on charges of murder and defeating the ends of justice. The police officers in this instance cleared the scene and deliberately did not inform the ICD of the incident.

The challenge for the ICD is to ensure that our investigators are thorough and of the highest quality. To achieve this, we invest a lot of effort in the training of personnel. The question as to whether the investigators should be secondments from the SAPS or civilians was a subject of intense debate. The Western Cape office eventually settled for an equal mix of civilian and seconded police officers. After a year of training, the civilians have dispelled the notion that all investigative skills reside within the SAPS. This illustrates that potentially effective investigators can be drawn from other professions, for example, journalists.

Our investigations are discerning, and we hope their results will impact on macro issues. As a strategy, the Western Cape office does investigations on a project basis, for example, all complaints of domestic violence, or search and seizure incidents, or sexual harassment, in order to recommend appropriate policy changes. We investigate approximately 30 per cent of all complaints.

4.4 Monitoring

The bulk of our complaints of a less serious nature are referred to the police services for investigation and are monitored by ourselves. In as much as this is necessitated by resource constraints it also ensures that the police maintain certain standards and are capacitated to deal internally with complaints.

4.5 Recommendations

In addition to having an investigative capacity, unlike many other civilian oversight bodies, we also make recommendations of three types:

1. To the Director of Public Prosecutions for a prosecution or for a formal inquest.

2. To the SAPS itself to charge officers for the violation of police standing orders and disciplinary codes.
3. General systemic or proactive recommendations.

The recommendations are either localised or national. The recommendations of provincial offices based on empirical investigative studies at a regional level are fed into the national recommendation-making process. In 1999 we engaged in two national recommendation projects, notably, racism and the police handling of exhibits. Our national recommendation reports in respect of these projects will soon be finalised. It is through recommendation making that we can truly impact on the systemic deficiencies of our police service and best serve the interests of transformation.

A challenge here is for the ICD to have its recommendations taken seriously. In this regard we work jointly with other stakeholders to ensure that proper consideration is given to our recommendations and reasons are furnished if they are not implemented.

4.6 Challenges

Creating an awareness of the ICD presents a major challenge within current constraints and calls for regular "free time". We attempt to venture into rural areas three evenings a month to meet with isolated rural communities and police, listen to difficulties and receive complaints. I have made many presentations to management and to rank and file police officers. The problem of information filtering down from management to rank and file is quite apparent at these gatherings and requests for legal training from the ICD not infrequent.

As can be expected, the ICD does not always enjoy the support of all sectors of the SAPS, particularly sectors which are under investigation. This is a common experience among internal police investigation units as well.

We effected an arrest of a senior white police officer on a charge of assault and had to endure police demonstrations, abuse and threats to our investigators from a relatively small conservative old guard element ostensibly representing the interests of this member. The member is currently being prosecuted in court. Again this underlines the importance of ensuring complete independence and effective investigations.

We have been encouraged to receive a lot of co-operation and complaints from members of the police service themselves. About 30 per cent of all complainants are SAPS members. Many of them are adamant that there are no avenues for them to raise their complaints or grievances satisfactorily within the SAPS. Many of the matters we have investigated are currently being prosecuted in court and, through our investigations, many police officers have been exonerated. Some have been convicted.

Success for us is not just about convictions, but the delivery of impartial, thorough, transparent and effective interventions – the effective and clinical search to uncover the truth. To our credit we receive complaints from across the political, social, religious and race spectrum.

An important lesson for me as a civilian oversight and human rights practitioner is that one needs to have the courage of one's convictions, one has to demonstrate impartiality and not succumb to pressure, political or otherwise. This is at times a difficult and a precarious path to tread. However, in the final analysis, one has to remain focused on one's mission and mandate.

The selection of personnel is very important. In my experience, because civilian oversight is never a national priority for governments, one must select on the basis of a commitment to serve and an ability to think laterally. It is critical that leadership in particular is energetic, provides vision and is politically astute.

The ICD has a long way yet to go in terms of resources, witness protection and general legislative empowerment. We have a small budget and about 49 investigators nationally to service approximately 125 000 SAPS members. Further we have an unfunded mandate to capture police statistics on domestic violence. Unless we are able to monitor what police actually do with domestic violence complaints, this would remain a token exercise. We have just completed a major consultative initiative with all stakeholders in an effort to muster support for the promulgation of our own statute, not only to ensure general ownership of the ICD, but also to guarantee our independence and efficacy.

5 CONCLUSION

Through its work the ICD engages and serves to protect almost all the basic human rights:

- *Right to life.* The investigations of deaths in police custody or as a result of police action is central to its functioning and so is its commitment to the right to life. In 1999 and 2000 we registered over 786 deaths in custody or as a result of police action. It is encouraging that our Section 49 amendments, which incorporate the principles of proportionality and "imminent life threat" have, after months of vacillation, finally been put into operation. This is a clear affirmation of the right to life. No longer, we hope, will it be easy for the courts to find that people who died in custody slipped in showers or on soap without the findings being preceded by thorough and impartial investigations.
- *Right to privacy and dignity.* Search and seizure operations which lead to gross violations of the right to privacy and bodily integrity last year generated many complaints. Through our commitment to the right to privacy and dignity, several prosecutions of police ensued as a result of our work.
- *The right to equality and dignity.* Sexual harassment policies for the SAPS and the Department of Justice have been put in place, following our active lobbying.

I could traverse the entire spectrum of the Bill of Rights if I had the time just to demonstrate to point that in every facet of our work we serve either to protect, affirm or promote basic human rights. Today, violations of human rights are only perpetrated by a minority of police officers.

However, it is no longer comfortable for them to do so. Alongside a vocal civil society and a political commitment to human rights, it is my view that a strengthened, committed and truly independent civilian oversight body can stem the tide or at least deter effectively human rights violations by our police. At the same time, it will strengthen and equip these police men and women to rightfully take their place as defenders of the poor, protectors of the innocent and agents of democracy.

I hope I have been able to convey some of the dynamics of policing in our country and the lessons, obstacles and contexts within which we operate in striving to impact positively on the SAPS. Although contexts may differ, it is my view that the principles and need for civilian oversight is universal. For me, the struggle to achieve proper policing, no matter where in the world we find ourselves, is an essential one and a struggle we need collectively to recommit ourselves to. We need to applaud successes, support and strengthen struggling efforts, strive for and identify that successful model that we can hold up proudly as the shining example of civilian oversight and through it, with conviction, drive home the truism that it is indeed possible to effectively police within a human rights dispensation.

The challenge always however is to create the human, political and economic conditions that discourage crime. The concluding words of the National Crime Prevention Strategy are:

“The strategy is based on the view that we need to build a new society, rather than simply normalise something which was never normal. The magnitude of the challenge should not be underestimated. It requires commitment, clarity of vision and leadership from within all national government institutions, provincial and local government, and participation by civil society.”