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Constitutionalism, legitimacy, and public order: A South African case study

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Why do constitutions, or the broader political orders that coalesce around them, persist? One way to answer this question is to look at the institutional choices embedded in the text of the relevant organic document to see whether their designers were far-sighted or not.¹ Another approach is to ask whether they command the respect and loyalty of their citizenry.² Few constitutions persevere through sheer force of arms, violence, or terror. As Max Weber (2009 [1922]) explained, the state—and hence the constitution upon which it rests—commonly relies on a reservoir of popular support for its basic institutions.³ In the absence of positive dispositions on the part of at least some substantial tranche of the people for some substantial part of the time, a state must make large expenditures on coercion, surveillance, and control. Political scientists, legal scholars, and social theorists operationalize this idea in terms of ‘legitimacy’.⁴ To be sure, the term ‘legitimacy’ has been challenged for its vagueness and opacity.⁵ And it is always important to distinguish “sociological legitimacy” (my focus here) from moral and legal variants.⁶ But legitimacy remains a valuable tool for thinking about the preconditions of constitutional persistence.

The central role of ‘sociological’ legitimacy in the maintenance of a constitution as a going concern raises a host of normative and empirical questions. What is the range of strategies for building reserves of popular support for a constitution—understood as both the specific document and the political order to which it is affiliated?⁷ How do the specific conditions and circumstances of a given nation at a particular moment in time cabin the range of potential legitimating strategies? Constitutional legitimacy, that is, might be a highly contextual and path-dependent matter. An obvious pathway is mediated by a claim to democratic credentials. Alternatively, societies or political orders might be characterized by legitimation pathways that hinge on historical or religious predicates (or, as in the United States, some confabulation of the two). Yet others – consider here

¹ For example, Z. Elkins et al *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

² T. Ginsburg and A. Huq ‘What can constitutions do? The Afghan case’ (2014) 25 *Journal of Democracy* 116–30.

³ M. Weber, *From Max Weber: Essays in Sociology* (Routledge, 2009)

⁴ B. Gilley, ‘The determinants of state legitimacy: results for 72 countries’ (2006) 27 *International Political Science Review* 47–71.

⁵ X. Marquez, ‘The Irrelevance of Legitimacy’ 2015 *Political Studies*. doi: 10.1111/1467-9248.12202. It is also an open question whether surveillance technology will ultimately render legitimacy an outmoded technology of state consolidation.

⁶ R. H. Fallon, ‘Legitimacy and the Constitution’ (2005) 118 *Harvard Law Review* 1787–1853.

⁷ B. Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (New York City: Columbia University Press, 2013) p. 5.

recent experience of China under communist rule after 1980 – might endorse a relentlessly consequentialist and welfarist criterion of legitimacy that is grounded on the promise of anticipated economic growth for most (if not all). Among these diverse strategies, empirical questions arise about how different pathways might interact to reinforce or undermine each other. And normative questions might arise as to whether certain strategies of legitimacy are preferable to others. It might be argued, for example, that a legitimating strategy that hinged on economic welfare while stifling democracy was intrinsically inferior to one that relied on free and fair elections. The opposite argument in favor of the post-Deng Xiaoping China model, of course, is also possible.

This chapter considers an important, but rarely considered, question about constitutional legitimation: How might experiences with a particular kind of street-level bureaucrats⁸ influence the legitimacy of a constitutional regime?⁹ The post-apartheid experience of South Africa usefully illuminates the possibility that public experiences with policing – or rather the want of sufficient, effectual, and non-corrupt policing – can undermine trust in a government newly constituted under a constitution. Police are important precisely because they are dispersed, numerous, and localized representatives of the state. Members of the public are more likely to encounter police than judges, elected officials, or other state officials. Their view of the state, in consequence, may well be mediated by the behaviour of police. As a correlative, there is some evidence to suggest that experiences with the police provide important signals of relative standing, recognition, and dignitary worth to individuals.¹⁰

The functions of police in conveying information about the competence and integrity of the state on the one hand, and in setting the terms of identification with the state on the other hand, suggest that scholars of constitutional legitimacy should attend closely not solely to *macro* pathways of constitutional legitimation, but also *micro*-level or retail dynamics. The persuasive hold of a constitution, that is, might depend not just on high-profile questions of national policy. It might also turn on the behavior of highly-dispersed officials, pursuing a range of state policies with high levels of discretion, and connected into the larger network of state institutions through loose and imperfectly-articulated nested sets of intrastate networks. This presents a significant question for constitutional designers: perhaps the harvest from their labors depends not on their choices, but the dispersed and hard-to-supervise decisions of a vast cadre of public officials at the front lines of contact with the public. Although a constitution can include some tools for regulating may-level bureaucracies, it seems likely that this control will be partial. As a result, a constitution will rise or fall on the integrity of state institutions with only partial linkages to the document and the main institutions of government created thereby.

South Africa provides a useful lens to study this question. As I explain below in Part I, policing received careful attention in both the interim and permanent constitutions of the mid-1990s. The assumptions animating these interventions, though, are at least up for debate. In Part II, I explore in some detail how policing and the production of public order have remained a pressing,

⁸ M. Lipsky, *Street-Level Bureaucracy*, 30th Ann. Ed.: *Dilemmas of the Individual in Public Service* (Russell Sage Foundation, 2010)

⁹ There is a good deal of scholarship on the relationship between administration and constitutional regimes. My focus here, however, is on the discrete and different question of policing.

¹⁰ B. Bradford et al., 'Officers as Mirrors: Policing, Procedural Justice and the (Re)Production of Social Identity' (2014) 54 *British Journal of Criminology* 527–50.

even intractable, problem for South Africans of all stripes. The realization of the ambitions of the 1996 Constitution thus proved elusive, at least in regard to policing. Moreover, recent empirical studies suggest that this failure of the *police* to maintain public order is undermining the trust in the *state*. Micro encounters with police hence seemed to have macro effects in terms of judgments about the state as a whole. Part III then steps back and considers the possible consequences of this dynamic for constitutional design, given the effort by the South African constitutional drafters to influence the post-enactment path of policing.

I. Policing and the 1996 Constitution

Criminality and private violence have presented tremendous policy challenges in South Africa under its 1996 Constitution. The Constitution itself speaks both to the organization and the practice of policing, albeit in inchoate and arguably ineffectual ways. Subsequent experience under the 1996 Constitution suggests that the mechanisms included in that document, in addition to subsequent statutes, have not oriented policing on the ground toward public-regarding ends. It is useful to begin, though, by attending to the text itself.

South Africa is one of a handful of states to have had a system of racial hierarchy embodied in law – the apartheid regime established in 1948 and finally and definitively repudiated by the election of Nelson Mandela as president in 1994.¹¹ The ensuing Constitution of 1996 was adopted in the context of a transition from apartheid rule that was accomplished without large defections from the police or other security services.¹² Some changes to the national policing regime predated the Constitution. Until 1994, the South African Police Force had been organized into eleven homelands and tasked with maintaining a segregated polity.¹³ Police forces were further internally segregated, with ill-trained black officers called *kitskonstabels* tasked with policing townships.¹⁴ In 1995, the police force was centralized, the use of military ranks for officers was eliminated, and the ‘Force’ was renamed a ‘Service’. The Internal Security Act was also amended to constraint the police use of deadly force.¹⁵

In the context of these sustained efforts to shift the role of security forces away from the promotion of racial stratification, it is hardly surprising that both the interim and the permanent Constitutions of the mid-1990s would address the pathologies of Apartheid-era police regulation. To begin with, the interim Constitution provided explicitly for community policing.¹⁶ Article 221 of that document envisaged ‘community-police forums’ that would promote the ‘accountability of the Service to local communities and co-operation of communities with the Service’ and evaluate ‘the provision of visible police services, including ... the provision, siting and staffing of police stations

¹¹ W. Beinart, *Twentieth-Century South Africa* (New York: Oxford University Press, 2001).

¹² R. W. Johnson, *South Africa's Brave New World: The Beloved Country Since the End of Apartheid* (London: Penguin Books, 2010).

¹³ W. R. Pruitt, ‘The progress of democratic policing in post-apartheid South Africa’ (2010) 4(1) *African Journal of Criminology & Justice Studies* 116–140; M. Shaw, ‘Crime, police and public in transitional societies’ (2002) 49 *Transformation: Critical Perspectives on Southern Africa* 1–24; M. Brogden, ‘Reforming police powers in South Africa’ (1994) 17(1) *Police Studies* 25–44.

¹⁴ Pruitt, ‘The progress of democratic policing’ (n. 13).

¹⁵ *Ibid*; Brogden ‘Reforming police powers’ (n. 13).

¹⁶ M. Marks, C. Shearing and J. Wood, ‘Who should the police be? Finding a new narrative for community policing in South Africa’ (2009) 10(2) *Police Practice and Research* 145–155.

[and] ... the reception and processing of complaints and charges'.¹⁷ Further, art. 222 stipulated an 'independent' complaints body that would operate under some form of 'civilian' control.¹⁸ These shifts might be understood as efforts to make policing not only less racially segmented, but also as levers to dislodge inherited policing patterns of physical abuse and malign neglect.

Both of these design choices reflect then-contemporary trends in policing. The former provisions reflect the influence of an international movement toward community-oriented policing that was emerging in Europe, America, and Australia in the 1980s and 1990s as a reaction against the more technocratic style of policing that had dominated since the 1950s.¹⁹ The core insight of community policing strategies is that police and communities are 'coproducers' of security against crime; this basic intuition can be executed in a wide range of different kinds of police-community interaction.²⁰ At the same time that community policing was coming into vogue, various forms of 'independent' review authority were being adopted, such as civilian complaint review processes and auditors.²¹

Both design choices, furthermore, entailed literal transplantations of concepts and institutional forms from other national contexts in ways that are open to question. For example, the English scholar Michael Brogden has forcefully argued that the 'community policing' model rests on assumptions about social structure and governance capacity that simply do not hold in contexts such as South Africa's, where the level of available bureaucratic capacity may not have equaled that of Britain or the United States.²² Similarly, it is far from clear that 'independent' review authorities are a panacea for police wrongdoing. Although internal investigatory processes can suffer from pro-police bias, they might also benefit from better access to information to determine when potential wrongdoing occurs, and what, in fact, happened. By contrast, independent bodies often depend on police for this information. Further, whereas internal processes are often staffed by police officers with experience with forensics and investigative techniques, there is no guarantee that such expertise can be recruited for an external agency. The choice between internal and external accountability mechanisms in the policing context, in short, presents a difficult trade-off between information and impartiality. Depending on the context and the available resources, the trade-off may be best resolved in quite different ways.

The 1996 Constitution, like its interim precursors, speaks directly to the core aims and the structural organization of policing. In comparison to its interim precursor, it retreats from the community-focused interim document, but preserves the idea of an independent police review power. As in the interim Constitution, there is a specific section solely focused on policing. In section 205 of the 1996 Constitution, the 'objects of the police service' are characterized in anodyne and general terms: 'to prevent, combat and investigate crime, to maintain public order, to protect

¹⁷ Constitution of the Republic of South Africa Act 1993, art. 221.

¹⁸ *Ibid.*, art. 222.

¹⁹ W. G. Skogan and S. M. Hartnett, *Community Policing, Chicago Style* (Oxford University Press, 1997); H. Goldstein, 'Toward community-oriented policing: potential, basic requirements, and threshold questions' 1987 (33) *Crime & Delinquency* 6–30.

²⁰ J. H. Skolnick and D. H. Bayley, 'Theme and variation in community policing' (1988) 10 *Crime and Justice* 1–37.

²¹ S. E. Walker and V. W. Bumphus, 'The effectiveness of civilian review: observations on recent trends and new issues regarding the civilian review of the police' (1992) 11(1) *American Journal of Police*.

²² M. Brogden, 'Implanting community policing in South Africa: a failure of history, of context, and of theory' (2004) 24(3) *Liverpool Law Review* 157–179.

and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. Unlike section 221 of the interim Constitution, these general terms provide no direction as to the nature of the relationship between the police and the public, or any obligations in respect to procedural justice, community policing, or distributional equity. Indeed, it is possible to read the 1996 Constitution's Article 205 as a *volte-face* from interim iteration's section 221: where the latter stressed the organic relationship between the police and the population they serve, the former identifies abstract, technocratic objectives that sound in a more authoritarian 'law and order' register than their precursors.

Yet the commitment to community-oriented policing did not vanish. In a 1998 White Paper published by the Ministry of Safety and Security, the new government identified the creation of a 'legitimate police service' as a central goal of organizational and legal changes to policing.²³ That paper envisaged 'a partnership between the police and communities' to deliver effective security (quoted in Minnaar 2009: 28).²⁴ That is, what had previously been installed at a constitutional level was sublimated into sub-legislative governmental policy. This shift, it should be noted, raises the interesting question whether street-level policing might have been rendered more effective by a constitutional commitment to community policing. Absent far more evidence, testing this counterfactual is difficult.

Like the interim Constitution, the 1996 Constitution also speaks to questions of institutional structure and accountability within the police force. In section 206, political responsibility for a national policing strategy is shared between a cabinet-level official and provincial governments. It is striking that the most substantive constraint upon policing policy reflects a concern with provincial power, rather than individual or community-level interests, insofar as national policy must account for 'the policing needs and priorities of the provinces as determined by the provincial executives'.²⁵ Section 207 envisages a national police commissioner with a level of managerial responsibility for implementing the national policing strategy. The constitutional text is not clear as to whether this official is supposed to have supervisory and corrective responsibility for lapses in the legality or efficacy of policing. Nor is it clear that the office is vested with power to remedy such lapses.

Further, section 206(7) states 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 in the province'. In addition to reflecting international trends in police reform, installation of independent police review could be usefully understood in light of the rise of constitutionalized ombudsman institutions in the 1990s and 2000s focused on human rights or corruption matters (Reif 2011). Like an ombudsman, an independent police review authority at least seems to promise a neutral (if not necessarily well-informed) perspective on governmental malfeasance. It is yet another effort to create a neutral, legalistic space within the state for realization of rights free from short-term political hydraulics.

²³ Shaw, 'Crime, police and public in transitional societies' (n. 13) at 29.

²⁴ Quoted in A. Minnaar, 'Community policing in a high crime transitional state: the case of South Africa since democratization in 1994' in D. Wisler, I. D. Onwidiwe (eds.) *Community Policing: International Patterns and Comparative Perspectives* (London: CRC Press, 2009) at p. 28. For details of the White Paper's context, see A. Minnaar, 'The Changing Face of 'Community Policing' in South African post-1994' (2010) 2 *Acta Criminologica* 189-210.

²⁵ Constitution of the Republic of South Africa 1996, s. 206.

Finally, although not explicitly tethered to policing, elements of the Bill of Rights further speak to how police are envisaged as operating. Section 12 contains a commitment to the “free[dom] from all forms of violence from either public or private sources.” Section 14 protects privacy from searches and seizures in absolute terms, but is modified by the general limitations language of section 36. The latter permits constraints that are ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors elsewhere in the Constitution’. The parallelism with (and divergence from) the U.S. Fourth Amendment is striking. Like its South African counterpart, the United States (U.S.) provision does not protect against all searches and seizures, but only those that are ‘unreasonable’. Unlike the South African document, the U.S. Constitution directs its energies at the margin to the regulation not of executive-branch officers, but of judges. It imposes constraints on when and how (presumptively judicial) warrants for searches and arrests can be issued. In practical effect, the U.S. Supreme Court has often exploited the ambiguous term ‘unreasonable’ as a means to facilitate police discretion, but rarely as a way to account for ‘human dignity, equality and freedom’.²⁶

Calibrating the measure of appropriate police force in general terms presents a difficult problem. Police routinely exercise force in order to limit or restrain private violence. The more effective police are in this task, studies suggest, the less likely citizens are to endorse the extralegal use of force.²⁷ Hence, there is a trade-off in some instances between the police’s use of force and the quantum of private violence. By lumping these two kinds of violence together, section 12 leaves it unclear how the trade-off will be resolved. It is not clear the generic language of section 36 provides more precise guidance. Just like the vaguer language of the U.S. Constitution, the South African approach thus leaves crucial questions unresolved even at a fairly general level of abstraction.

II. Policing and public order in the post-apartheid state

A. *Crime and policing under the 1996 Constitution*

The aspirations of the 1996 Constitution in respect to policing and crime have not been vindicated. South Africa remains deeply afflicted by crime. Recorded crime rose after the establishment of democratic government, and, despite a reduction in some categories of violent crime over the last decade, other forms of offending have increased. House robbery, for example, almost doubled between 2002/03 and 2009/10, while business robbery increased 2.6 times over the same period. In 2011, in a nation of about 49 million inhabitants approximately 50 murders, 100 rapes, 400 armed burglaries and 500 violent assaults were reported *each day*.²⁸ To put this in perspective, South Africa’s murder rate in 2011 was about 7.9 times that of the United States. Even as crime, violence and insecurity have become pervasive features of post-apartheid life, neither the African National Congress’s (ANC) efforts to maintain social order against crime or to reorient the South African Police Service (SAPS) prevailed. Rather, policing has continued to be pervasively shaped by the historical legacy and contemporaneous effects of racial, economic, and geographic

²⁶ A. Z. Huq, ‘Judicial independence and the rationing of constitutional remedies’ (2015) 65(1) *Duke Law Journal* 1–80.

²⁷ J. Jackson et al ‘Monopolizing force? Police legitimacy and public attitudes toward the acceptability of violence’ 2013 19(4) *Psychology, Public Policy, and Law* 479–497.

²⁸ ‘Kill and be killed’ (27 August 2011) *The Economist*, (available at www.economist.com/node/21526932).

stratification.²⁹ It has both reflected and shaped sharp economic and racial divides. Whether or not a different constitutional design might have yielded different outcomes, therefore, it is clear that the actually adopted constitutional design of post-apartheid policing resulted in national-level policy failure.

Violent crime became a major national issue for the ANC in the late 1990s as the flush of transformative change started to recede.³⁰ A very early government response took the form of a National Crime Prevention Strategy. This proved to be ‘stillborn’ and hence ineffectual.³¹ Post-apartheid governments instead instigated organizational change policies that have purported to aim toward a generally pro-active, community policing model.³² For example, the police were rechristened the South African Police *Service*. This organization folded together the police, and the police forces of the former homeland—seemingly intently focused on a community-oriented form of security.

But the reality has been quite different. Government and police have uniformly over-promised and under-performed in regard to what can be ‘delivered’.³³ The SAPS has been continuously presented as the answer to crime, and there have been repeated attempts to import the latest crime control models from Anglo-American police departments and academics.³⁴ ‘Crime-talk’³⁵ remains pervasive in the public sphere, revolving perennially around the failure of police and the state to protect citizens from violent crime. In response, the state promoted its own effectiveness in combating crime throughout the post-Apartheid period. This discourse persisted even as overall crime rates rose, but has continued as those rates have fallen. This discourse ultimately led to the re-emergence of paramilitary style policing around the year 2000 that culminated in 2009 with President Zuma insisting the police were a ‘force’, not a ‘service’,³⁶ a shift in language justified by an alleged need to communicate to criminals that the state was not soft on crime.

Through this period, police increasingly relied upon apartheid-era policing modalities in townships, in particular ‘high density, high mobility, paramilitary policing’.³⁷ As Mark Shaw rightly emphasizes, it is those who are poor and black who are most likely to be victims of this approach (Shaw 2002: 14-15).³⁸ In contrast, the policing of urban business districts has been aimed at

²⁹ T. Leggett, ‘Performance measures for the South African police service: setting the benchmarks for service delivery’ (2002) 49 *Transformation: Critical Perspectives on Southern Africa* 55–85.

³⁰ J. Steinberg, ‘Security and disappointment: policing, freedom and xenophobia in South Africa’ (2011) 51(5) *British Journal of Criminology* 1–16; J. Steinberg, ‘Crime prevention goes abroad: policy transfer and policing in post-apartheid South Africa’ (2011) 15(4) *Theoretical Criminology* 349–364; A. M. Singh, *Policing and Crime Control in Post-apartheid South Africa* (Aldershot: Ashgate, 2008); Leggett ‘Performance measures’ (n. 29).

³¹ Steinberg, ‘Security and disappointment’ (n. 30) at 5.

³² Ibid; J. Steinberg ‘Establishing police authority and civilian compliance in post-apartheid Johannesburg: an argument from the work of Egon Bittner’ (2012) 22(4) *Policing and Society* 481–495.

³³ Leggett, ‘Performance measures’ (n. 29).

³⁴ Steinberg, ‘Crime prevention goes abroad’ (n. 30); D. H. Baylay, *Changing the Guard: Developing Democratic Police Abroad* (New York: Oxford University Press, 2006).

³⁵ T. Sassoon, *Crime Talk: How Citizens Construct a Social Problem* (New York: Aldine de Gruyter: 1995).

³⁶ Leggett, ‘Performance measures’ (n. 29); J. Steinberg *Thin Blue* (Capetown : Jonathan Ball Publishers, 2008); Steinberg ‘Crime prevention’ (n. 30).

³⁷ Steinberg, ‘Security and disappointment’ (n. 29) at 9.

³⁸ Shaw, ‘Crime, police and public in transitional societies’ (n. 13).

preserving the exclusion of black township residents from those areas.³⁹ The bifurcation of policing strategies has exacerbated geographic segregation by race and income.

As a result of the durability of an 'old' policing culture, police relations with black urban populations in particular have remained characterized by the same 'strong mutual defiance' that had been observed during the late apartheid era (Fourchard 2011: 252).⁴⁰ Police efficacy has suffered as a result. Police morale also remains fragile. Using a narrative form, Jonny Steinberg vividly recounts the fragility of police command of space in township areas, and the weakness of the formal institutions of policing.⁴¹ Within the SAPS, he shows, morale remains low. This is perhaps not surprising, since South Africa has one of the highest rates of police deaths in the world.⁴²

Many people in South Africa report difficult relationships with the police. These negative views seem to result from extremely negative experiences of police activity. In particular, the police's relations with young men from the townships are often tense.⁴³ So, too, is their relationship with immigrants and particularly undocumented foreigners,⁴⁴ or rape victims and other vulnerable groups.⁴⁵ As in any policing context, if people feel unfairly targeted, or that they are not receiving the level of service they deserve when they report a crime, then the legitimacy of the police will likely suffer. In contrast to this evidence, Kynoch reports perceptions that SAPS officers are more approachable and respectful than their apartheid predecessors and that people expect the police to serve all citizens rather than narrow sectional interests.⁴⁶ That study is probably best read to suggest that South Africans may at least be open to positive experiences of encounters with police given the marginal improvement in policing since the early 1990s.

These problems are compounded by a long-standing problem of corruption. This undermines attempts at legitimating the South African police. Police malpractice has been a major concern in recent years as high-profile scandals reached the very top of the SAPS, including the suspension, replacement and conviction of former national commissioner Jackie Selebi due to alleged involvement in organized crime, and the suspension of his successor, Bheki Cele, in October

³⁹ T. R. Samara, 'Order and security in the city: producing race and policing neoliberal spaces in South Africa' (2010) 33(4) *Ethnic and Racial Studies* 637–655.

⁴⁰ L. Fourchard, 'The politics of mobilization for security in South African township' (2011) 110 (440) *African Affairs* 246–268 at 252; Steinberg, 'Security and disappointment' (n. 30); Steinberg, 'Crime prevention goes abroad' (n. 30); Steinberg, *Thin Blue* (n. 36).

⁴¹ Steinberg, *Thin Blue* (n. 36).

⁴² D. Singh 'Violators and victims: a historical review of policing in South Africa after a decade of democracy' (2004) 17(3) *Acta Criminologica* 86–98.

⁴³ M. Marks, *Transforming the Robocops: Changing Police in South Africa* (Durban: University Of KwaZulu-Natal Press, 2005).

⁴⁴ A. Mosselson, "'There is no difference between citizens and non-citizens anymore": Violent xenophobia, citizenship and the politics of belonging in post-apartheid South Africa' (2010) 36(3) *Journal of Southern African Studies* 641–655; M. Neocosmos, 'The politics of fear and the fear of politics: reflections on xenophobic violence in South Africa' (2008) 43 *Journal of Asian and African Studies* 586–94.

⁴⁵ R. Morrell et al, 'Hegemonic masculinity/masculinities in South Africa: culture, power, and gender politics' (2012) 15(1) *Men and Masculinities* 11–30.: 10.1177/1097184X12438001; L. Vetten, 'Paradox and policy: addressing rape in post-apartheid South Africa' in N. Westmarland and G. Gangoli (eds.) *In International Approaches to Rape* (Bristol: The Policy Press, 2011).

⁴⁶ G. Kynoch, 'Apartheid nostalgia: personal security concerns in South African townships' (2003) 5 *South African Crime Quarterly* 7–10.

2011 based on corruption allegations. These problems appear to reach right down through the organization.⁴⁷ It is no surprise that there is an entrenched public perception that the SAPS is corrupt.

Policing does not merely reflect South Africa's internal conflicts. It also reproduces and deepens them. Efforts to make the SAPS more diverse and inclusive have faltered, leading to limited changes to police-community relations. In a 2008 ethnography of the Durban police, Monique Marks found that 'despite affirmative action and equity legislation and programs, Durban's police force] was still plagued by deep racial and gender divisions'.⁴⁸ Women and blacks, rather than being welcomed, were marginalized by 'police managers who are steeped in old ways'. Even to the limited extent that the police have become more racially diverse, police recruited from townships quickly cease to be identified as in-group members by those they police. As Steinberg (2012: 352) explains, upwardly mobile police officers move to suburbs, 'diving into a very deep pool of expensive private services and a lifetime of debt' scorned by the subjects of their policing.⁴⁹

Relatedly, the salience of crime as an issue in South Africa and the social divisions fostered by extreme inequality and the legacy of apartheid have, along with other factors, catalyzed alarming displays of xenophobia. 'Foreigners', usually immigrants from other Sub-Saharan African countries, but also internal migrants, are blamed by some for many social ills, including crime.⁵⁰ The legitimacy of the police may, again, be caught up in the social strain that produces and is reproduced by this xenophobia.⁵¹ Yet the effect of rising xenophobia on public judgments about the police is likely to be complex. Steinberg notes that anger toward immigrant groups was encouraged by state practices as the government attempted to maintain its bond with the poor. But their negative views are often motivated by anger at the perceived failure of the police to deal with immigrants' purported criminality.⁵²

The failure of policing reform cannot be explained without attending to the deep, and widening, socio-economic rifts within South African society. South Africa is characterized by high economic inequality in comparison to other countries. According to the United Nations Development Program, it has a Gini co-efficient of 57.8.⁵³ Alongside Brazil, this makes it one of the most economically unequal societies in the world. Economic inequality, moreover, tracks racial divisions. Apartheid policies ensued that racial divides would translate into economic inequalities. Apartheid 'systematically and brutally' entrenched economic inequality along racial lines.⁵⁴ Unsurprisingly, by the fall of the apartheid, income, employment, and education were distributed in sharply uneven fashion between South Africa's generally recognized racial groups (blacks, whites,

⁴⁷ J. Burger 'To protect and serve: restoring public confidence in the SAPS' (2011) 36 *South African Crime Quarterly* 13–22.

⁴⁸ M. Marks, 'Looking different, acting different: struggles for equality within the South African police service' (2008) 86(3) *Public Administration* 643–658 at 646.

⁴⁹ Steinberg, 'Security and disappointment' (n. 30) at 351.

⁵⁰ *Ibid.*

⁵¹ Mosselson, 'There is no difference' (n. 44).

⁵² Steinberg, 'Security and disappointment' (n. 30), at 354–56.

⁵³ United Nations Development Program, *Human Development Report 2010 - 20th Anniversary Edition: The Real Wealth of Nations: Pathways to Human Development* (Geneva: United Nations, 2010).

⁵⁴ J. Seeking and N. Natras, *Class, Race, and Inequality in South Africa* (New Haven: Yale University Press, 2005) at p. 2.

coloured, and Indians).⁵⁵ Racial and economic divisions in South Africa also have a geographic dimension that influences how police are deployed. Samara,⁵⁶ has argued that urban centers, and in particular, business improvement districts, have been developed in ways that preserve the segregation of black townships from highly developed white urban areas. In his study of policing in Cape Town, he emphasizes how private and public security is deployed to prevent the ‘spillover of violence’ from the largely poor black townships of Cape Flats into the highly developed urban center (Samara 2008: 204).⁵⁷

A collateral effect of economic inequality is the temptation for the wealthy to ‘opt out’ of the state system of social order maintenance through the purchase of private security and for the impoverished to turn to vigilante organizations.⁵⁸ The private security sector has grown rapidly since the 1990s, fed in part by defections from the post-apartheid SAPS.⁵⁹ Private and public policing functions, however, are not cleanly separated, but characterized by a ‘growing interpenetration and overlap’.⁶⁰ Indeed, Marks and Wood present evidence that private security can interact directly with community policing initiatives and thereby serve as a ‘more responsive and reliable’ substitute for the SAPS.⁶¹ As a result of these trends, the provision of security is no longer exclusively (or even centrally) associated with the state as opposed to private networks defined by solidarity group, residence, or economic class.⁶² Samara has demonstrated that the resulting proliferation of geographically-sorted private policing produces a racial social ordering that tightly restricts the mobility of the urban black poor.⁶³

In contrast, some less wealthy South Africans have turned to vigilante organizations to replace absent policing.⁶⁴ Again, the resulting structures are not always easy to cleanly separate from official state structures. Fourchard argues that grassroots vigilante organizations are hard to separate from formal structures established through community policing initiatives from the late 1990s onward.⁶⁵

The experience of poor South Africans with the SAPS, finally, cannot be untangled from the difficulties encountered by the post-Apartheid state. Failure to address backlogs in the provision and maintenance of basic services may further erode police legitimacy. Put bluntly, when people do not

⁵⁵ L. Thompson, *A History of South Africa*, (New Haven: Yale University Press: 2001) at pp. 299–230.

⁵⁶ Samara, ‘Order and security in the city’ (n. 39); T. R. Samara, ‘Policing development: urban renewal as neo-liberal security strategy’ (2008) 47(1) *Urban Studies* 197–214.

⁵⁷ Samara, ‘Policing development’ (n. 58) at 204;

⁵⁸ M. Marks, and J. Wood, ‘South African policing at a crossroads: the case for a ‘minimal’ and ‘minimalist’ public police’ (2010) 14(3) *Theoretical Criminology* 311–329; Samara, ‘Order and security in the city’ (n. 39); Shaw, ‘Crime, police and public in transitional societies’ (n. 13); B. Baker, ‘Living with non-state policing in South Africa: the issues and dilemmas’ (2002) 40(1) *Journal of Modern African Studies* 29–53.

⁵⁹ Pruitt, ‘The progress of democratic policing’ (n. 13).

⁶⁰ Baker, ‘Living with non-state policing’ (n. 58) at 33.

⁶¹ Marks and Wood, ‘South African policing’ (n. 58) at 318.

⁶² Singh, *Policing and Crime Control*, (n. 30).

⁶³ Samara, ‘Order and security in the city’ (n. 39).

⁶⁴ B. Bearak, ‘Constant Fear and Mob Rule in South African Slum’, *The New York Times* (30 June 2009); R. Abrahamson and M. C. Williams, ‘Public/private, global/local: the changing contours of Africa’s security governance’ (2008) 35(118) *Review of African Political Economy* 547–553.

⁶⁵ Fourchard, ‘The politics of mobilization’ (n. 40). See also, Steinberg, ‘Security and disappointment’ (n. 30); Samara, ‘Policing development’ (n. 56).

have running water, or are forced to use unenclosed ‘street toilets,’ their sense that *any* state agency can legitimately represent their interests may be undermined. There have been large protests in recent years due to dissatisfaction with household service provision, access and quality. The police – especially Public Order Police (POP) units – have played a key role in monitoring and quelling these mass actions, and there have been a number of instances of police brutality, the most notable being the killing of Andries Tatane, a protester in Ficksburg in Free State province in early 2011. Such events may have strengthened the public’s perception of an association between policing and failures in service provision.

b. The failure of policing and constitutional legitimacy

The 1996 Constitution implied a promise of sound policing. The post-apartheid state has thus far failed to deliver on that promise. But has this had any effect on the Constitution’s legitimacy? Some evidence to that effect derives from a 2013 study conducted by a group of four criminal-justice researchers (including myself).⁶⁶ That study drew on data from the 2010 South African Social Attitudes Survey (SASAS), an annual national survey of 3183 South African adults aged 16 years and over conducted annually by the Human Sciences Research Council (HSRC). As relevant here, the survey focused on how experiences with the police—in particular perceptions of the police’s efficacy and fairness—influenced normative judgments about not only the police, but also the state more generally. Our study did not ask about the Constitution. Nevertheless, it is plausible to think that our findings about normative judgments about the post-apartheid state have some correlation with normative judgments about the post-apartheid constitution.

A core finding of this study was that the legitimacy of the *state* was strongly correlated with the polity’s experience of the *police*. Micro-level negative interactions with specific officers, in other words, translated into a macro-level effect of state delegitimation. Citizens attended not only to the effectiveness of the police when forming their legitimacy judgments in regard to the state, but also to the fairness of their actions (e.g., whether they acted with respect and impartiality, allowed individuals’ to voice their perspective, etc.). Consistent with a body of research that shows the importance of ‘procedural justice’ in policing,⁶⁷ the results suggested that citizen’s concerns about crime should not be acted on at the expense of efforts to improve the more affective aspects of the relationship between police and public. Correlatively, the study also found evidence that perceptions of broader state failure influenced judgments about the police. That is, when the government’s trustworthiness and performance is in doubt, the legitimacy of the police also suffers. Perceptions of the policing function and of the state writ large were entangled. Police legitimacy is a vital element of the wider legitimacy of any democratic state, and the failure of a police force to deliver security in an efficient and fair manner can undermine the broader normative mandate of the state.

Experiences with police might have powerful effects on normative judgments of state’s legitimacy for a number of reasons. Two are worth highlighting here. First, the police are at the front lines of contact with the public. Police are especially likely to be present (or conspicuously absent) in

⁶⁶ B. Bradford et al, ‘What price fairness when security is at stake? Police legitimacy in South Africa’ (2013) 8(2) *Regulation and Governance* 246–268.

⁶⁷ T. R. Tyler ‘Legitimacy and legitimating’ (2006) 57 *Annual Review of Psychology* 375–400; T. R. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press: 2006); T. R. Tyler, ‘Policing in black and white: ethnic group differences in trust and confidence in the police’ (2005) 8 *Policing Quarterly* 322–324.

stressful and emotionally charged situations such as the Marikana massacre of late September 2012. Hence, it is likely that judgments about the overall competence and fairness of the state writ large will be often inferred from experience with the state writ small, i.e., the police. Second, although relatedly, experiences with the police, and in particular perceptions of how the police treats the citizen, help form a sense of shared social identity and, correlatively, a sense of the citizen's relative standing as a citizen. As a result, policing has an 'expressive' effect.⁶⁸

As the criminologist Ben Bradford has argued based on studies of the United Kingdom and Australia, experiences of fairness at the hands of authority figures, such as police officers, has positive effects on trust, legitimacy and people's compliance-related behaviors, because such experiences strengthen their connections to the social groups those authorities represent, promoting allegiance to group norms and values (Bradford 2012;).⁶⁹ Bradford suggests that people are sensitive to signs and symbols that communicate information about their status and position within a group, and that police treatment has an especially powerful communicative effect in this regard. His research finds that people evaluate police behavior in terms of its identity-relevant content, in particular, the message it conveys about membership in the nation. Policing – whether the failure to provide security or the unwillingness to treat individuals with dignity and respect—sends a strong message that an individual is not a coequal member of the polity. For the wealthy, it signals that the state is unable to supply your basic needs. Such messages, in turn, seem to have consequences for the legitimacy of the state. By extension, it is quite plausible to think that deterioration of moral support influences public views on the Constitution too.

In sum, there is good reason to think that micro-level interactions with police have an effect on macro-level normative beliefs about the state and the Constitution. A person whose daily experience of the state is its failure to provide basic security against crime and violence, who then finds the police to be corrupt and violent themselves, is not likely to have a positive view of other state institutions. The leap of inference I am offering here – one that ought to be treated as a hypothesis warranting further research rather than a solid conclusion – is to claim that this distrust of the state will leak into judgments about the Constitution upon which the state rests as a matter of law. In this way, the Constitution can be undermined as a legitimate instrument of government by the dispersed and only partially controlled actions of its street-level agents.

III. Theorizing the role of public order in constitutional legitimation

The South African experience suggests that policing and the problem of public order can play a role in the legitimation or delegitimation of a new constitutional order. This dynamic illustrates the possibility of linkages between the micro-level experiences of the state and macro-level effects of legitimacy and stability. It thus illuminates one of the pathways that may connect the mass of the public with relatively abstract constitutional dynamics. In this regard, it illuminates one

⁶⁸ J. Jackson, and B. Bradford, 'Crime, Policing and Social Order: On the Expressive Nature of Public Confidence in Policing' (2009) 60 *British Journal of Sociology* 493–52. See also, J. Jackson and J. Sunshine, 'Public confidence in policing: a neo-Durkheimian perspective' (2007) 47 *British Journal of Criminology* 214–233.

⁶⁹ B. Bradford, 'Policing and social identity: procedural justice, inclusion, and cooperation between police and public' (2012) 24 *Policing and Society* 22–43. See also, B. Bradford et al. 'Officers as mirrors: policing, procedural justice and the (re)production of social identity' (2014) 54 *British Journal of Criminology* 527–50.

modality of what might be called popular constitutionalism,⁷⁰ albeit not only consciously or directly focused on the text or substance of the constitution itself. This Part steps back by developing a tentative account of when and how such popular constitutional effects might be observed, and what implications for constitutional survival.

As a threshold matter, it is important to point out that state legitimation effects are not contingent on a constitutional reference to policing. Even if the 1996 South African Constitution had said not a word about policing or public order, the efficacy and fairness of individual officers could still have had an effect upon state and constitutional legitimacy. A constitution might thus founder due to omissions, or because it speaks to policing and public order in a suboptimal fashion. Similar effects have been found in a wide range of other national contexts, from the United States⁷¹ to Ghana,⁷² without regard to constitutional commitments to public order. The promise of maintaining an effectual monopoly on violence, per Weber, may well be so ingrained in understandings of *what a state is* that constituting documents do not need to spell this out in order to create public expectations.

At the same time, the South African experience shows that a state's failure to supply public order may not prove fatal (in the sense of precipitating constitutional change) or even debilitating to the continued operation of a constitutional order. A state may rely on plural sources of legitimation. These might include a historical claim to be an authentic voice of the 'people.' This may be a claim with special potency in the South Africa for blacks at least. Until recently, the ANC had an effectual monopoly on political power. In August 2016, however, the party experienced an unprecedented string of electoral defeats at the municipal level, including in important cities such as Pretoria, where blacks make up three-quarters of the population.⁷³ A large question for the future stability of the South African constitutional order, therefore, may be whether a new class of political leaders can identify alternative pathways to state legitimacy even as the institutional apparatus of the state (including the police) are likely to remain highly corrupt and incompetent, so as to limit the delivery of effectual services. Different political parties have taken different positions in respect to this question, with the Democratic Alliance striving most clearly to position itself as the party of delivery rather than the custodian of a national, democratic revolution. Other states with similarly deficient systems for service delivery have resorted to quite different legitimation strategies, and continue to survive (if not prosper in any conventional way) by focusing on the promise of external threats. The current North Korean and Iranian regimes provide useful examples in this regard.

A selective failure to supply public order, moreover, may be unjust but also remarkably stable. In the United States, for example, local and state police have a long history of both withholding effectual protection and also imposing supernumerary coercion on racial minorities. One consequence is that for racial minorities in the U.S. today, contact of any form with the criminal justice system tends to be politically enervating in the sense that it is associated with lower levels of

⁷⁰ L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004)

⁷¹ Tyler 'Legitimacy and legitimating' (n. 67).

⁷² J. Tankebe, 'Self-Help, policing, and procedural justice: Ghanaian vigilantism and the rule of law' (2009) 43 *Law and Society Review* 245–268.

⁷³ N. Onishi, 'A.N.C. Loses Pretoria, South Africa's Capital, as Setbacks Mount' *The New York Times*, (6 August 2016).

political and civil engagement a trend that is likely to worsen with time.⁷⁴ The result is a stable negative feedback loop: negative encounters with police reinforce minorities' sense that they are not coequal citizens, which in turn leads them to give up on voting and other forms of civic engagement. Their disengagement in turn diminishes the chances of meaningful reform of policing emerging from the political process. A stable constitutional order, the American experience shows, can coexist with persistent racial (or social) stratification of a deeply iniquitous sort.

Conclusion

The post-apartheid state's failure to deliver on constitutional promises of public order and effectual security is an important determinant of state and constitutional legitimacy, even if it does not fatally undermine the prospects for the 1996 Constitution's continued survival. On a more general, theoretical level, the dynamics illuminated here illustrate the connection between macro-level dynamics of constitutional legitimacy with micro-level interactions occurring between individual citizens and street-level agents of the state. This micro/macro connection suggests that constitutional survival should be conceptualized as a problem of ordinary politics and administration, as much as a question of high theory and normative principle.

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⁷⁴ A. E. Lerman and V. M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago: University Of Chicago Press, 2014).