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**Ali Malik**

## **Negotiating boundaries of tolerance: the Scottish Police Authority and the doctrine of operational independence**

### **Abstract**

In *Scottish Affairs* in 2001, Kenneth Scott and Roy Wilkie, while discussing the appointments of chief constables, noted that ‘the real power in Scottish policing is probably revealed where those elements in the tripartite system [chief constables, local government and central government] interact’ (2001: 57) irrespective of the constitutional and legislative boundaries. This paper examines the nascent police governance arrangements by shining a spotlight on the status of the operational independence doctrine in the post-reform era. It revisits the Scottish Police Authority’s attempts to negotiate its own boundaries of influence since its formation. The discussion draws on the 2012 reform legislation, official policy agenda that led to the creation of the Scottish Police Authority (Malik, 2018), a select number of interviews with key architects of the Scottish police reform conducted between 2013-2016, official parliamentary reports, public meeting minutes, and HMICS and Audit Scotland inspection reports. The analysis suggests that the reform agenda did not seek to address the broad interpretation of operational independence that played a key part in diminishing the influence and performance of the local police boards. On the one hand, the Authority have attempted to challenge the scope of operational independence but with limited success. Conversely, and contradictorily, the influence of Ministers and the Scottish Government has gradually expanded. This raises important questions in relation to the essence of operational independence, when it is invoked and crucially who it is invoked against. New boundaries of tolerance and influence need to be negotiated for the Scottish Police Authority to be able to play a more meaningful and independent oversight role in police governance.

### **Keywords**

Police governance, operational independence, accountability, Scottish Police Authority, chief constable.

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## **Introduction**

Over two decades ago Scott and Wilkie (2001) argued that the organisational, constitutional and symbolic significance of the role of the chief constable, within the broader tripartite governance arrangement, has lacked due recognition and attention within Scottish policing discourse, particularly in comparison to England and Wales. Nearly a decade since the Police and Fire Reform (Scotland) Act 2012 (henceforth, the Reform Act 2012) came into effect, this observation remains true. The Reform Act 2012 replaced the previous and oft-criticised local police boards (Walker 2000; Scott and Wilkie, 2001; Donnelly and Scott, 2002; Tomkins, 2009; Laing and Fossey, 2011; Scott, 2011; Malik, 2017a) with a centralised Scottish Police Authority and amalgamated the eight local police forces into a single Police Scotland. When examining police governance arrangements south of the border, scholars have routinely highlighted the importance of the relationship between the Police and Crime Commissioners (PCCs) and their chief constables, often placing the effectiveness of the governance arrangements on the ability of the former to be able to navigate the fine lines between the operational independence of the chief constable and legitimate oversight of operational policing (Newburn and Peay, 2012; Lister, 2013; Lister and Rowe, 2014; Wells, 2015; Loveday, 2018a). In Scotland, notwithstanding Scott and Wilkie's concerns, there is a substantial body of publications often critical of the role of chief constables and their relationship with the local police boards during tripartism (Gordon, 1980; Oliver, 1987; Walker, 2000; Scott and Wilkie, 2001; Donnelly and Scott, 2002, 2010; Scott, 2011). There is, however, a dearth of research into the status of the operational independence doctrine in the era of the Scottish Police Authority (notable exceptions include Scott, 2013, 2014; Fyfe, 2016; Loveday, 2018b). This omission is surprising not least because powers of leading Britain's second largest police force now rest with a single chief constable. The Scottish Police Authority, on the other hand, only came into being on 01 April 2013. Despite the many challenges it faced during its formative years (Scott, 2014, Fyfe, 2016; Malik, 2018; Loveday 2018b), the Authority has wide-ranging legislative powers and responsibilities over maintenance of the police, setting strategic direction for policing, appointments/dismissals of senior officers, and a duty to hold the chief constable to account for the policing of Scotland (Reform Act 2012, s.2).

The sheer scale of the transformation, ushered in by the Reform Act, in itself is a sufficient reminder that police reform should be understood as 'not an event but a negotiated and incremental process' (Henry et al, 2019: 574). Within this broader realm of negotiation and implementation of legislation and subsequent policies, there are myriad secondary, but no less

important, negotiations between actors and stakeholders as they seek to assume their respective roles and responsibilities. Through a chronological review of events leading up to and after the Reform Act, official policy papers, minutes of public meetings, inspection reports and a select number of interviews with key stakeholders involved in the Scottish police reform, including a former Minister<sup>1</sup>, this paper shines a spotlight on how the ‘new’ tripartite actors in the post-reform era - i.e. the Scottish Police Authority, Police Scotland and the Scottish Government - sought to establish the respective boundaries of influence, and tolerance, in the new governance arrangements. As the paper demonstrates, successive chairs of the Authority made unsuccessful attempts to define the boundaries of operational independence, whilst at the same time, the role and influence of the Scottish Government increased often bypassing the Authority on key issues (Malik, 2017b; Murray and Malik, 2019). Whilst central government and the chief constable have emerged as powerful players in the ‘new’ tripartite arrangement, the Authority is often either perceived as an extension of the Scottish Government or too dependent on Police Scotland providing a rubberstamp to decisions made by the chief constable and senior officers. Under the current arrangement, the precise status of operational independence merits deeper examination. The paper concludes that for the Authority to fulfil its legislative duties in relation to police governance and accountability, new boundaries of influence, and tolerance, need to be drawn between the three stakeholders and a clearer interpretation of operational independence is required.

### **Governance: an art of negotiation?**

Through the lens of public administration literature, governance involves a network of actors both private and public, it can be hierarchical and non-hierarchical, it can take on various methods including negotiation, bargaining, and participation, and often the choice between methods of governance depends on the purpose and interests of various stakeholders, policy objectives and shared outcomes (Rhodes, 1996; Weale, 2011; Bevir, 2010). Powers of governance can manifest in two significant ways; formal powers enshrined in law, and informal powers that are negotiated between actors during their interactions (Zimmerling, 2005). Scholars have long tried to distinguish the precise meanings of the words *power*, *influence*, *control* and *authority*, and some have used these terms interchangeably. In the context of police governance, power may refer to legally defined set of duties and responsibilities which provide

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<sup>1</sup> As part of a doctoral study conducted at the University of Edinburgh, semi-structured interviews were conducted with a range of stakeholders including a former Minister, senior police officers, board members of the SPA, representative from HMICS and a civil servant. Interviews were conducted between 2013 and 2016. Unless otherwise stated, all interviewees were in post at the time of the fieldwork.

the basis for a governance and accountability relationship to be established. Legally defined powers with a clear articulation of responsibilities and lines of reporting are necessary for a police governance arrangement to be effective. Robust mechanisms of police governance also enhance democratic legitimacy of the police, ensuring that powers are not concentrated in one institution, rather they are distributed between key stakeholders (Jones et al, 1996) to create checks and balances between institutions (Schillemans, 2011). Even where formal legal powers do not signify a principal-agent relationship, governance bodies and regulatory authorities often negotiate informal influence creating a ‘shadow of hierarchy’ in a non-hierarchical governance arrangement and allocation of funding and resources and monitoring of budgets is often used as a bargaining tool for changes in policy and practice (Héritier and Lehmkuhl, 2008; Weale, 2011). Researchers have found that in policy negotiations, institutions often concerned with ‘getting things done’ find creative ways to ‘manage tensions and conflicts’ (Crawford and Jones, 1995:21). However, it has been recognised that informal arrangements can also lead to unfettered discretion and the lines of accountability and responsibility are blurred particularly when things go wrong (Crawford and Jones, 1995). Furthermore, if powers of governance are not clearly articulated, and if one institution that is accountable to another holds more influence over the other, it can often lead to regulatory capture. Regulatory Capture is a process by which regulation ‘is consistently or repeatedly directed away from the public interest and toward the interests of the regulated ...’ (Kwak, 2014: 73). It is also reflected in ‘a regulatory agency's collusion with the firms it is ostensibly regulating, to the detriment of the public interest’ (Zinn, 2002: 107). Those involved in corporate governance are well-versed in the vices of regulatory capture and its contribution to ineffective governance and accountability and a loss of legitimacy and public trust (Carpenter and Moss, 2013: 1-22).

In policing literature, the notions of ‘governance’ and ‘accountability’ have been deployed and utilised interchangeably, both often referring to the same principles. Lustgarten (1986) and Walker (2000) framed police governance within the contours of constitutional law. Both deemed accountability as ‘too narrow’ and focused on exploring the paradoxical relationship between the democratic state and the public police, and the enabling and constraining functions of law in relation to police powers (Lustgarten, 1986: 1; Walker, 2000: vii). Marshall (1965; 1978), and later Reiner (Reiner and Spencer, 1993; Reiner, 2010), examined the various regulatory strategies implemented at different times during tripartism to secure accountability of chief constables and their police forces, implicitly focusing on organisational accountability. Prior to the 2012 Reform Act, these regulatory strategies were also deployed in Scotland, following a similar trajectory to developments elsewhere in public administration evolving

from localised/hierarchical bureaucratic structures, through market-based reforms and the New Public Management (NPM) to the centralised/network-based governance with a greater emphasis on performance, inspection and auditing (Donnelly and Scott, 2002; Scott, 2011; Davidson et al, 2016). Yet time and again, the Scottish local police boards, despite holding the ‘power of the purse strings’ rarely used those powers and were routinely criticised for ineffective governance and deference to chief constables (Donnelly and Scott, 2010:82). Police governance is often described as a *paradox*, a ‘regulatory puzzle’ (Walker, 2000: 4), a ‘democratic dilemma’ (Bayley and Stenning, 2016: 2-9). On the one hand, the state empowers the public police to act on its behalf, sets out the legal boundaries for police organisations to operate within, allocates public funds and resources to buy land, property, equipment, and to employ staff, and sets national policing objectives and strategic direction. Conversely, the state restricts the same powers to ensure policing conforms to core democratic values such as fairness and equity, to maximise efficient use of public resources, and to ensure policing remains responsive to shifting public concerns (Jones et al, 1996). These competing demands require a balancing of local and central interests, and a governance framework that gives due regard to national strategic objectives as well as local priorities and equitable service delivery. In addition, and paradoxically, the state also has to ensure its own influence in day-to-day policing is limited, so that policing remains free from partisanship and competing party-political rhetoric (Walker, 2000; Bayley and Stenning, 2016). In Britain, it is this latter concern that provided the foundational basis for the doctrine of ‘constabulary’ independence under common law, which has gradually evolved into the all-encompassing and ‘sacrosanct’ operational independence (Reiner, 2013: 169), as described below.

### **From constabulary to operational independence**

The doctrine of constabulary independence is the most controversial and long-standing trend in police governance discourse in Britain, and ‘it remains central to contemporary attempts to understand – and change – the world of police governance’ (Walker, 2000: 44). The foundation for the traditional ‘constabulary’ independence is the judicial interpretation of the common law office of constable, given credence by the oft-quoted judgement by Lord Denning that police officers are responsible for their actions to the law and only to the law (for a detailed discussion on the judgement, see Walker, 2000: 45). The primary legitimising foundation for this doctrine is the judicial interpretation of the ancient office of the constable which derives its authority from English common law and exercises independent authority, instead of delegated powers (Lustgarten, 1986: 25). In Scotland too, the office of the constable has existed at least since the Union of the Crowns in 1603 as an office holder with original powers and authority and thus

not answerable to anyone, save the Crown (Royal Commission, 1962, para.28: 10). The judicial view that police officers were not in a master-servant relationship with their local police authorities was further strengthened in *R v Metropolitan Police Commissioner* [1968]. In his judgement, Lord Denning emphasised that “police officers are responsible for their actions to the law and only to the law” (Walker, 2000: 45). In Scottish case law too, there have been several unsuccessful attempts to fix vicarious liability on local police authorities for the actions of police officers (Walker, 2000). While the judicial backing for constabulary independence was primarily rooted in the context of civil damages under tort (Delict in Scots Law), the doctrine was also vigorously defended and invoked by chief constables throughout Britain to protect police operational policies from local political interference. The Royal Commission (1962) gave its backing to the judicial interpretation (para. 151: 50) and following the Police Act (1964) and Police (Scotland) Act 1967, chief constables had complete autonomy over the operational direction and control of their police forces. In essence, constabulary independence served as a ‘sacred shield against political interference, partisanship and problems of corruption’ (Reiner, 2010: 88).

Under the Police (Scotland) Act 1967, local police boards had a statutory responsibility to maintain local police forces, including funding and resource allocation. They also had powers of appointment and dismissal of chief constables, however, these powers were subject to the approval of central government. Local boards, however, were routinely criticised for not exercising their right and power to regularly ask for reports from chief constables, particularly in regard to the ‘allocation of scarce public resources’ (Oliver, 1987: 48) and providing national strategic direction (Tomkins, 2009; Laing and Fossey, 2011). The failings of the local police boards in influencing where public resources were spent, were largely because chief constables were ‘sensitive to the apparent attack on their positions’ and by extension their professional judgement (Oliver, 1987: 54; also, Donnelly and Scott, 2002, 2010; Scott, 2011). In addition to a lack of influence on police spending, local police boards were also often reluctant to ask questions regarding operational policies. Scott argues that this arrangement created a ‘very powerful position for chief constables both constitutionally and personally with almost no political intervention or democratic accountability’ (Scott, 2011: 123). In reference to police authorities in England and Wales, Reiner argues that whilst there was an obligation for chief constables to give an account of their performance annually, there was no ‘enforceable obligation on them to listen to the reply!’ (Reiner, 2013: 169). Similar state of affairs existed in Scotland, where chief constables would appear in local police authority meetings in full regalia, surrounded by senior officers, congratulating their own performance with local

councillors ‘almost applauding’ (Malik, 2017a: 221). During tripartism, the only real development towards more robust accountability of police organisational decision-making in Scotland took place through the partial application of market-based reforms (Walker, 2000: 159-162; Donnelly and Scott, 2002: 9) following the introduction of wholesale market-based principles in England and Wales (Reiner, 2010). The introduction of performance-based pay and rewards ‘nibbled at the edges’ of police operational independence (Donnelly and Scott, 2010: 84) and measures such as key performance indicators rendered the notion of operational independence as somewhat ‘illusory’ (Reiner, 2010: 233). However, this apparent diminishing of the operational independence doctrine was only true as far as the relationship between central government and chief constables was concerned. With regards key decisions such as the appointment of senior officers, whilst central government and chief constables were deemed as important players in the tripartite relationship, the local police authorities merely provided the rubber stamps (Scott and Wilkie, 2001: 58).

Despite attempts to dilute the operational independence of chief constables, through performance-based measures, the first real challenge, at least in policy terms, came as a result of the Independent Commission on Policing for Northern Ireland (henceforth, Patten Report 1999). The Patten Report contested the dominance of operational independence doctrine and argued that the term ‘independence’ should be replaced by ‘operational responsibility’ given that every public office holder was operationally responsible and not independent. The Patten Commission defined the notion of operational responsibility as such:

Operational responsibility means that it is the chief constable’s right and duty to take operational decisions, and that neither the government nor the Policing Board should have the right to direct the chief constable as to how to conduct an operation. It does not mean, however, that the chief constable’s conduct of an operational matter should be exempted from inquiry or review after the event by anyone – (Patten Report, 1999: 32)

Whilst Patten’s recommendation, and the general notion of operational responsibility emphasises the *right* of the chief constable to take operational decisions. Whether chief constables were *responsible* for operational decision-making was never a matter of contention. Matters become more complicated when considering proactive accountability of operational policing, setting strategic direction and priorities, allocation of resources and performance management. The reluctance of local police boards to interfere in operational matters and their

deference to chief constables increased with a gradual trend towards police professionalisation (Jones, 2008). Traditional claims to police professionalism, were based on ‘ownership of an area of expertise and knowledge’ (Fyfe, 2013: 408). Such ownership manifests in the ‘defining of the nature of problems’ and ‘controlling of access to potential solutions’ (Evetts, 2013: 788). Throughout tripartism, deference to chief constables as experts and knowledge-brokers in all matters of local policing delivery and strategic priorities weakened the influence of local police boards and strengthened the expansive interpretation of operational independence affording greater autonomy to chief constables.

### **The Reform Act 2012: omissions and missed opportunities**

In the lead-up to the Reform Act 2012, the issue of operational independence was not raised in official policy circles as a problem that needed a resolution (notable exception being the HMICS report by Laing and Fossey, 2011). The general wisdom within Scottish policing held that ‘decision-making in operational policing’ was ‘the preserve of the chief constable alone’ (Scott, 2011: 123) and it continues to remain so. After the 2012 Act had passed, but prior to the reforms taking effect, the matter was discussed in the Scottish Parliament’s Justice Committee. On the issue of operational independence, Andrew Laing, former HMICS, replied as such:

We are back in the muddy territory where we have always been in that regard. Members might recall that in the run-up to the 2012 act, I made a strong plea that we get a clear—or as clear as possible—determination about what I called operational independence and what John McNeill said was operational responsibility. The 2012 Act has not covered that grey area, so it still exists. (Andrew Laing, Justice Committee Hearing, 27<sup>th</sup> November, 2012: 2114)

The HMICS paper on governance and accountability explicitly stated that the existing legislation [Police (Scotland) Act 1967] was ‘frustratingly opaque on the matter of independence’ (Laing and Fossey, 2011: 9) and called for a ‘better balance’ that established clear boundaries between operational independence and the duties of those who would be responsible to hold the chief constable to account for their operational decision-making (Laing and Fossey, 2011: 10). The Reform Act 2012 does not define operational independence, and instead replicates the ambiguities that existed in the previous legislative framework. It places the ‘direction and control’ of Police Scotland under the office of the chief constable (s.17). The chief constable is also responsible for the day-to-day administration of the police. Further,

officers of any rank, including civilian staff, in exercising their functions are also subject to the direction and control of the chief constable (s.21), and it is the chief constable who is liable for any unlawful conduct by a constable in respect of their functions (s.24(1)). These powers stand in contrast with the Authority's role as the legal employer of Police Scotland and all its employees (including civilian staff) and its duty to account to the Scottish Parliament and the Scottish Government in relation to police spending, allocation of resources and strategic direction.

The vague provisions in the Reform Act 2012 demonstrate that the architects of the legislation did not feel the need to address the issue of operational independence, and their intention was to let the new stakeholders negotiate the boundaries of their own respective roles. When I asked those involved in the reform programme about a lack of clarity on operational independence, their response reflected the complexity that has surrounded this notion. It was felt that a contemporary interpretation should be left to negotiated agreement between the various actors in the new governance landscape:

You could write books and theses on it. At the end of the day, the chief [constable] has to call all the shots. Equally we live in a world where things are very interactive. Where does the line cross, depends on the society, the history, the era in terms of what is happening in the community... it has to come down to common sense and there will always be grey areas. Do you want to litigate over it? No. I think that's where it's a job for the Parliament, it's a job for the Ministers, it's a job for the Chief, it's a job for the Authority [the SPA].

(Interview: Former Minister).

The non-prescriptive nature of the 2012 Act was reiterated by a civil servant:

There wasn't something that in the end, certainly from a legislative perspective, would seem to be a neat solution. It was very difficult to find something where you could legislate because again there were different arguments... from a government perspective, the tools the government has got is legislation and then the setting up of the SPA. There was public appointments process the government ran or oversaw after that *it's down to those parties to work it out*.

(Interview: Civil Servant, emphasis my own).

This approach stands in contrast to the developments south of the border. While the Police Reform and Social Responsibility Act 2011 Act does not define what ‘direction and control’ of police forces means in practice, the Policing Protocol Order issued by the Home Office sets out the respective roles and responsibilities of the PCCs and chief constables. Rather than leaving the implementation of the legislation to be negotiated between the stakeholders, the Protocol outlines the boundaries, directing the PCC not to interfere with the operational independence of the police force and the chief constable who leads it, solidifying the independence of chief constables, their officers and civilian staff, from undue political interference. Furthermore, the scope of the powers of the PCCs were tested in a recent court case where a PCC sought to dismiss a chief constable in the aftermath of the Hillsborough report. In, *R v PCC South Yorkshire* [2017], the High Court noted that:

PCC is obliged to hold the Chief Constable to account for every function he performs. In our judgment, matters relevant to operational independence are not excluded from the scope of the PCC’s powers of scrutiny (para. 78). The Act adopts a more nuanced approach than the common law in this regard, recognising in the Protocol it introduces both the importance of operational independence and an important competing imperative, namely democratic oversight of the police. It is, in our judgment, impossible to see operational independence as being beyond the supervision of the PCC. (para. 79)

The High Court’s observations are open to further challenge and interpretation by the courts, but according to Loveday (2018a: 35) it provides ‘the first significant breach in the traditional police defence of their operational independence’. Despite the Home Office Protocol document, empirical research has shown that the PCCs have tested the boundaries on a few occasions but overall, the relationships are ‘largely positive’ (Wells, 2015: 201). In Scotland too, the boundaries of tolerance were tested in the immediate aftermath of the Reform Act 2012, during early negotiations around respective roles and responsibilities, manifesting in a *turf war* between the Scottish Police Authority and Police Scotland.

### **Operational independence following reform**

#### *The Turf War*

The formal powers of the Scottish Police Authority in relation to the maintenance of Police Scotland were subject to early contestations particularly from senior officers of Police Scotland, the civil servants and the Scottish Government (Audit Scotland, 2013; Fyfe, 2016). As part of its broad statutory role, the Authority sought to deliver all support functions including HR, Finance, ICT, and Procurement to Police Scotland by incorporating these services within its own organisational boundary. It was acknowledged by the Scottish Government that any ‘business partnering agreement’ between Police Scotland and the Scottish Police Authority, was within the scope of the formal powers of the Authority (Audit Scotland, 2013: 16). One board member suggested that the chief constable had initially agreed to such an arrangement:

The Chief Constable agreed after a lot of debate, signed an agreement with the SPA that all of the services needed to maintain policing would be under the auspices of the SPA.

(Interview: Board Member 3, Scottish Police Authority)

However, the passing of the corporate functions of Police Scotland to the Authority was perceived to come into direct conflict with the chief constable’s powers of direction and control of the police. The then Chief Constable Sir Stephen House, in giving evidence to the Justice Committee in November 2012, remarked:

Is there a 100 per cent meeting of minds on the governance structure between the Police Authority and the police service? No, there is not 100 per cent yet (...) my belief is that our agreement is that, on a day-to-day basis, the directors of finance and HR will work at the police headquarters - in, as I have put it, the same corridor as myself - and will come to my morning meetings and be part of my senior management team. –

(Stephen House, Justice Committee Hearing, 27th November, 2012: 2106-2107)

During the Justice Committee evidence session, the extent to which this turf war was about influence, in general, and not just about corporate functions became clear. The Chief Constable reminded the members that the 2012 Act places the direction and control of the ‘entire Police Service’, not just police constables, under his domain (Justice Committee, 2012: 2126).

The then Chief Constable’s insistence on integrating all corporate functions within his direction and control also reflected the desire within Police Scotland’s hierarchy to maintain their

autonomy, not just over day-to-day operational matters, but also over all other aspects of organisational decision-making. This was the understanding from within the Authority, particularly as it was felt that senior officers of Police Scotland sought to limit the Authority's *potential* influence:

Any chief constable in the legacy forces obviously had complete power over what they did with the force, so with the creation of Police Scotland I think they [Police Scotland] had a particular view on how it would be run which would just be a bigger version of the previous forces. However, the introduction of the SPA whilst it was similar to the previous joint police boards actually technically had more power in legislation and a greater oversight role.

(Interview: Executive Officer 1, Scottish Police Authority)

Despite the Scottish Police Authority having a greater governance and oversight role in statutory terms, following an intervention from the Cabinet Secretary for Justice, the Authority had to relinquish its claim to the maintenance role only two months after the reforms had taken effect (Audit Scotland, 2013: 17), weakening its position within the new tripartite arrangement. This was subsequently agreed upon by the Authority in a public board meeting, effectively rubberstamping a change in direction following a 'request' from the Cabinet Secretary for Justice (Fyfe, 2016: 174):

We now believe that it is time to move on to be a much more scrutinising, policy and strategy organisation than a delivery organisation. If you remember—in fact, I doubt that you would ever forget—we had two roles in the beginning: a maintenance role and a governance role. What we are basically saying is that the maintenance role will pass back to the Police Service of Scotland.

(Vic Emery, Justice Sub-Committee hearing, 27 June, 2013: 151-152)

Following the change in direction, the control of corporate functions was transferred over to the office of the chief constable. The turf war to decide the boundaries of tolerance had in fact shaped the new boundaries of influence, in favour of the chief constable. This episode also marked the beginning of an interventionist approach by the Scottish Government (Malik, 2017b). The consequence of ceding statutory powers so early on determined the limited influence the Scottish Police Authority would have over police governance as the new arrangements evolved.

### *Accountability deficits*

The conceptual and legal ambiguities of the operational independence doctrine aside, the practical implication of leaving this perennial problem unresolved also highlighted accountability deficits particularly in the first three years of the new governance arrangements. In public administration, accountability deficits are a manifestation of weak or inadequate mechanisms of accountability (Bovens, 2007: 462). The presence of armed officers on routine patrols in Northern areas of Scotland, with traditionally low levels of crime, caused unprecedented levels of political controversy and extensive coverage in the local and national media. The policy became operational without prior consultation with the Scottish Police Authority (Justice Sub-Committee, 2014: 481-482), or the local authorities of the areas affected. After intense media scrutiny, the senior officers within Police Scotland, including the incumbent chief constable, defended the decision as one within the operational independence of the chief constable. Iain Livingstone, the then Deputy Chief Constable and currently the Chief Constable of Police Scotland, noted that:

The Chief Constable's duty of operational independence requires him to make decisions on policing, free of political interference and to assess what is best to keep local communities safe.

(Iain Livingstone, Police Scotland, 2014)

The former Cabinet Secretary, who led on police reform, also defended this position in the Scottish Parliament:

The decision where and when to deploy resources has always been an operational matter for the chief constable, who has the power to make decisions about the necessary and proportionate use of firearms. That position has not changed with the introduction of a single force.

(Kenny MacAskill, Meeting of the Parliament, 20 May, 2014)

Similarly, the misuse of stop and search powers was identified as an issue within the operational domain of the chief constable and the policy was defended initially by Police Scotland and the Scottish Government (Murray, 2017). Other 'operational' decisions such as the removal of traffic warden support, closures of front counter provisions and the raids on

Edinburgh's previously tolerated sex-for-sale saunas, without prior consultations with the local authorities of affected areas, or the Scottish Police Authority, continued to raise question marks about the effectiveness of the new governance and accountability arrangements (Scott, 2014; Murray, 2015; Terpstra and Fyfe, 2015; Fyfe, 2016; Malik, 2018; Loveday 2018b). In the aftermath of the armed policing case, the former Scottish Police Authority Chair Vic Emery came out publicly and stated that:

The return of this phrase 'operational independence' to the airwaves is one of the more unfortunate aspects of comment over armed policing. The term is nowhere in the legislation that underpins policing. In the past many have been seduced by the desire to define the concept. They failed. I hope that we do not get distracted down that road again.

(Vic Emery, Scottish Police Authority, 2014)

The above statement presented an opportunity for a public debate on this long-standing problem. However, at a subsequent Justice Sub-Committee hearing on armed policing, the former Chair of the Authority, reversed his stance and acknowledged that the decision to deploy armed officers on routine patrols was 'within the operational independence of the chief constable, by virtue of his statutory responsibilities of "direction and control" of Police Scotland' (Justice Sub-Committee, 2014: 480).

### *Perceptions of stakeholders*

During my conversations with stakeholders, the topic of operational independence often resulted in a deep sigh, followed by a very thoughtful and contemplative reply, as if I had touched on 'something-that-everyone-knows-exists-but-no-one-quite-wants-to-talk-about'. Yet, everyone did make attempts to describe or define it. If placed on a spectrum, the definitions ranged from 'everything in the domain of the chief constable is an operational matter', through the age-old 'distinction between policy and deployment', to the view that 'chief constable, like any public figure is accountable and therefore all policy decisions that impact communities should be open to scrutiny and challenge'. The description closest to the traditional view of operational independence, came from a senior officer:

Well operational independence obviously is one subject we don't really like to discuss as you well know but operational independence for me is allowing

the chief constable (...) and command team to make those decisions that are decreed from all the information and intelligence available, to be the right decision.

(Interview: Senior officer 1, Police Scotland)

While the above quote from a senior officer equates operational independence to professional judgement and occupational expertise of senior officers as per the traditional claims to police professionalism, the board members of the Authority did not have a consistent view emphasising the inherent ambiguities associated with operational independence:

... there are such things as tactical operations which we would have no business knowing about (...) I don't know because depending on the subject there would be different levels of interest and ultimately it depends on the impact in the end. So, I suppose policy vs deployment.

(Interview: Executive officer 1, Scottish Police Authority)

Well there's a question! (...) I don't think you can define it easily. It's almost a case by case thing. We have had again in the public domain issues played out where the Chief Constable has felt that something was an operational matter and we have felt that it wasn't operational, it was strategic.

(Interview: Board member 2, Scottish Police Authority)

Where there is a policy decision, it is absolutely legitimate for the government and politicians, and parliament, and the local authorities and for the SPA, to have a view - and the police must give due regard to that view. I think the police would say it's all operational, it's not, its policy, sending out armed officers with guns was a policy decision.

(Interview: Board member 3, Scottish Police Authority)

The responses above reflect the traditional demarcation between 'deployment' and 'policy' or 'operations' and 'strategy'. Policing scholars have routinely challenged this false distinction and consistently held that the perceived boundaries between policy and deployment and operations and strategy are blurred (Lustgarten, 1986; Walker, 2000; Reiner, 2010, 2013). A

more measured description of the operational independence doctrine was put forward by another senior officer:

There are clearly issues that the chief and the chief alone has to take responsibility for, when we are talking about sensitive policing tactics, or the dealing with serious and organised crime or terrorist matters, child protection, (...) There's legislation to prevent us talking about them so this isn't mythical, there is a real reason there are checks and measures there to make sure that there's one person who has that responsibility (...).

(Interview: Senior officer 2, Police Scotland)

The use of the term 'operational responsibility' is in keeping with the long-held position propagated by the Patten Report (1999) which has been consistently supported by HMICS (HMICS, 2014; 2019b). In the aftermath of the armed policing debate, the Scottish Government, the Authority and senior officers of Police Scotland negotiated a Joint Engagement Protocol, emphasising prior engagement between the tripartite stakeholders in relation to *any* operational policy that may adversely affect communities. Whilst the Engagement Protocol was a step in the right direction, tensions continued to exist between successive Authority chairs and senior leadership of Police Scotland.

Following a change in leadership at both the Authority and Police Scotland, the incoming chair was tasked by the Minister to conduct a review of police governance arrangements. In his report, Andrew Flanagan wrote:

While the SPA is often referred to publicly as a watchdog, it has none of the regulatory powers or sanctions normally associated with a watchdog. It has to govern essentially through its relationships and influence rather than having a direct ability to instruct. This is intentional, as it allows the Chief Constable to carry out their statutory duties and maintain their operational independence. I do not believe it appropriate to request additional powers but the SPA should through its communications be clearer about its function and where regulatory powers actually rest.

(Flanagan, 2016: 16, para. 69)

Despite growing concerns around a lack of clarity over the functions of the Authority, under its second chair, the Authority's business increasingly shifted away from the public and

towards private meetings and informal behind-the-scenes style of governance which led to severe criticisms over a lack of transparency and openness from the Scottish Parliament and HMICS (2017). Following the unceremonious departures of Andrew Flanagan, and the then chief constable Phil Gormley (BBC, 2018), the new chair of the Authority, former MSP Susan Deacon, also defended the notion of operational independence, using the preferred term ‘operational responsibility’ on behalf of the Chief Constable. The Chair noted that:

The operational deployment of police officers is a matter for the Chief Constable and it is important that his operational responsibility is understood and respected.  
(Susan Deacon, Scottish Police Authority, 2019)

Shortly afterwards, Professor Deacon revisited her views following her departure (the third chair of the Authority to leave the post abruptly). In writing to the Cabinet Secretary for Justice, she noted that:

The realities of the day-to-day relationships between both the Authority and Government, and the Police Service and Government merit examination. In my experience, the close and multiple channels of communication which have become the norm are, at best, inefficient and confusing and, at worst, compromise the separation that was intended. The SPA and Police Scotland are, in some ways, ‘joined at the hip’.  
(Deacon, 2020: 6-7)

The concerns highlighted by the former chair of the Authority raise the spectre of regulatory capture, whereby the body responsible for governance and regulation starts to serve the interests of those being regulated/governed rather than the wider public interest (Zinn, 2002; Kwak, 2014). While the turf war between the Authority and chief constables and senior officers has played out publicly, the role and influence of the third key stakeholder in the ‘new’ tripartite arrangement has gradually expanded.

### **The role of the civil servants**

The Reform Act 2012 gives considerable powers to the Cabinet Secretary for Justice who is responsible for appointing the chair of the Authority and has powers to influence the final composition of the Board. The Scottish Ministers also have formal powers to give directions to the Authority, so long as those directions are not related to police operations – maintaining

the legislative ambiguities around operational independence. These powers have been used time and again (informally) since the Reform Act 2012 came into effect to the detriment of the Authority's own institutional autonomy. During the armed policing and stop and search controversies, some Board members raised concerns about the role of the Minister in giving instructions to the Authority. Some of the instructions related to the way the Authority should fulfil its functions of holding the chief constable to account with an emphasis on 'light touch scrutiny' (Malik, 2017b). The role of the civil servants and the involvement of Scottish Government's 'Police Division' was brought to the fore during the contested proposals of the merger of the British Transport Police with Police Scotland (Murray and Malik, 2019). Civil servants also regularly attend both private and public meetings of the Authority and have been involved in discussions with regard to the allocation of funding, strategic direction and other key issues such as the merger of the British Transport Police and Brexit preparations. On the latter issue, HMICS found that the Authority was bypassed during negotiations between Police Scotland and the Scottish Government to request mutual aid funding as part of its Brexit contingency planning (HMICS, 2019a: 25).

### **Discussion: redrawing the boundaries**

It is clear since the initial *turf war*, the Scottish Government and the chief constable have emerged as powerful players in the 'new' tripartite governance arrangement. The Scottish Police Authority, on the other hand, has gradually deferred all matters related to police organisational policies, long-term strategy and performance management to Police Scotland and the Scottish Government. Police Scotland has also gradually established internal corporate governance structures parallel to the Authority, with internal oversight and decision-making over Finance, IT, Estates, Procurement, Fleet and HR. The Reform Act 2012 places a statutory responsibility on the Scottish Police Authority to prepare a strategic police plan once every three years (s. 34(8)(a)). However, the Authority seemingly has ceded this responsibility to Police Scotland and the Scottish Government, reframing its role as a collaborating partner. The most recent strategic plan was developed in partnership with Police Scotland and aptly labelled 'Joint Strategy for Policing 2020'. A revised governance framework outlining the roles and responsibilities of the Authority and the Scottish Government notes that:

It is expected that throughout the process of developing the plan, discussion should take place with the Scottish Government's Sponsor Team with regard and due consideration given to any comments offered.

(Scottish Police Authority, 2022: 5)

In an inspection of policing priorities and strategic planning, HMICS noted that the Scottish Police Authority had no engagement with Police Scotland over the discussing or setting of national priorities (HMICS, 2018: 5, para.38). The gradual dilution of the ‘governance’ and ‘maintenance’ role of the Authority has also hampered its ‘accountability’ role. Police Scotland continues to exercise operational independence and professional autonomy over key issues such as the performance framework, strategic objectives, policing priorities, and arming officers with tasers. The Scottish Government has expanded its involvement in broader decision-making around strategic direction and key issues such as the merger of the British Transport Police and Brexit contingencies and it maintains a shadow of hierarchy through allocation of funding. Meanwhile, the Scottish Police Authority’s role and influence in the governance landscape remains ambiguous. One of the primary reasons for this gradual dilution of its role and deference to the Scottish Government and Police Scotland is a lack of capacity. Ever since its inception, the Authority has relied upon secondments of staff both from the Scottish Government and Police Scotland (Murray and Rennie, 2017). Susan Deacon noted:

... the degree of reliance which the SPA has on police support and resource, including the operation of its corporate support functions. SPA staff are classified as police staff, IT systems are shared and financial decision making is intertwined. Accountabilities are blurred and it should be noted that this goes well beyond the issue of the Accountable Officer function which has been the subject of some considerable attention.

(Deacon, 2020: 7)

HMICS also noted concerns about the provision of corporate resilience functions offered by Police Scotland to the Authority, led by an Assistance Chief Constable and seconded officers from Police Scotland:

HMICS accepts the positive intentions in bolstering SPA development resources. It is a matter for the Chief Constable to decide how officers are best deployed however HMICS would have concerns about the prolonged use of experienced senior police officers in this corporate capacity.

(HMICS, 2019a: 16, para. 47)

As propagated by the Patten Report (1999), it is recognised without contention there are such matters that will remain within the scope of duties and operational responsibilities of the chief constable. The crux of the issue is whether governance and accountability bodies have the influence and the capacity to challenge the ‘unbridled professional dominance’ of police organisations (Lustgarten, 1986: 170). In ideal terms, this can be achieved by scrutinising police operational policies proactively and retrospectively, setting strategic direction and priorities by counterbalancing police expertise, and implementing robust mechanisms of accountability including performance management and financial oversight. Under the current arrangement, the Authority continues to lack influence amidst a growing risk of regulatory capture (being too close to the police) and insufficient autonomy and capacity (being bypassed on key issues or being perceived as an extension of the Scottish Government). New boundaries of influence are needed in order for the Authority to bolster its capacity and to fulfil its legislative duties more effectively.

## **Conclusion**

By drawing on Scotland’s pre- and post-reform police governance arrangements, this paper has shone a spotlight on the status of the operational independence doctrine in the era of the Scottish Police Authority. The doctrine, underpinned by police professional autonomy, has gradually expanded into a broad occupational shield against legitimate external accountability of police organisational decision-making. During tripartite governance arrangements, chief constables would routinely distance organisational decision-making from local police boards. Whilst the Reform Act 2012 introduced widespread changes to the Scottish policing landscape, the expansive interpretation of operational independence was not addressed by the legislation or a subsequent working protocol. The operationalisation and implementation of the legislation was left to the stakeholders to negotiate their own respective boundaries of tolerance. This omission has gradually diminished the role and influence of the Scottish Police Authority and the lop-sided structure of the previous tripartite arrangement is mirrored in the current governance set up. Ten years since the Reform Act 2012 came into effect, the Authority does not have the organisational capacity to play a meaningful and proactive role in the governance landscape. Bolstering its capacity, and creating distance from the Scottish Government and Police Scotland would enable the Authority to counter operational independence more effectively and deliver robust governance and operational accountability.

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