THE ENIGMA OF A POLICE CONSTABLE'S STATUS

I. INTRODUCTION

The reconciliation of a Police ideal within a democracy raises a problem which has baffled legislators, legal writers and sociologists alike.

The incompatible concepts, of a Police Service requiring a degree of independence with which to exercise their function, the tripartite machinery of Government (the Crown, the Executive and Parliament) responsible for the efficient workings within a state and accountable for their malfunctioning, and the citizen demanding his constitutional freedoms and rights pose problems which for the most part still remain unsolved.

In an attempt to clarify the position a Royal Commission of Inquiry in Great Britain was appointed in 1959, "to review the constitutional position of the police throughout Great Britain, the arrangements for their control and administration . . . the status and accountability of members of police forces" . . . [1]

The results of the Commission of Inquiry, culminating in legislation,[2] effected little change in police functioning and administration. However, in response to the important issues raised during the inquiry, there followed in the wake of the Commission, a surfeit of legal[3] and sociological[4] writing, examining the role of the policeman in the community and the many facets peculiar to his function. New Zealand escaped this flood of commentary[5] and surprisingly little has been written on the status and accountability of the New Zealand Police.

The purpose of this writing, therefore, is to examine the degree to which the Police in New Zealand are independent and the extent to which they are answerable to authority.

II. THE NOTION OF POLICE INDEPENDENCE

> The policeman is nobody's servant . . . He executes a public office under the Law, and it is the Law . . . which is the policeman's master.[6]

It is this notion which has led to the relatively modern thesis

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1. *Great Britain Royal Commission on the Police Final Report* (1962; Cmnd. 1728), 1.
2. Police Act, 1964.
3. E.g. principally G. Marshall, *Police and Government* (1965).
4. E.g. M, Banton, *The Policeman in the Community* (1964).
5. Apart from one notable exception: D. Chappell and P. R. Wilson, *The Police and the Public in Australia and N.Z.* (1969).
6. Sir John Anderson, "The Police" (1929) 7 Public Administration 192.

that a policeman in the office of constable enjoys a degree of independence in the exercise of powers which, derived from the common law, are original and not delegated.[7] His relation therefore to Central Government, Local Government, the Judiciary and his superiors is characterised by "vagueness".[8]

This line of reasoning underlying the report of the Royal Commission on the Police 1962 in England, was based on the historical common law derivation of a constable's office and power, and on a review of subsequent legislation the majority of the Royal Commission recommended that the independent exercise of police discretion was paramount in the duty of law enforcement. Consequently, the Royal Commission viewed a centrally controlled Police Force as a serious threat to the immunity of the Police from Governmental control in the exercise of their discretionary powers. Yet such a conclusion admits inconsistency, for example, the Commission had greatly emphasized that a constable's powers were derived from the common law yet could only conclude that they "differ little from those of ordinary citizens".[9] The notion of police independence was raised because of the "original" nature of the constable's powers from the common law and yet in the course of reappraising the historical development of the Police, much emphasis was given to the era when the early parish constables were *subordinate* to the Justices of the Peace. In fact, there is little evidence supporting the commonly held theory that the Police Constable has always enjoyed a measure of independence in the exercise of his powers.

III. HISTORICAL INCONSISTENCIES

A. Subordination to Justices of Peace

In *Hawkins, Pleas of the Crown*[10] "it is said, that a constable was at the common law a subordinate officer to the conservators of the peace, and consequently since the office of such conservators hath been disused, and justices of the peace constituted in their stead, it hath always been holden that the constable is the proper officer to a justice of the peace, and bound to execute his warrants . . . "

At a time when the community constables failed to secure good order within the towns, the office of Justice of the Peace was established and "from about the end of the fourteenth to the second quarter of the nineteenth century the justice of the peace was the superior, the constable the inferior, conservator of the peace".[11] E. Bittner[12] goes so far as to suggest that there was a general principle whereby law enforcement officers worked under their judges. Thus in the

7. *Royal Commission on the Police supra* at p. 11.
8. Ibid., at p. 15.
9. Ibid., at p. 11.
10. Hawkins, *Pleas of the Crown* (8th ed. 1824) ii, 98, s. 35.
11. *Royal Commission on the Police supra* at p. 12.
12. *The Functions of the Police in Modern Society* (1970) at p. 31.

19th century "the licensing of some police operations invariably involved the elevation of the head of the agency to the post of Magistracy. This was true for all these kinds of agencies of which the Bow Street Runners were the best example". It finds its counterpart today in the responsibility of a constable to execute the legal processes issued from the Magistrates Court (Section 38 Police Act 1958).

How is this subordination to be reconciled and equated to the notion of independence? As one article tactfully suggests,[13] "To some extent this subordination of the constable to a higher authority appears to have eroded the constable's original independence".

B. The Equivalence of the Powers of Police and Citizens

What was the nature of a constable's *original* independence? Before the days of the Justice of the Peace the role of constable was played by every citizen within the village, each performing his duty to assist in keeping the peace. This function, later performed by one elected member of the community was termed, "watch and ward".[14] It is difficult to ascertain the extent of the early constable's powers. His prime duty was to keep the peace[15] and according to Hawkins:

> As to the nature of this office, there seems to be no doubt but that the original institution of it was for the better preservation of the peace; for which purpose a constable is said to be authorised by the common law to arrest felons, and also all suspicious persons that go abroad in the night, and sleep by day, or resort to bawdy houses, or keep suspicious company, and to suppress affrays.

Yet these are also the powers of a private citizen. A distinction was said to lie between breaches of the peace within the view of a citizen and those out of his view, the latter over which a citizen was powerless. The distinction in comparison to a constable's powers is tenuous, for similarly his powers were curbed.

> It is difficult to find any instance wherein a constable hath any greater power than a private person over a breach of the peace out of his view; and it seems clear, that he cannot justify an arrest for any such offence, without a warrant from a justice of the peace.[17]

It is hard to reconcile historical evidence which equates a constable's position with ordinary citizen's powers, subordination to a Justice of the Peace and the subsequent obligation to execute warrants

13. V. Gillance and A. N. Khan, "The Constitutional Independence of a Police Constable" (1975) 48 Police Journal 55 at p. 57.
14. Ibid., at p. 57.
15. *R.* v. *Terry, Furnes and Sturges* (1668), 2 Keb. 557.
16. Hawkins, *Pleas of the Crown* (8th ed. 1824) ii, 98, 34.
17. Ibid., at p. 129.

under his hand with the assertion that a constable's powers are original, not delegated and as such, have been exercised with a highly esteemed degree of independence. This anomaly has led Gillance and Khan to state:[18]

> An examination of history shows there was no clear boundary between the independent common law powers of the constable and legal orders given to him by a J.P. The office of constable appears to have combined common law powers and lawful instructions from legitimate sources with no contradiction between the two.

IV. MODERN DAY ANOMALIES IN THE THEORY OF INDEPENDENCE

A. Concepts of "Independence" and "Service".

Notwithstanding these inconsistencies, the majority of the Royal Commission recommended that the present system in Great Britain should remain under the admininistrative supervision of the local watch committees without any threat to an independent exercise of discretion from outside influence or pressure.[19]

However, the Royal Commission in reaching their findings in the matter of a constable's independence in the exercise of his discretionary powers, was greatly influenced by the decision of the Court of Queen's Bench in *Fisher* v. *Oldham*.[20] In that case the plaintiff Fisher, sought to make the Oldham Borough (also the Police Authority for Oldham) liable for the actions of the Oldham Police who wrongfully arrested the plaintiff and detained him. He brought an action for damages for false imprisonment. The Court there held per McCardie J. that the Oldham Borough was not liable in law for the arrest and detention of the plaintiff, as the Police in effecting the arrest and detention were not acting as the servants or agents of the Borough but were fulfilling their duties as public servants and officers of the Crown. The Court took the view that if the Borough was to be liable for the felonies and misdemeanours of the Police, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. It envisaged the control being exercised in the form of a command to the constable who had arrested a man for felony to release him and the constable would be bound to adhere to the command. Such a situation in the eyes of the Court was abhorrent. Thus the preservation of a police officer's independence from outside control was crucial to at least his conceptual role if not his actual role. The following passage from *Enever* v. *The King* was cited with approval by the Court:

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18. Note 13, at p. 58.
19. *Royal Commission on the Police supra* at p. 140.
20. [1930] 2 K.B. 364.

> A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority.[21]

The anomalies resulting from the example above mentioned supposedly supporting the conclusion reached by the Court are manifest. Firstly, as G. Marshall points out,[22] this example is insufficient and of too gross a nature to warrant so general a conclusion. It would be the duty of a constable to ignore any attempt by the watch committee to interfere with his duties if it amounted to an illegal order. Secondly, the Commission in its report had followed its discussion of *Fisher* v. *Oldham* with a consideration of the status of ranks below chief constable in respect of quasi-judicial matters, i.e. where a constable relies on his own discretion and knowledge of the law. "In matters of this kind," they said "it is clearly in the public interest that a police officer should be answerable only to his superiors in the force . . . His impartiality would be jeopardised, and public confidence in it shaken, if in this field he were to be made the servant of too local a body".[23]

These findings seem inconsistent. The Commission had referred to the precarious position of a constable "as a member of a disciplined body subject to the lawful orders of his superior officers in the hierarchy"[24] From this relationship of a constable to his superior officer it is as equally plausible to assume that a constable would be subject to an illegal order from a superior officer as may issue from a Watch Committee. However, an important distinction has here been blurred. A distinction should be drawn between orders that are purely administrative and those that relate to a constable's legal responsibilities.

In his capacity as an officer of the law, the constable is still entitled to exercise his discretion over and above the recommendation of his senior officer. This point was clearly illustrated in a recent case in England.[25] There, one P.C. Joy, contrary to the decision of his senior officer not to prosecute, laid an information as a private person against a Member of Parliament for refusing to take a breath-alyser test. In due course the defendant was found guilty and convicted. The principle emerging clearly from this action is "that all members of British police forces, regardless of rank, have one thing in common — they each hold the common law office of constable".[26] The fact that this distinction was overlooked by the Royal Commission can be attributed to the confusion surrounding the concepts of "independence" and "service". Geoffrey Marshall has pointed to this confusion[27] and illustrated the distinction with an example of the

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21. (1906) 3 C.L.R. 969 at p. 975.
22. G. Marshall, *Police and Government supra* at p. 37.
23. *Royal Commission on the Police supra* at p. 26.
24. Ibid., at p. 24.
25. *P. C. Joy* v. *Rees-Davies* (1974) unreported decision cited in K. Gillance and A. N. Khan's article *supra.*
26. Ibid., at p. 56.

members of the armed forces who have the right and duty to exercise their discretion and disobey illegal commands from their superiors. He concludes:

> the independence involved in a right to reject legal orders carries no implications about independence in the sense of an immunity from legal orders.[28]

In New Zealand these concepts of "service" and "independence" have distinct application . Under s.30 of the Police Act 1958 every member of the Police must obey any general instruction issued by the Commissioner. This stipulation issuing from the highest echelon of a hierarchical body is an inherent attribute of service.

On the other hand the Crimes Act 1961, s.315 vests a constable with a power exercisable at his own discretion quite apart from considerations of "service".

B. The Implications of Central Control

Dr A. L. Goodhart in his dissent to the Report[29] attacked the majority's line of reasoning stating emphaically that the purview of the historical status of the police constable was misleading and lead to confusion.

> Whatever may have been the situation in regard to parish constables in the eighteenth century, the Metropolitan Police Act, 1829, the Municipal Corporations Act, 1935, and the County and Borough Police Act, 1856, and the regulations made under their authority make it clear not only that he is subject to orders, but that he can be punished if he refuses to obey them . . . The suggestion that in some form or other the status of the police constable can be regarded as an argument against placing the provincial police force under central control can, therefore, find no support either in history or in law.[30]

The very existence of a centrally controlled police force as in New Zealand lends support to Dr Goodhart's dissent and verifies the validity of his statement. However it could be said that this difference in police organisation between Great Britain and New Zealand arose from the intrinsically different ways in which the two police forces developed, thus affecting the nature of the constable's common law powers in each country. Geoffrey Marshall in his book, *Police and Government* saw little in statutes and commentaries to support the theory of police independence and he says:

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27. G. Marshall, "Police Responsibility" (1960) 38 Public Administrtation pp. 213-226.
28. Ibid., at p. 214.
29. Ibid., at p. 157.
30. Ibid., at p. 160.

"The office itself had its origins in military functions representing a 'fusion of popular authority'."[31]

In view of New Zealand's early development, the military connection is pre-eminent. The British parish constable system failed in New Zealand and was followed by an Ordinance in 1846 for "the establishment, maintenance and discipline of an armed Constabulary Force". The first national police force was established under The Armed Constabulary Act 1867 having two branches, the field force and the police. Both branches were involved in fighting the Maori Wars and doing public works, but more importantly "both branches were commanded by army officers" and it was not until 1898 that "the first civilian police commissioner was appointed".[32] This connection of the police function with the militia could rebut the inference of a common law tradition of police independence in New Zealand. If this is so, then the apparent anomaly of a nationalised police force in New Zealand would be easily reconcilable. However, on the passing of the English Laws Act 1858[33] all laws existing in England as in 1840, were deemed to be in existence and in force in New Zealand. Consequently, the powers and common law traditions purportedly befitting the office of a British constable would apply to a New Zealand constable. Under these circumstances the existence, then of a centrally controlled police force in New Zealand composed of independent constables presents at once a dichotomy in the theory of police independence. It would also follow from the arguments presented to the Royal Commission in Great Britain[34] that a national police force would be under greater surveillance and strict Parliamentary supervision. The accountability of the Police Force in New Zealand to Parliament will be examined in more retail in this article, but suffice to say that a historical survey of the development of the New Zealand Police Force contributed little to an analysis of a constable's present constitutional status or accountability.

C. Independence as "Fiction"

That the whole notion of police independence is based upon a confusing and oftentimes inconsistent historical argument becomes apparent when an enigma such as the nationalist police force exists in New Zealand. This is amply illustrated by the paradoxical problems which beset the Royal Commission when they recognised the need for external as well as internal controls of the police. As I. T. Oliver says,[35] however, it would be more correct to say that the notion of independence is a relatively "modern fiction" and does little towards defining the constitutional status of the constable. For all the fears of a nationalised police force and the visualised external controls.[36]

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31. Note 3, at p. 21.
32. Chappell and Wilson, *The Police and the Public supra* p. 17-18.
33. Now amended by the English Laws Act 1908 s. 2.
34. Supra at p. 40, "The case for a unified or 'national' police service".
35. *Royal Commissio non the Police supra* p. 40 *et seq.*

The status of the New Zealand police is best gauged by assessing the controls on the relative independence of the constable.

V. POLICE ACCOUNTABILITY

A. Relationship with the Crown

> Prima facie therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power . . . They [the Police defendants] were fulfilling their duties as public servants and officers of the Crown . . .

This finding by McCardie J. in *Fisher* v. *Oldham* has been criticised by Geoffrey Marshall[37] in that the basis for this finding was a misreading of the case, *Coomber* v. *Berkshire Justices*.[38] McCardle J. thought that the ratio decidendi of that case was that the police were the servants of the Crown and not of the local authority, as restated in *Metropolitan Meat Industry Board* v. *Sheedy*.[39] However, in both these cases, the claims were for a share of the financial immunity of the Crown. In the former case, the claim was based on tax exemption for Government Buildings, a part of which was used by the Police Department. The criticism levelled at McCardie J's. assumptions seems justified in that, although Departments other than the Police Department may share in the financial immunity of the Crown, similar observations have not been made concerning the master-servant relationships between the Crown and these other bodies.[40]

It would seem therefore that the decision in *Fisher* v. *Oldham* was reached in an attempt to exempt the Watch Committee from a master-servant liability for police action and to establish police independence of the English local authorities in view of the increasing vagueness as to Local Government liability.[41] In so doing, the Court justified its conclusion by saying the Police were Crown servants, without paying heed to the long term repercussions of this statement. In a preceding decision of *Enever* v. *The King*,[42] an attempt had been made to modify the extent of Crown liability. The Court there held the Crown would only be liable on those occasions when the constable was not acting on his own authority but on a delegated authority from the Crown. However, this distinction was obviated in *Fisher* v. *Oldham*.

The ramifications of the Crown-servant finding in *Fisher* v. *Oldham* were examined in *Attorney-General for New South Wales* v. *Perpetual*

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35. *Royal Commission on the Police supra* p. 40 *et seq.*
37. G. Marshall, *Police and Government supra* at p. 39.
38. (1883) 9 App. Cas. 61.
39. [1927] A.C. 899.
40. *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343.
41. See scope of cases referred to in *Fisher* v. *Oldham supra.*
42. (1906) 3 C.L.R. 969.

Trustee Company,[43] a situation in reverse where the Crown claimed for the loss of service of a policeman who was injured while on duty. The Crown argued that a claim for loss of service was available where the services lost were those of a police constable, *(per quod servitium amisit)* acting in the employ of the Crown. After reviewing the authorities, the Privy Council came to the conclusion that:

> there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the state which he is said to serve. The constable falls within the latter category. His authority is not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory right independently of contract.[44]

During the course of judgment, certain observations were made concerning the decision of the *Commonwealth* v. *Quince*.[45] There it was decided that the Crown could not recover for loss of services of a member of the Royal Air Force. The Court in *Attorney-General for New South Wales* v. *Perpetual Trustee Company* concurred in holding that "the case of the constable is not, in principle, distinguishable from that of the soldier. Certain differentiating features . . . cannot affect the position".[46]

The equation of military standing with police status somewhat vitiates the purity of the notion of independence solely for the Police and has interesting implications for New Zealand, in light of its early police history.[47] The differences that have been drawn between the two broad categories of military service and civil service,[48] and the attendant repercussions on Police status have led to a unique yet viable definition of the relationship between the Crown and the Police.

In *Ryder* v. *Foley*[49] a constable brought an action for wrongful dismissal from the force, without being afforded an opportunity of speaking in his own defence. Important observations were made regarding the contracts entered into by civil servants and the similarities between military and police service. The argument was centred on the idea that if by his oath, a constable entered into a contract with the Crown, his employment could not be terminated without a charge being made against him. The Court said that it was formerly thought that there could not be a contract in respect of military service, as there must be a right of the Crown to terminate employment for the

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43. [1955] A.C. 457; [1955]1 All E.R. 846.
44. Ibid., at p. 489, 490.
45. (1944) 68 C.L.R. 227.
46. [1955] A.C. 457 at 489 per Viscount Simonds.
47. See previous discussions under "Notion of Police Independence".
48. See for further discussion Blair, "The Civil Servant — A Status Relationship?" (1958) 21 M.L.R. 265.
49. (1906) 4 C.L.R. 422.

benefit of the state. However, this reservation extends to all civil servants:

> continued employment of a civil servant might in many cases be as detrimental to the interests of the State as the continued employment of a military officer.[50]

It was this consideration that lead the Court to consider carefully the contractual implications of a constable's oath — the conclusions of which have been followed in New Zealand.

But firstly, let us look at the oath:

> Section 37 of the Police Act prescribes the oath to be taken: "I, A.B., do swear that I will well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until *I am legally discharged;* that I will see and cause Her Majesty's peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God."

In *Power* v. *The King*,[51] following *Ryder v. Foley*, it was held that although a constable may enter into a written agreement with the Queen, there is no corresponding contract made by the Queen to employ him as a constable. "The contract so entered into appears to be a unilateral one only".[52]

This principle is embodied in s.37 sub. 2 of the Police Act 1958, "that agreement shall not be . . . annulled for want of reciprocity".

Thus every member of the Police holds his tenure of office at the pleasure of the Crown and as such an action will not lie against the Crown for wrongful dismissal.[53]

Yet this conclusion appears to conflict with s.35 of the Police Act 1958 which gives the *Commissioner* the power to dismiss any constable, or with Ministerial approval, any commissioned officer. The contradiction can perhaps be best explained in terms of an extension of the Commissioner's *administrative* powers enabling him to control an efficient force. (These powers are to be viewed in direct contradistinction to his powers as an officer of the law — a status enjoyed equally by all members).[54]

As a recognition of the Commissioner's administrative powers, s.6 (4) of the Police Amendment Act 1973 allows the dismissee to

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50. Ibid., at p. 444 per Barton, J.
51. [1929] N..ZL.R. 267.
52. Ibid., at p. 283.
53. *Ryder* v. *Foley* supra and *Power* v. *"The King"* [1929] N.Z.L.R. 267.
54. See previous discussion under "Notion of Police Independence" and the distinction drawn between "service" and "independence".

make written or oral submissions to the Commissioner as to why the dismissal should not take effect and s.36 of the Police Act 1958 allows for an appeal against dismissal.

It is suggested that these sections illustrate the practical precautions available in the event of improper exercise of the Commissioner's powers. This is supported by the decision in *McConnell* v. *Urquhart and Another*[55] where the Commissioner had dismissed a constable for breach of Police Regulation without giving him the opportunity of a hearing. The Court was adamant that the Commissioner should observe the procedure laid down by the Police Regulations and the Police Act and condemned his summary termination of the constable's employment. The Court was clear in its reasoning.[56]

> the whole trend of the relevant legislative changes is to increase the security of tenure of members of the force by affording them the redress of being heard in answer to the imposition of any penalty, including termination of office . . .

The right to appeal thus becomes the differential between the apparent conflict of the administrative function of the Commissioner to dismiss, (with the protective controls drafted into the legislation) on the one hand, and the blanket unilateral contractual right of the Crown to dismiss on the other. But rather than remaining significantly counterpoised, the Commissioner's function complements the overriding contractual right of the Crown, by operating firstly at an administrative level to maintain an effective force, with the ultimate sanction of the Crown's unilateral right of dismissal still remaining paramount.

It will be noted that under s.6 of the Police Act 1958, the Commissioner, each Assistant Commissioner and each Superintendent shall hold office during the pleasure of the Governor-General — "the constitutional representative of the Queen."[57] This has an important bearing on the constitutional status of the police in that such a right vested in the Crown impinges on the totality of police independence. That the Crown should preserve this right, was firmly upheld in *Deynzer* v. *Campbell and Others*.[58] There it was said that the Crown as employer may dismiss or transfer an employee as "regard . . . for the welfare of the State must at all times be paramount in determining the relations of the Crown and the public servant."[59]

Thus, police independence in this country, at least, may be said to be a subordinate consideration when the welfare of the State is in possible jeopardy. Crown intervention, in the context of power to dismiss can therefore be seen as an effective backstop to the

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55. [1968] N.Z.L.R. 417.
56. Ibid., at p. 424.
57. S. A. de Smith, *Constitutional and Administrative Law* (2nd ed. 1973) at p. 657.
58. [1950] N.Z.L.R. 790.
59. Ibid., at p. 810 and see also C. D. Beeby, "The Relationship of the Crown and Its Servants" (1960) 3 V.U.W.L.R. 1.

growth of a police state — a matter considered by the British Royal Commission.

The unilateral contract has a further effect on the policeman's constitutional status. In the context of the oath there is the phrase:

> "I will well and truly service . . . UNTIL I AM LEGALLY DISCHARGED"

and in s.16 there is a stipulation that no member of the Police may resign his office without one month's notice and unless the resignation is made in accordance with the provisions of the section, the member is held to have deserted. In addition by sub. (2) the agreement shall not be set aside, cancelled or annulled for want of reciprocity.

The significance attached to these provisions is in part due to the effect of the unilateral contract and in part, to the service, police render the Crown.

Just as the policeman enters the service of Her Majesty, he must wait at the pleasure of the Crown for assent to his resignation.

> by his oath and agreement every member of the force . . . is bound to serve on the terms there laid down and he cannot by himself terminate his service . . . [Therefore] the contract is entirely a unilateral one, that, as long as a man remains in the service he is bound by it, and it can only be determined either by cancellation in the terms set out in the section by the Commissioner, acting for the Crown, or by the Commissioner being willing to accept his resignation.[60]

The importance attached to a policeman's office bears witness to the fact that a policeman enters into a special service —

> The administration of justice both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of Government . . . [and] these functions do, of common right, belong to the Crown.[61]

It is important at this stage to note that while a policeman's oath contains the word "serve" and it is established he has entered into a unilateral contract, the significance of a master-servant relationship with the Crown does not attach. The word "serve" and "service" receive the same connotations as defined in *Attorney-General for New South Wales* v. *Perpetual Trustee*,[62] namely that they "may be used to describe one side of a relationship that is not that of master and servant." It is also noteworthy that many people take an oath of allegiance but are not termed public servants, e.g. Magistrates and Judges.

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60. *Ryder* v. *Foley supra* at p. 439 per Barton, J.
61. *Coomber* v. *Justice of Berks* 9 App. Cas. 61 at p. 67 per Lord Blackburn.
62. [1955] A.C. 457 at p. 488 per Viscount Simonds.

However, this explanation does appear to conflict with the statement made in *Power* v. *The King*[63] that "In New Zealand all police officers are servants of the Crown," and also contradicts G. Marshall's statement[64] that under the New Zealand Crown Proceedings Act 1950 "police officers are in act in a master and servant relationship with the Crown and their employer is open to suit", whereupon he refers to *Ellis* v. *Frape*[65]. The exact position of a New Zealand police constable with the Crown therefore needs, and is, capable of further definition.

It is this writer's respectful opinion that the law is correctly stated in *Osgood* v. *Attorney-General.*[66] The plaintiff, Osgood, brought an action against the Crown claiming damages for a constable's unlawful assault and false imprisonment.

The Crown pleaded a "novel" defence, exonerating the Crown from vicarious liability for the constable's actions, since, like all other constables, he was not a servant or agent of the Crown. After commenting on the important function which the police perform and the constitutional status of the Commissioner, the learned Magistrate relying on *Attorney-General for New South Wales* v. *Perpetual Trustee* said,

> "It would appear . . . that police constables too hold a . . . peculiar position [removing] them from the ordinary category of Crown servant."[67]

This was followed, however, by a careful analysis of the Crown Proceedings Act 1950, the object of which was "to equate the Crown with a private person for the purpose of tortious liability" . . .[68] In particular three important observations were made on s.6 (3). First, it can be considered as an extension of the Crown's liability, quite apart from the specific servant-master type relationship outlined in s.6 (1). (i.e. Where the tort feasor is a distinct servant or agent of the Crown). Secondly, that "Section 6 (3) can be read to show that liability does not depend on the nature of the act but rather to relate to the circumstances which led the servant to perform it"[69] and this overcomes the decisions in *Enever* v. *The King*[70] and *Baume* v. *The Commonwealth*[71] in that it does not restrict the Crown's vicarious liability to specific acts of the employee, in which the employee may be said to be acting specifically on the Crown's authority, but covers the overall liability attached to such employment.

Thirdly, s.6 (3) imputes to the Crown vicarious liability for acts carried out by persons in the employ of the Crown who have functions imposed on them by common law or statute.

63. Note 51, at p. 279.
64. In his article, "Police Responsibility" *supra* at p. 225.
65. [1954] N.Z.L.R. 341.
66. 13 M.C.D. 400.
67. Ibid., at p. 405.
68. Ibid., at p. 407.
69. Ibid., at p. 408.
70. (1906) 3 C.L.R. 969.
71. (1906) 4 C.L.R. 97.

In conclusion it was held that the relationship of a constable to the Crown is not that of a master and servant, because his authority arising out of the common law, is original not delegated. Thus, the doctrine of respondeat superior, where the servant carries out the will of the master, is avoided in respect of a police constable, as he falls within the ambit of the third distinction drawn by the Magistrate where the servant carries out his duties independently of the master's delegation. In this way, *Osgood* v. *Attorney General* clarifies the relationship of the police constable and the Crown, specifying that although the constable is not a "servant" in the master-servant context, the Crown is nevertheless liable for his tortious acts by operation of s.6(3), Crown Proceedings Act 1950.

B. Police Answerability to Executive and Parliament

In the light of the foregoing discussions of the police constable's independence and his unusual relationship with the Crown, a picture begins to emerge of a police constable enjoying a freedom of discretion and the advantages of a one-sided bargain. The Crown cannot delegate authority and yet is responsible for the torts of a police constable's misdemeanours in the exercise of his "original" powers.

However as a member of a nationalised police force in New Zealand, paid out of national funds, the police constable in, as previously explained, subject to the administrative orders of the Commissioner ,who as head of this body, is responsible for the workings of the Police Service. Thus with additional statutory powers vested in him[72] the Commissioner, would seem to accept not only more responsibility but also the onus of greater accountability for police actions.

Yet, Lord Denning in his famous statement in *R.* v. *Metropolitan Police Commissioner Ex parte Blackburn* had this to say:[73]

> I hold it to be the duty of the Commissioner of Police . . . to enforce the law of the land . . . but . . . he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that . . . The responsibility of law enforcement lies on him. He is answerable to the law and to the law alone.

If this is so, to whom then are police, as a whole, accountable?

The questions of accountability and the exercise of controls on police discretion and action, can only be answered by examining more closely the exact relation of the Commissioner of Police to Executive and Parliamentary controls. Lord Denning in *Ex Parte Blackburn* continued and said of the Commissioner of Police of the Metropolis:

72. Sections 8, 9, 33, 35 of the Police Act 1958 being examples.
73. No. 1 [1968] 1 All E.R. 763 at p. 769.

> His constitutional status has never been defined either by statute or by the courts . . . I have no hesitation however, in holding that like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or retire in the interests of efficiency.

The position is the same in New Zealand. The inevitable deduction from this proposition is that the Commissioner's accountability both for his actions and those of the Police service to the main constitutional bodies, the Executive and the Crown, is negligible.

The Royal Commission had a different view. They saw the dangers in complete immunity from external influence, as exercised by the Chief Constables of each borough, and regarded some restraint to be necessary.

> The present position in the Metropolitan police area illustrates this point. The Commissioner of Police acts under the general authority of the Home Secretary, and he is accountable to the Home Secretary for the way in which he uses his force.[74]

Although Chief Constables throughout Britain are subject to certain controls vested either in local authorities or the Executive such as dismissal or calls for reports, the Commission concluded that these controls were arbitrary in that they did not exercise enough influence nor restrict or in any way alter a Chief Constable's actions.[75] Thus further restraints were recommended.

With regard to the New Zealand Commissioner's accountability to the Executive, there appears to be some divergent opinion, and owing to lack of available sources on this subject, the question still remains somewhat clouded.

It was said in *Osgood* v. *Attorney-General*[76] that "Here is a national Police force responsible to Parliament . . . ", yet in the following paragraph is the statement, "The position of the Commissioner of Police in New Zealand is comparable in status with that of a Metropolitan Police Commissioner in England", after which follows the much quoted passage by Lord Denning:

> "The passage quoted is a recognition of the special status of the Police Commissioner who has a duty to the public to enforce the law while being independent of the executive.[77]

Since the ensuing discussion in the case was concerned with the relationship of Police to the Crown, it appears that the confusion

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74. *Royal Commission on the Police supra* at p. 31.
76. Ibid., pp. 35-37.
76. *Supra* at p. 405.
77. Idem.

lies in the imprecise use of the terms, "Crown", "Executive" and "Parliament". The fact that the Governor-General is the Sovereign representative and is acting head of the Public Service, as well as constituting a part of the Executive Council along with the Ministers of the House of Representatives, would also have attributed to the blurring of the distinction between the Crown and the Executive. Since it is established that the Police through the Commissioner are not accountable to the Crown,[78] it is imperative to distinguish between answerability to Parliament and/or the Executive, and it is contended that the statement in *Osgood* v. *Attorney-General* is correct, i.e. whilst a Police Commissioner may be independent of the Executive he is in fact answerable to Parliament. The reason for this distinction appears to be in the fact that the Executive consisting of the Ministers of Parliament, comprises the Government of the day and for fear that that body may become instrumental in manipulating the Police Service to create a Police State, the safeguards are, to have a relatively independent body with the safeguard of being answerable to Parliament as a whole.

This view was expressed in Parliament by Mr Walsh[79] during the second reading of the Police Bill:

> It is in keeping with traditions that police should not be used for political purposes. Policemen have always had the full confidence of the public because the public recognise that they are uninfluenced by the political situation of the day. So long as we keep them on that plane, the welfare of democracy is secure. Too often do we see misdirection of the police forces of other countries as a consequence of warped political life.

Thus the Commissioner is responsible to the Minister of Police who in turn is responsible to Parliament but as Mr Eyre (Minister of Police) was quick to point out, this responsibility was only to account for police action and *not* to direct it.

> Their [the Police] duty was to carry out the law as contained in the statute book and that they did. They certainly did not act on instruction from the Minister.[80]

However, there was one example where the Minister, Hon. Michael Connelly, did issue a specific instruction to the Commissioner, in actively asserting his role as Minister of Police. It concerned the report that a Senior Detective's telephone at the Auckland Police Station had been tapped, and in a press release[81] he said:

78. Although the Crown is referred to in the oath and is vicariously responsible for a policeman's actions, the Police are not accountable to the Crown, by virtue of their original powers and the absence of a master-servant relationship. (See "Relationship with Crown" ante).
79. N.Z. *Parliamentary Debates* 1 October 1958, p. 2180.
80. N.Z. *Parliamentatry Debates* 4 October 1957, p. 2855: This was in reply to a statement by Mr Moohan who had said that the Police were occasionally blamed for different things when they were merely carrying out the directions of Parliament and the Minister.
81. Dated 14 June 1973 (Press Release from Parliamentary File).

> I have today conveyed to the Commissioner of Police Government's direction that in no circumstances are the Police to tap telephones.

Having actively exercised his Governmental responsibility in face of public concern, the Minister publicily called on the Commissioner to account for the incident.

> I have also asked the Commissioner for an urgent and full report on the Auckland affair including a resume of what has happened and a statement of what procedures were followed and who authorised such procedures.

In accordance with the Minister's directions, Commissioner Sharp also issued a press statement[82] in which he accounted for the controversy, expressed his disproval and announced the measures that were taken over the detectives involved.

Thus when public pressure demands it, the machinery for active Parliamentary concern and subsequent police accountability become publicly operative.

The Commissioner's ultimate answerability to Parliament lies in the final sanction of Parliament to dismiss him. This sanction has already been witnessed in New Zealand in regard to the resignation of Commissioner of Police, Mr E. H. Compton in 1955. Following charges made against him "of a very grave nature . . . reflecting upon his honour and integrity . . . this Government acted promptly by setting up a Commission of Inquiry to inquire into these and other allegations relating to the Police Force."[83]

Finally, with the imminent threat of dismissal pending, the Commissioner resigned.

That Parliament does, generally, keep a watchful eye on Police activity is witnessed by the occasional heated debate over police action or even by newspaper reports where the Minister is awaiting a report from the Commissioner.

A recent example was the police raids on the Remuera Abortion Clinic, an action which excited public outcries in the paper and prompted questioning in the House.[84] At the outset of that case, both the Commissioner and the Minister were unaware of the action taken and both were placed in a position of accountability, without having immediate knowledge of the incident available.

However, for an active control of police action, apart from the ultimate dismissal of the Commissioner, Parliament remains relatively powerless. More active methods of control are relied on from other sources.

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82. Appearing in the Evening Post 29 August 1973.
83. *The Dominion* 20 April 1955.
84. N.Z. *Parliamentary Debates* 17 September and 25 September pp. 4516-17.

The Police Service is thus focussed in an unusual light. It stands in a protected, almost paternalistic setting. "Original" powers are derived from the common law, giving the police an inestimable source of independence. Statutory powers are wide especially under the Police Offences Act and the Crimes Act. It relies on National Funds for its wages and the Crown remains responsible for its tortious misdemeanours. It is a body controlled within by an omnipotent head, the Commissioner, yet only in an administrative capacity, the police constable still retaining his independent common law powers. The Police Service escapes the imposition of a master-servant relationship yet enjoys an overall indemnity and immunity for consequences of an error. The body is independent of the Executive, yet answerable to Parliament through the Commissioner, he being the only one against whom active control can be taken.

The full understanding of the constitutional nature of this body is not complete, however, without regard being had, to the exercise of judicial control on Police power and direction.

C. Judicial Control on Police Action

Although the Police have been entrusted with and are responsible for the maintenance of law and order in the community, the powers awarded them under our statutes are wide, nebulous and largely subjective. Under the Crimes Act 1961 s.315 empowers a constable to arrest without a warrant any person "disturbing the peace" (subs 2(a)) or "whom he has good cause to suspect of having committed a breach of the peace". (Subs 2(b)). Section 317(3) gives the police power to enter premises to arrest offenders or prevent an offence "if he believes on reasonable and probable grounds that any such offence is about to be committed". Together s.315 of the Crimes Act 1961 and s.60 of the Police Offences Act 1927 allow the police the power to arrest without a warrant for a multiplicity of offences, ranging from obstructions and breaches of good order, indecency, vagrancy and obscenity, to rogues, vagabonds and boxing contests, many of which lack objective definition.

It is the abuse of these powers and the public's objection to undue exercise of these powers,[85] and the refusal by the Police to comment on such action,[86] that has focussed much attention recently

85. (i) e.g. Dawn search and service of documents at R. Cruickshank's house: allegation of "intimidating search methods" and "refusal to show search warrant". *Evening Post* 10 June 1975.
(ii) Criticism of undue use of Police Dogs at Mt. John Demonstration 1972.
(iii) Criticism of the Task Force — see Report from Committee on Racism and Discrimination (1975) "Task Force — An Exercise in Oppression".

86. e.g. (i) Gideon Tait's refusal to comment on the Cruickshank affair, and Detective Superintendent J. F. Stevenson who headed the search, was "not immediately available for comment". *Evening Post* 10 June 1975.
(ii) Refusal to comment on attack of a young Polynesian by a police dog, "because the Commissioner has called for a report". *The Waikato Times* June 28 1975.

on the Police and has led to a greater demand for control of police action in order to protect individual freedoms and rights. Concomitant with this demand was the increasing realisation that the Police were not adjoined to any particular administrative body and as such, the courts were the only remaining body which could objectively control police action.

> But in all these things, the Chief Constable is not the servant of anyone, save of the law itself. He is answerable to the law alone.

The Court is thus seen literally as a balance of justice:

> In my judgment, the Police owe the public a clear legal duty to enforce the law, a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently . . .
>
> On their failure however to do so the Court would not be powerless to intervene.[88]

The power of the court is sufficient to ensure the Police *do* carry out their duty of law enforcement, as in *Ex Parte Blackburn* (although lost on a technical point there was victory, since the policy decision as to the Gaming Laws was reversed),[89] while maintaining a check on abuse of power. On the other hand the court can also give its approval to a policy decision made by the Commissioner. This was illustrated in *Buckoke* v. *Greater London Corporation*[90] where police officers were told not to prosecute fire-engine drivers for crossing red lights in an emergency call. Denning L. J. said:

> This would be a justifiable policy decision so as to mitigate the strict rigour of the law . . . Thus by administrative action, backed by judicial decision, an exemption is grafted onto the law.

E. Bittner however is sceptical of the control the courts have over the Police:[92]

> Our courts have no control over police work, never claimed to have such control, and it is exceedingly unlikely that they will claim such powers in the forseeable future . . .

Yet, it is in the capacity of granting approval or imposing rebuke or admonition that the Court curtails Police power and acts as the effective control and safeguard of the individual and society.

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87. *Ex Parte Blackburn* No. 1 supra per Denning, L.J.
88. Ibid., per Salmon, L. J.
89. Although the point was made in *Ex Parte Blackburn* No. 3 [1973] 1 All E.R. 324 that the court will not interfere with the discretion of the Commissioner in carrying out his duty, the court *would* interfere where the Commissioner was not enforcing the law.
90. Ibid., 2 All E.R. 254.
91. Ibid., at p. 258.
92. *"The Functions of Police in Modern Society"* Chapter IV: "The Courts and the Police" supra at p. 23.

The notion of retaining a compromising balance is most succintly expressed by McCarthy J. in *Melser* v. *The Police*:[93]

> I must say something of this Court's function in defining the social rights of citizens in our form of democracy and of the way I see that function being performed in the course of applying such a provision as s.3D of the Police Offences Act . . . The task of the law is to define the limitations which our society, for its social health, puts on such freedoms. Sometimes the law defines with precision the boundaries of these limitations; often the definition is only in general terms. In these latter cases, the Courts must lay down the boundaries themselves, bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of lower or less important ones.

Where the boundaries are ill-defined for freedoms which are frivolous and do not portend to the social health, the courts have been most adamant that there should be no infringement of harmless whims. In *Kinney* v. *The Police*[94] for example, Woodhouse J. delivered a somewhat facetious judgment which nevertheless contained a sharp rebuke in its conclusion.

> Section 3D should not be allowed to scoop up all sorts of minor troubles and it certainly is not designed to enable the Police to discipline every irregular or inconvenient or exhibitionist activity or to put a criminal sanction on over-exuberant behaviour, even when it might be possible to discern a few conventional hands raised in protest or surprise.[95]

In a situation of trifling import where the Police were too hasty in exercising their power, they are subject to peremptory reproof and often at their own expense. In *Ball* v. *McIntyre*[96] the police sergeant's resentment of a student's actions towards a "sacred" statue was described as taking on "a dignified hurt appeal" and the rest of Australia was mature enough to tolerate spontaneous protests without "anger, resentment, disgust or outrage aroused to any significant extent"; the inference of course, being that while Australia was mature the sergeant was not.

The reason for such reaction becomes more clear, as the court realises the ridiculous extents to which ill-defined boundaries, in relation to an individual's liberty, can be stretched.

> I entirely reject the proposition . . . that a constable is in this country entrusted with power to restrain persons against whom there is some vague suspicion that they may have

93. [1967] N.Z.L.R. 437 at p. 445.
94. [1971] N.Z.L.R. 924.
95. Ibid., at p. 926.
96. [1966] 9 F.L.R. 237.

> commited an unspecified criminal offence, while "reasonable inquiries" are made.[97]

is a further expression of the idea. It is not to be implied, however, that the Court despises the powers per se, but it is in these ways, the scope of the Police Offences Act 1927 is modified and the triviality therein is curtailed.

The necessity to restrict excessive use of Police power seems to arise from the fear of a police state. It has previously been mentioned[98] that a police state is avoided by Parliamentary non-interference with police powers. However, the idea of an autonomous powerful body exercising powers without effective controls, has given rise to much concern both by constitutional writers as well as the judiciary.

H. Street in his book, *Freedom, Individual anr the Law asks*:[99]

> Does the Englishman's cherished idea that he does not live in a police state match up to reality? Are Police Powers hedged around with adequate protection for the citizen?

It is the expression of this concern by the judiciary in a number of decisions on police powers particularly those on false imprisonment that has lead to more control being wrought.

In *Christie* v. *Leachinsky*[100] the court was horrified to see an individual deprived of his freedom by physical restraint and imprisonment without knowledge of his offence. The Court's disapproval is couched in terms of fear of police tyranny:[101]

> Blind unquestioning obedience is the law of tyrants and of slaves; it does not yet flourish on English soil. I would therefore submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested.

The control is manifest: likewise the reasoning behind the restraint is a rejection of the concept of police independence in view of the possible resulting oppression. That such is also the reasoning of the courts in New Zealand is apparent in *Blundell* v. *Attorney-General*, a fact situation similar to *Christie's* case per McCarthy J:[102]

> The British people have always turned their backs positively on the grant of such powers to Police, no doubt bearing in mind how often history has demonstrated that even in modern and sophisticated communities such powers can be distorted into instruments of oppression and injustice.[102]

With this motivation the courts are quick to exercise their control

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97. *Blundell* v. *Attorney-General* [1968] N.Z.L.R. 341 at p. 354.
98. See Mr Eyre's statement in Parliament, note 80.
99. Pelican Original (2nd ed. 1967) at p. 12.
100. [1947] A.C. 573.
101. Ibid., at p. 591.
102. *Supra* at p. 357.

over police discretion in order to preserve the basic freedoms of an individual living in a democratic state.

Nevertheless, the courts are faced with a difficult task. The reconciliation of the two opposing considerations, maintenance of law and individual freedom, presents a conflict, which the courts do recognise and must reconcile.

The dilemma is expressed by Lord Denning in *Chic Fashions* v. *Jones*[103]

> We have . . . on the one hand the freedom of the individual. The security of his home is not to be broken except for the most compelling reason. On the other hand, we have to consider the interest of society at large in finding out wrong-doers and repressing crime.

This conflict, perhaps highlights the reason for relative police independence; because of the difficulty of accountability to a body which must decide on correct use of discretion and reconcile two separate poles of interest. It also speaks volumes for the difficult position in which the Police are placed.

VI. CONCLUSION

Controls over police in New Zealand are many, varied but never clear and certainly never complete. But even if precise and complete control could be attained, would that allay doubts about the relative perfections or imperfections of our police and the extent to which they exercise their powers? It is suggested, not, for, as Julien Symons perceptively observed:[104]

> Shall we then have a perfect police force? By no means. The conflict between the rights of the individual and the rights of society will always go on, and the very existence of the police is an expression of it.

HELEN ANN CULL

103. [1968] 2 Q.B. 299.
104. From a review on a book entitled *The Police* taken from *Mr Punch and the Police* (Christopher Pulling London Butterworths 1964).