

Ingredients for a good police/executive relationship

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by

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Introduction

Ever since the first introduction of modern police forces domestically in Britain, and in British controlled overseas territories, in the late 18th and early-to-mid-19th Centuries, concerns have been expressed that these institutions, empowered and equipped to employ coercive force, may be deployed by governments for purposes of oppression, or as “government spies”, and for undemocratic, partisan political ends. There was certainly no shortage of justifications for such concerns during that time. The French police, which substantially pre-dated the establishment of the modern British police, were notorious for the extensive and intensive surveillance and information-gathering that they practised in relation to the population, and the secrecy and lack of public accountability of their operations (See e.g. Emsley, 1983). And the police forces that Britain established in her overseas colonies, being modelled at first on the more militaristic Irish Constabulary, rather than on the later, more civilian “London Met” model, had a clear mandate to “pacify” indigenous colonial populations and to suppress, by force if necessary, any serious resistance or perceived

threat to British colonial rule and the members of the colonial ruling class (Hill, 1986; Brogden, 1987).

The dilemma, therefore, of how to achieve the dual objectives of, on the one hand, democratically accountable, impartial and fair policing, and on the other, policing and a police institution that are insulated from undesirable and undemocratic partisan political control and influence by governments, is one which has challenged political scientists, civil libertarians and constitutional lawyers ever since these “new police” were first established. At the heart of this dilemma, of course, is the relationship between the police and the governments which establish and sustain them.

Strategies to “depoliticise” the new police

A number of broad strategies evolved during the 19th Century in Britain itself to try to assuage such fears of police becoming deployed for undemocratic, repressive political purposes. The first, was what would be recognized nowadays as a rather crude marketing strategy. In order to persuade the public, and more particularly Parliamentarians, to agree to the establishment of the “new police”, its proponents (most notably the Home Secretary, Sir Robert Peel) attempted to portray the new police as no more than ordinary citizens, organized in a disciplined and uniformed public service, whose duty was essentially no more than that which had traditionally been the duty of every citizen, namely to preserve the peace and ensure that offenders were brought to justice. In the 20th Century, the commentator Sir Charles Reith (1952) summed up this marketing ploy with the slogan “the police are the public and the public are the police” - a slogan which subsequently became routinely (and erroneously) attributed to Sir Robert Peel himself. Anyone who gave the new police

more than the most cursory consideration, however, could immediately appreciate that this was nothing more nor less than false advertising. Clearly, the new police were not just “citizens in uniform” - they had powers, duties, access to the use of force, and the practical capacity to use it, which were not available to ordinary citizens. Indeed, they were authorised to do things which, if ordinary citizens did them, would be treated as criminal acts. Nevertheless, these attempts to persuade the public that they had no reason to fear the police, and that they should regard them as their friends (the friendly Bobby on the beat, etc.) were remarkably successful with respect to large segments of the population for quite a long time (Reiner, 2000: Ch. 2), and are perhaps to some extent echoed in the soothing representations of “community policing” or “community-based policing” in the modern era, and the current fashion of referring to police *services* rather than police *forces*.

The second strategy was to *demilitarize* and *civilianise* the police. For what must be obvious reasons, this occurred much sooner and more completely in mainland Britain than in many of its colonies. It involved, if not disarming the police, at least severely restricting their authority to carry and use lethal weapons (especially guns) and use lethal force. It also involved developing uniforms for police that were clearly different from military uniforms, and limiting the use of mounted police (so that they wouldn't be thought of as “cavalry”). In the latter half of the 20th Century, it also involved a rejection of military-style discipline codes and disciplinary procedures, in favour of more civilianised labour relations regimes, and the gradual relinquishment of “command and control” styles of police management in favour of more participatory, team-based organisational structures. It was understood that it was not just the public, but the police themselves, who needed to be persuaded that they were not supposed to be military or quasi-military organisations, but civilian organisations

committed to public service. As we all know, in many countries many of these demilitarizing trends have begun to be reversed somewhat during the last twenty years or so - modern police officers in many countries are required to carry a remarkable collection of weaponry and restraint devices on their belts as they go about their daily business, and riot police increasingly resemble Star Wars-style storm troopers (Waddington, 1991).

A third strategy was to place significant restrictions on involvement by police officers in the normal processes of democratic politics. One of the first examples of this was the ban on involvement of police officers in “secret societies”¹. In Canada, given conflict between Catholics and Protestants in some communities, this was directed particularly at involvement with the Orange Order. Similar concerns about sectarian politics were reflected in the Standing Rules for the Royal Irish Constabulary which included the following instruction: “6. Partisanship prohibited - It cannot be too strongly or frequently impressed upon both the officers and the men of the establishment, that as its character and efficiency would be seriously injured by even a suspicion of its partisanship, the expression or any other manifestation of political or sectarian opinions on the part of the Constabulary is most strictly forbidden.” To this day, most Commonwealth police services insist on some restrictions on police involvement in political activities; while officers are typically not denied the right to vote or to hold membership in a political party, standing for political office, or campaigning for political candidates, and other overt manifestations of political partisanship are commonly prohibited, although there is no doubt that in some countries such restrictions have been significantly relaxed (as has

¹ Freemasonry, however, was typically exempted (Stenning, 1994: 222; see also Wall, 1998: 141-159).

been the case for other public servants) in the last twenty years or so (see e.g. Stenning, 1994; Reiner, 2000: especially Ch. 7).

Each of these three strategies focused on shaping public perceptions of police - specifically, to try to encourage the public to feel reassured rather than threatened by the presence of police in their neighbourhoods, and to have confidence that in performing their duties the police would act impartially, and not be serving particular partisan political interests. Three further strategies were designed to directly address the relationship between police and governments. The first of these, which dates back to the creation of the London Metropolitan Police in 1829, involved excluding government ministers from involvement in decisions with respect to the hiring, assignment, deployment and promotion of individual police officers; such decisions, with respect to all but the most senior officers of a force (e.g. the Commissioner/Chief Constable and Deputy Commissioner/Chief Constable), were to be the exclusive prerogative of the head of the police service. Such restrictions on governmental interference in internal personnel decisions remain in place in most Commonwealth police services today.

A second strategy designed to more directly insulate the police from the influences of partisan politics, involved the interposition, between the police and elected governments, of more or less “independent” police governing authorities composed of a majority of non-elected, appointed officials. Most commonly called “Police Commissions” or “Boards of Commissioners of Police”, such bodies were granted considerable autonomy from direct governmental supervision in determining policies and making regulations for their police forces, and determining what budgetary and other resources were required for them. They were most commonly put in place for the governance of local (municipal), rather than national or state, police

forces, and there is little doubt in my mind that this strategy reflected a widespread (albeit questionably justified) belief that locally elected governments were more prone to corruption and “machine politics” (Fogelson, 1977), from which the police needed to be protected, than their state or national counterparts (see Stenning, 1981).

The “doctrine” of “police independence”

The final “strategy” that I want to discuss is perhaps not very accurately described as a “strategy” at all, in the sense of a clearly articulated measure that was deliberately adopted at an identifiable time. This was the gradual development, during the late-19th and 20th Centuries of a concept or “doctrine” of “police independence”. This concept drew on the related concept of judicial independence, which had gradually evolved during the 19th Century in Britain as, with the maturation of parliamentary and local institutions of democratic governance, the distinction and separation between the roles of the judiciary and the executive was realised in theory and in practice. The idea here was that with respect in particular to their responsibilities for the administration and enforcement of the law, the police should be insulated from the kind of direct political control that governments normally exercise over public servants. Applying a concept to the police that had originally developed in relation to the judiciary was made easier, and made to appear “naturally” appropriate, by the fact that the “old police” which the “new police” replaced had in fact been under the control and governance of, and accountable to, the magistracy (justices of the peace)². And indeed, in Britain, magistrates continued for many years to be represented on many of the governing authorities established for the “new police”.

² Indeed the two Commissioners, Rowan and Mayne, who were first put in charge of the new London Metropolitan Police, were justices of the peace - a continuity that Sir Robert Peel emphasised when introducing the Bill establishing the force into Parliament in 1829.

It took a long time, however, for the idea of “police independence” to gain any widespread acceptance, and it has continued to be quite strongly resisted by many democrats. I think there are two main reasons for this, one relating to the formulation of the concept, the other relating to its supposed scope and implications. As to the formulation of the concept, there has been a tendency for it to be presented as if it signified that the police are not only to enjoy immunity from political (governmental) direction and control with respect to their law enforcement duties, but also immunity from political *accountability*. This broad interpretation of “police independence” is nowhere better exemplified than in the famous words of Lord Denning in the English case of *R. v. Metropolitan Police Commissioner, ex parte Blackburn* (1968) - words which have since come to be recited, especially by police leaders, but also by judges, politicians and commissions of inquiry - and, I’m sorry to say, by a lot of academics too - in countries throughout the Commonwealth, with a reverence and obeisance normally reserved for religious texts [***Blackburn slide*** - see **Appendix 1**].

Critics of Lord Denning’s exposition of the concept, of whom there have been many (e.g. Lustgarten, 1978; Orr, 1986), and among whom I include myself, have argued that while police immunity from governmental direction and control with respect to their law enforcement functions may be justifiable in a democracy, complete immunity from political (and particularly parliamentary) accountability for these activities can never be. Indeed, from the point of view of democratic principles, *the greater the political independence that police are accorded, the greater is the need for effective political accountability for what they do*. Lord Denning’s description of “police independence” is simply too broad to be compatible with democratic principles and values.

With respect to the supposed *scope* of police independence, there has been a tendency - again particularly among Chief Constables and Commissioners of Police - to present the concept as if it embraces *every aspect* of the police's role in society - that the police are to be completely immune from political (governmental) direction and control with respect to *everything they do*, regardless of whether it can be considered to involve administration or enforcement of the law. The most extreme expression of this view that I have come across so far is the statement of an English Chief Constable, Eric St. Johnston, who wrote in his memoirs in 1978 that "in operational matters a Chief Constable is answerable to God, his Queen, his conscience, and to no-one else" (St. Johnson, 1978: 153). When the limitation of the concept of police independence to matters of law enforcement - itself a rather vague term - is replaced by its extension to all "operational matters" - a term whose scope police commonly consider themselves uniquely qualified to define - *and* is also said to embrace immunity from political *accountability* as well as from governmental control and direction (St. Johnston did not even, apparently, acknowledge accountability to the courts or the law, as Lord Denning had done), alarm bells should sound in democratic circles. Such over-broad expositions of the concept of police independence, however, have not been at all uncommon throughout the Commonwealth even in recent years.

States in which police claim and in fact enjoy such complete immunity from political accountability and control are rightly referred to as "police states", just as are states in which the police are under complete political direction and control. This is because police who are so completely "out of control" pose just as great a danger to civil liberties, human rights and democratic values as police who are "under the thumb" of undemocratic, tyrannical regimes.

Ingredients for a good (democratic) police-executive relationship

So what is the right formula for political control and accountability of police in a genuinely democratic state? And what should this imply for the relationship between the police and the government of such a state? [**Accountability/control matrix slides - see Appendix 2]**

First, in principle, in a democracy police should be subject to democratic control *and* accountability absent good reasons to exempt them from it. There has for quite some time, however, been broad agreement that with respect to *some* of their *law enforcement activities* - specifically, what the English Royal Commission on the Police described as their “quasi-judicial” responsibilities with respect to *decisions about whom to investigate, charge and prosecute in individual cases* - it is important that police be shielded from direction, control and undue influence by governments (the executive), and thus have a somewhat different relationship to the executive *with respect to such matters* than is the usual case for public servants in a democracy. It must be acknowledged, however, that there has by no means been universal agreement as to the appropriate *scope* and *limits* of such “police independence”. The following aspects of it need to be clarified: [**Police independence definition slide - Appendix 3]**

1. **Is it *always* inappropriate/unacceptable for governments to seek to influence such police decisions?** What if such decisions have potentially major implications for international relations, national security or the stability of the national economy? Might it reasonably be argued that governments must take responsibility for such decisions, rather than leaving them to “independent” police? I would argue that such a case can be made, but that if governments are to be permitted to direct or influence the police in such exceptional circumstances, such government direction or influence must, at the appropriate time³, be

³ I think it can be argued that in certain very exceptional circumstances (e.g. where matters of international or national security are involved), such information may have to be kept secret for a

made fully public so that governments can be effectively held accountable for it.

2. **What is the scope of “law enforcement”, and what constitutes an “individual case”, for the purposes of immunity from such government direction or influence?** The English Royal Commission suggested that such police independence should apply only to those kinds of “*quasi-judicial*” decisions to which I referred earlier, *in individual cases*. While this is an easy criterion to state, it is not always quite so easy to apply in practice. For instance, what about police decisions with respect to public order policing strategies at major demonstrations, etc. (i.e. operational policing decisions that may or may not require those kinds of “quasi-judicial” decisions to be made)? Opinion (including expert opinion) has been greatly divided within many Commonwealth countries as to the applicability of the principle of police independence to such public order policing.
3. **Are all expressions of government “influence” with respect to such decisions inappropriate and unacceptable? [Control & influence slide - Appendix 4]** Is it, for instance, ever acceptable for governments to *advise* police of their interests and concerns about such decisions while still assuring police that the ultimate decision in such matters is theirs? I would argue, and others have too (e.g. Canada, Commission of Inquiry..., 1981: 1013), that *when police decisions have significant public policy or public interest implications*, governments should be free to express their views to the police provided that they do so publicly, do not try to exert undue pressure on the police, and are able to be held fully and effectively accountable for such advice.

Acknowledging then that there are some grey areas here, and that there is by no means universal agreement on the principles that should govern the police/executive relationship, I would suggest the following as key ingredients for an appropriate police/executive relationship in a democracy:

- The *general principle* should be that police, like other state functionaries, should be subject to democratic control *and* accountability for their decisions and activities through the usual democratic political, judicial and administrative processes.
- Exceptions to this general principle - and in particular the scope and application of any concept of “police independence”,

limited time (e.g. until a crisis has passed or is “under control”). But even in such cases, it is essential in a democracy that a government can eventually be held fully accountable for such an intervention.

which gives police freedom from normal governmental direction and control (but not from political accountability), should be kept to the necessary minimum. Specifically, this principle of “police independence” should be considered applicable only to decisions with respect to the enforcement of the law in individual cases, and not to all operational decisions regardless of whether they involve such law enforcement decisions. Police should normally enjoy independence from political direction and control with respect to such law enforcement decisions.

- Such exceptions, however, should not prevail over the general principle in cases involving significant repercussions for international relations, national security or the domestic economy - these kinds of decisions are properly the responsibility of governments, for which governments should be held effectively and democratically accountable, and should not be left to “independent” police.
- Governments should not be precluded from advising police of their views and concerns with respect to police decisions that may have significant public policy or public interest implications, provided that they do not seek to exert undue pressure on the police, and provided that they acknowledge and respect that the ultimate decision in such cases rests with the police. Police should be obligated, whenever possible, to bring such cases to the attention of governments in advance⁴.
- A written record should be kept of any such government direction, control or influence over police decision-making which, with some very limited exceptions (such as decisions during a national security crisis) should be made public as soon and as completely as possible, so that the government can be effectively held accountable for such interventions. Procedures should be in place to ensure that information about government interventions, the release of which may be legitimately delayed to protect national security, is eventually made public.
- Any such government intervention in police decision-making should be open to effective review by an independent judiciary, in addition to other processes of democratic accountability, in order to verify its legality/constitutionality.
- Communications from governments to the police should always be through the head of the police service, and from the minister responsible for the police, and not otherwise.

⁴ I recognise, however, that this may not be appropriate, or may necessitate a more restricted reporting requirement, when government ministers themselves, or their staff, are the subjects of police investigations.

- Governments should not involve themselves in decisions concerning the appointment, assignment, deployment or promotion of individual members of police services other than the head of the police service. The head of the police service should have ultimate responsibility and accountability for such decisions.
- Heads of police services should be given adequate protection against arbitrary dismissal. The general principle should be that heads of police services can only be dismissed for: (1) misconduct, following established and impartial disciplinary processes; (2) mental or physical incapacity, on the basis of independent expert medical advice; or (3) on the termination of an agreed term of service⁵ which should not normally be for less than five years.
- Police should be able to be held effectively *accountable* through normal political, legal, administrative and direct public accountability processes and mechanisms for *all* their decisions and actions, regardless of whether such decisions are ones to which the principle of police independence applies. It should be recognised, however, that in the case of those “quasi-judicial” law enforcement decisions, such accountability will often need to be *ex post facto* rather than before decisions are made.
- Police, politicians and the public should understand that: (1) democratically elected governments are the legitimate and ultimate guardians of the public interest and welfare; and (2) the exercise of democratic governmental oversight of police and democratic accountability of the police are an essential aspect of a free society and do not *prima facie* constitute “improper political interference”.

Conclusion

During the last twenty years or so, attempts have been made in many Commonwealth countries to clarify, and in some to codify, the essential principles that should govern the police/executive relationship in a democracy. I do not have time today to review all of these, or the often vigorous debates that have accompanied

⁵ A debate is going on in Canada right now as to whether the appointment and tenure of a police chief may legitimately be subject to confirmation following a probationary period specified in a contract of service.

them. Perhaps I might conclude, however, by drawing your attention to two such debates which have recently been going on in Commonwealth countries.

In Northern Ireland, the whole issue of democratic accountability of the police, and appropriate police/executive relations was addressed in the 1999 report of the Independent Commission on Policing for Northern Ireland (the “Patten Report”), as a critical element in the implementation of the Good Friday Agreement there. In its report the Commission advocated a principle of “operational responsibility” as an improvement over the more familiar principle of “police independence”, as a governing principle for the police/executive relationship. This principle of “operational responsibility” embraces many of the “ingredients” for a good police/executive relationship that I have just discussed.

In New Zealand, a “first principles” review of its police legislation is currently underway. Last year the review team published an Issues Paper on police governance and accountability, which canvassed many of the questions that I have raised in this presentation. More recently, it published an analysis of the responses that it has received during the course of extensive public consultations on this issue. There appears to be broad agreement that the police/executive relationship should be clarified through legislation, despite that fact that an earlier attempt to achieve this (in the *Police Amendment (No. 2) Bill*, introduced in 1999) was unsuccessful⁶. A Discussion Document outlining the government’s proposals on this issue will be published later this year.

If one were to try to identify the most salient current trends on this topic, I think they would be: (1) that police-government relations are increasingly reflecting a growing managerialism that has been pervading government more generally, and

⁶ For the text of these proposed provisions, see the Appendix 5 to this article, below.

which is raising questions about the concept and application of “police independence”; (2) there has been a growing demand for more, and more effective, public accountability for police decisions and activities; (3) there is increasing support for clearer articulation, through legislation or otherwise, of the principles that should govern police-government relations; and (4) there continues to be a growing demand for “community” involvement in the governance of the police.

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APPENDIX 1

The “Blackburn” Doctrine

per Lord Denning in

R.v. Metropolitan Police Commissioner, Ex Parte, Blackburn
[1968] 1 All E.R. 763 (Eng. C.A.) at p. 769

"I have no hesitation...in holding that, like every constable in the land, the Commissioner 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 to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things 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; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

APPENDIX 2

accountability/control matrix

FULL CONTROL

1

2

NO
ACCOUNTABILITY

FULL
ACCOUNTABILITY

3

4

NO CONTROL

accountability/control matrix 2: a broad concept of independence

FULL CONTROL

1

2

NO
ACCOUNTABILITY

FULL
ACCOUNTABILITY

INDEPENDENCE
(freedom from control/direction
and accountability)

3

4

NO CONTROL

***“police independence”
- a proposed definition***

With certain very limited exceptions, police should be free from governmental (political) direction or control with respect to decisions concerning the exercise of their “quasi-judicial” powers (of investigation, search, detention, arrest, questioning and charging of suspected offenders) in individual cases. They should nevertheless be fully accountable for such decisions and activities through the normal processes of democratic political accountability.

**Degrees of direction,
control, influence, etc.**

direct/instruct

strongly advise

recommend/suggest

express opinion

hint

subtle “influence”

no involvement

APPENDIX 5

Sections 4 & 5 of the New Zealand *Police Amendment (No. 2) Bill, 1999*

“4 Responsibility and independence of Commissioner

- (1) The Commissioner is responsible to the Minister for -
 - (a) the carrying out of the functions, duties, and powers of the police; and
 - (b) tendering advice to the Minister and other Ministers of the Crown; and
 - (c) the general conduct of the police; and
 - (d) the efficient, effective and economical management of the police; and
 - (e) giving effect to any directions of the Minister on matters of Government policy.
- (2) The Commissioner is not responsible to the Minister, but must act independently, in relation to the following;
 - (a) enforcement of the criminal law in particular cases and classes of case;
 - (b) matters that relate to an individual or group of individuals;
 - (c) decisions on individual members of the police.

5 Minister’s power to give directions

- (1) The Minister may give the Commissioner directions on matters of Government policy that relate to -
 - (a) the prevention of crime; and
 - (b) the maintenance of public safety and public order; and
 - (c) the delivery of police services; and
 - (d) general areas of law enforcement.
- (2) No direction from the Minister to the Commissioner may have the effect of requiring the non-enforcement of a particular area of the law.
- (3) The Minister must not give directions to the Commissioner in relation to the following;
 - (a) enforcement of the criminal law in particular cases and particular classes of case;
 - (b) matters that relate to an individual or group of individuals;
 - (c) decisions on individual members of the police.
- (4) If there is a dispute between the Minister and the Commissioner in relation to any direction under this section, the Minister must, as soon as practicable after the dispute arises, -
 - (a) provide that direction to the Commissioner in writing; and
 - (b) publish a copy in the *Gazette*; and
 - (c) present a copy to the House of Representatives.”