A NOTE ON THE RELATIONSHI BETWEEN POLICE PRACTICE AND THE LAW

Richard Phillipps

It is a commonplace that police enforce the law, or uphold the law. It may, nonetheless, be useful to problematize this notion somewhat, in order to understand what it is that police do, and in particular on what grounds and via what methods we might want to intervene in police practices.

In one respect the operations of the police are determined by complicated and detailed sets of administrative and procedural rules. Examples would include the organizational division of police into geographic areas, or into specialties such as the drug squad and the gaming squad, the procedural directions contained in the NSW Police Rules and Instructions issued by the Commissioner, the methodological protocols to be followed to ensure an efficacious interrogation as set out in an interrogation training manual,[1] and of course the unspoken but nonetheless binding customary rules of police behaviour. The debate about the source of police power concerns a tension between the formal control of police by the police authorities and the notion that the police should be answerable only to the law, and that this independence and thus immunity from 'political' interference by the Executive is guaranteed by the fact that the power of the police officer does not come via a chain of delegation, but direct from the Crown itself.

The authority for the proposition that the power of police comes directly from the Crown rather than from the police authorities appears mainly in cases that deal with civil liability, including the vicarious liability of police authorities for wrongful acts of police,[2] and the capacity of police authorities to recover for loss of services of a police officer.[3] Thus, it deals mainly with the question of whether police departments and police officers are in a master-servant relationship. Finally, in 1968, the U.K. Court of Appeal emphatically supported the proposition that a police commissioner is "answerable to the law and to the law alone" and "like every constable in the land he should be, and is, independent of the executive".[4] The question has also been discussed in the Report on the September Moratorium Demonstration 1970, and the Lusher Report.[5] The former followed an incident in Adelaide in which the S.A. Commissioner of Police refused to accede to a request of the Premier not to act against a group of demonstrators occupying an intersection. The Commissioner surveyed the authorities and came to the conclusion that there was authority for a power of executive intervention - "It is not only politically correct but it is also in the long term best interests of the police force in this State that there should be a power of executive intervention".[6] Following this report, the S.A. Police Regulation Act was changed, apparently to formalise the situation. The Lusher Report surveyed the same authorities and came to the opposite conclusion.

It is not of great importance here to go into the question as to whether police are or are not in law responsible to the Executive. As the Lusher Report notes, this will have to be eventually decided in a court.[7] Obviously, support or otherwise for the concept of executive intervention in the actions of the police will depend on the conditions under which it is proposed. Thus, in Queensland where there is very little separation between the police and the executive, the left would presumably argue that it was useful tactically to fight for the traditional separation, whereas in states with more progressive governments, it might be argued that the conservative tendencies of police might be effectively countered by more direct control by a police minister, to the extent that this is possible.

What is interesting about the debate is the insistence that there is something called the 'rule of law' and that (if the 'original authority' theory is right) the police follow it, and that the only alternative is a delirium of arbitrary power. For example, former Queensland Police Commissioner Whitrod, reporting

an occasion in Birmingham when a Chief Constable (quite sensibly, some would think) ordered 700 police not to confront 6000 miners, laments:

"For a short time in England the Rule of Law was superseded by the Rule of Might".[8]

I want to argue that the very idea that police follow or uphold the rule of law is meaningless, although this does not mean that they indulge in an orgy of undirected exercise of authority. The law *per se* does not govern practices of policing, although of course police will be expected not to break laws in the course of their duty. To the extent that they do, they may, perhaps, be punished either by departmental procedures or in the courts, but illegal behaviour will not of itself nullify the effect of a police officer's actions. For instance, illegally obtained evidence is not automatically excluded from being produced in court.[9] To the extent that they are operating within the law, police will still be making various choices upon which the law cannot bear: "... the discretionary decisions in question are all within the law and within the law there is no sense in which the law imposes responsibility or corrects error".[10] Further, to say police uphold or enforce the law is necessarily to impute to police officers as social agents the ability to know and to determine the law. But police officers are not trained as bearers of the law - they are trained and accorded status as performers of specific functions. A police officer cannot 'know' the law - even in the sense of an officer being able to repeat the terms of all the pieces of legislation s/he allegedly enforces, the notion is absurd. But even if it were possible for a police officer to repeat the whole of the written common law *verbatim* at will, this would still not entail that officer being a bearer of the law in any sense we can make sense of. For the 'law' in a given set of conditions as it relates to a given set of circumstances is not simply a statute or a set of *ratio decidendi*, it is those conditions and circumstances rewritten in legal discourse and then categorised according to legal protocols. The 'law' for example, as to whether a person is in fact guilty of armed robbery is not known until the case has been decided upon by a court. Thus a police officer is simply not able to decide/state/deploy the 'law' in the sense of a 'person's legal position' - except in specific circumstances, such as the decision as to whether a person is deserving of bail or not. The agency for making legal decisions of this sort is a court. A court as the site of legal decision making demands the presence of agents who are accredited as the bearers of certain discourses/ trained to repeat certain discourses, e.g. judges.

It is precisely because of the institutionalised indeterminacy of what counts as law and its specific requirements for certain classes of social agents as staff that it is nonsensical to talk of police as upholding or enforcing the law - that is, there is no *necessary* relation between the realm of police actions and the realm of 'the law'. At most, the existence of laws can be said to be one of the *conditions of existence* of police activity, but no more than this. This is not, of course, to suggest that the police act in an ad hoc manner. As already noted, there are many protocols that can be said to determine the operations of the police, but these are at the level of specific direction for policing operations.

Clearly, then, criticism of police practices, or demands for changes in police practices, cannot be couched in terms of police adherence or failure to adhere to a generalized zone of the 'legal' or of law. Criticism must be directed at *specific police practices*. Proposals must be couched in the form of *specific demands* for *specific positive practices of policing*.

FOOTNOTES

1. E.g. Inbau and Reid, *Criminal Interrogation and Confessions*, Williams and Wilkins, Baltimore 1917 (2 ed.)

2. *Enever v R.* (1906) 3 CLR 969.

3. *Attorney General (NSW) v Perpetual Trustees Co. Ltd.* (1955) 92 CLR 113.

4. *R v. Commissioner of Police for the Metropolis; ex parte Blackburn* (1968) 2 QB 118.

5. Royal Commission Report on the September Moratorium, 1970. Adelaide Govt. Printer, 1971. Report of The Commission to Inquire into N.S.W. Police Administration (Lusher Report) N.S.W. Govt. Printer, 1981.

6. At page 80.

7. At page 681.

8. R. Whitrod, "Accountability" in Milte and Weber (eds), *The Police in Australia*, Butterworths, 1977, p. 225 at 228.

9. *Bunning v Cross*, (1977) 141 CLR 54

10. Marshall, *Police and Government*, Methuen, 1965, cited in Milte and Weber, *op cit*, at p 221.

Would you buy a used police force from these men? Former N.S.W. Premier, Bob Askin, and police commissioner, Fred Hanson, showing the public face of police accountability.