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POLICE ACCOUNTABILITY IN IRELAND:

An Analysis of the Problems Posed by the Legal, Constitutional and Political Dimensions and how They Might be Addressed.

volume: 1 of 3

By

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SUMMARY

The concept of police accountability is not susceptible to a universal or concise definition. In the context of this thesis it is treated as embracing two fundamental components. First, it entails an arrangement whereby an individual, a minority and the whole community have the opportunity to participate meaningfully in the formulation of the principles and policies governing police operations. Second, it presupposes that those who have suffered as victims of unacceptable police behaviour should have an effective remedy. These ingredients, however, cannot operate in a vacuum. They must find an accommodation with the equally vital requirement that the burden of accountability should not be so demanding that the delivery of an effective police service is fatally impaired. While much of the current debate on police accountability in Britain and the USA revolves around the issue of where the balance should be struck in this accommodation, Ireland lacks the very foundation for such a debate as it suffers from a serious deficit in research and writing on police generally. This thesis aims to fill that gap by laying the foundations for an informed debate on police accountability and related aspects of police in Ireland.

Broadly speaking the thesis contains three major inter-related components. The first is concerned with the concept of police in Ireland and the legal, constitutional and political context in which it operates. This reveals that

although the Garda Siochana is established as a national force the legal prescriptions concerning its role and governance are very vague. Although a similar legislative format in Britain, and elsewhere, have been interpreted as conferring operational autonomy on the police it has not stopped successive Irish governments from exercising close control over the police.

The second component analyses the structure and operation of the traditional police accountability mechanisms in Ireland; namely the law and the democratic process. It concludes that some basic aspects of the peculiar legal, constitutional and political structures of policing seriously undermine their capacity to deliver effective police accountability. In the case of the law, for example, the status of, and the broad discretion vested in, each individual member of the force ensure that the traditional legal actions cannot always provide redress where individuals or collective groups feel victimised. In the case of the democratic process the integration of the police into the excessively centralised system of executive government, coupled with the refusal of the Minister for Justice to accept responsibility for operational matters, project a barrier between the police and their accountability to the public.

The third component details proposals on how the current structures of police accountability in Ireland can be strengthened without interfering with the fundamentals of

the law, the democratic process or the legal and constitutional status of the police. The key elements in these proposals are the establishment of an independent administrative procedure for handling citizen complaints against the police and the establishment of a network of local police-community liaison councils throughout the country coupled with a centralised parliamentary committee on the police. While these proposals are analysed from the perspective of maximising the degree of police accountability to the public they also take into account the need to ensure that the police capacity to deliver an effective police service is not unduly impaired as a result.

Ch.1. INTRODUCTION

1. The Concept of Police.

(a) French Origins

The word police originated in France to denote not a body of men but one of the major responsibilities of government.[1] Williams suggests that these can be classified as: making war, settling legal disputes, collecting taxes and police.[2] From this perspective it is clear that police was not confined to matters pertaining to the enforcement of the criminal law and the maintenance of public order. Indeed, when a central police authority was first established in Paris in 1667 the Government did not vest the office in the existing lieutenant criminal (the existing central authority responsible for criminal matters as opposed to the lieutenant civil who was responsible for civil matters). Instead, it created a new one; the lieutenant general de police.[3] The immensely broad scope of the police function is illustrated by the edict creating this office.[4] It stipulated that the lieutenant was to have control over security, fire, flood, provisionment, mendicancy, manufacture, commerce, illicit publication, price control, filth and rubbish removal. Williams suggests that this description of the lieutenant's police function was motivated as much, if not more, by the pressing need to tackle particular problems posed by the rapid expansion of Paris as by any logical or principled demarcation between a civil, criminal or a police jurisdiction.[5] The

inclusion of social and economic matters in the lieutenant's police remit, however, should not be interpreted as ad hoc pragmatism. When the special council, appointed to reform the police in 1666, set up six sub-committees to consider different aspects of the subject, four of them were concerned with social and economic matters as opposed to purely criminal matters.[6] It would be fair to say, therefore, that the concept of police, as originally understood, comprised the organised protection of the health, welfare, security and morality of the citizenry as well as the regulation of industry, commerce, the professions, agriculture and the environment in the interests of the common good.

The centralisation under a single authority of a wide range of police functions in Paris was the first step towards the equation of the term police with a body of men or officers. Even then it was not until the latter half of the eighteenth century that the term police became associated with an identifiable, organised body of specially appointed officers.[7] There were several reasons for this time lag; not the least of which was the character of the police authority itself. The lieutenant general of police was established not as a police force but as an office with jurisdiction over a wide range of police matters; a jurisdiction which could be, and was, extended or restricted by the Crown as it saw fit.[8] He was at once both a judicial and an executive officer.[9] In the early

years much of his time was taken up adjudicating on minor criminal cases and other judicial matters within his remit. While executive responsibilities soon demanded the bulk of his time they did not obscure the fact that his status as central police authority was expressed in the form of an office as opposed to being the head of a body of men.

When it came to discharging his executive responsibilities the lieutenant relied heavily on a wide range of subordinates.[10] Apart perhaps from the Parisian Guard these subordinates could not be described as members of a single police organisation under the lieutenant as their chief. On the contrary, many of them were members of independent entities which were vested with duties associated with the police of the city, while others were individual entrepreneurs. In the case of the former the lieutenant commanded their services through his constitutional status in the administrative hierarchy of the city, while in the case of the latter he paid. Even when the appellation police was used commonly to describe some of these subordinates it was notable that they acquired the description not because of the particular organisation they belonged to but because of the duties they performed. In other words it can be said that the early police of Paris referred to a range of bodies which might not necessarily share the same status, structure, objectives nor even perform the same functions. The scope of police as originally understood was so broad that it

spawned not one single uniform police organisation but many disparate bodies often sharing nothing in common apart from the discharge of duties associated with one or other aspect of police.

(b) English Influence

What was true of the early police of Paris was also true, to a lesser extent, of policing arrangements in the rest of France, other European jurisdictions and even of Britain and Ireland at that time. In France the primary police force outside Paris was the marechausee.[11] Established originally in 1544 to police the King's soldiers it was not until their reform in 1720 that they emerged as an important crime control organisation. Even then they retained their military character not only in uniform, equipment and methods of patrol but also in the fact that they concentrated primarily on the maintenance of public order under the direct control of central government. St. Petersburg adopted the Paris precedent in 1718 by appointing a police commissioner with functions which extended far beyond crime prevention and public order.[12] Like its Parisian counterpart the position was established as an office under the direct control of central government, rather than as the head of a large, single, uniformed and organised police force. Berlin followed suit in 1742,[13] as did Vienna in 1751.[14] In Britain and Ireland the primary police authority was the justice of the peace.[15] An official appointed by central

government, he shouldered responsibility for an extremely wide range of judicial and executive functions which today would be discharged primarily by magistrates, the police and local government authorities.[16] Like the commissioners of police on mainland Europe he did not sit at the head of a single organised force but relied on a range of subordinates to discharge his functions. Indeed what is peculiar about this arrangement is the complete lack of any organised body of men, apart from the army and militias, whom the justices could call on to carry out their directions on policing matters. Their primary subordinate in law enforcement matters was the constable who was a ministerial peace officer in his own right. This policing arrangement differed from the European pattern in that it was much more decentralised. Not only was there no organised body of police officers or men at the disposal of the justices, but the justices themselves were not subject to the executive directions of any higher central government official. It is also worth noting that the British and Irish policing arrangements of the eighteenth century were much more ancient than their contemporaries in Europe.

When the term police arrived in the English language in the mid-eighteenth century it carried both the broad meaning of the regulation of public peace, security, morals, the economy, the environment etc. as well as the narrower meaning of an organised body of men vested with

responsibility for such matters.[17] It was about this time, however, that the scope of the function embraced by the term in France began to contract. Since those bodies such as the Parisian Guard and the inspectors which the government established to perform police duties on a full time basis devoted the bulk of their time to preventive patrolling, the maintenance of peace and public order, the investigation of crime and on intelligence gathering it is hardly surprising that the term police became associated in the public mind with a body of men charged with these narrower responsibilities. Once the word police had taken root in the English language it did not take long for this refinement to cross the English Channel. This is reflected in the public debate on public order in England which gathered momentum from the end of the 1750's onwards.[18]

Until the London Metropolitan Police force (LMP) appeared in 1829 the country relied primarily on locally appointed constables and the army as the primary response to the challenge of crime and public disorder.[19] The former had proved hopelessly incompetent and usually corrupt while the latter, through the use of lethal force, often provoked as many riots as they quelled.[20] A further danger with respect to the army was that they constituted the last line of defence. If they were overcome in riot situations, as sometimes happened, parts of London or other major cities were left to the mercy of the mob. Peel and others realised that an alternative was required.[21] In

essence he perceived that this alternative should consist of an organised body of disciplined and trained men operating full-time in a crime prevention capacity. Furthermore, they would rely primarily on public cooperation and support, as opposed to the use of force, for the discharge of their functions. Not surprisingly, the appellation police was used to personify this concept in England.

Since there never had been such a thing as a police force in England the debate inevitability was dominated by the English interpretation of the system that was functioning in France at that time. In other words it focused on the implications of establishing an organised body of men, appointed, financed and controlled by central government to maintain order on the streets and apprehend trouble-makers. The depth of opposition to this concept among influential public opinion in Britain ensured not only that the first recognisable example of a police force did not appear there until 1829,[22] but it also had a lasting impact on the constitutional structures into which the new force s were moulded. This impact can be traced back to the fact that the deep-rooted English animosity to organised police forces stemmed partly from their perception of the French experience and partly from their association of it with a standing army.[23] For the English person both were identified with the tyranny of centralised totalitarian states in which the liberty of the individual

was subordinated to the needs of the central executive. In this scenario the police would function as the spies of central government through out the country thereby enabling the government to restrain the freedoms of those whom it perceived to be a threat to its' interests. Surprising as it may seem today, liberty to English people in the eighteenth century was a prize to be valued even above the benefits of an orderly society. The structures of the police forces that eventually emerged, after a forty year gestation period, were heavily influenced by the need to overcome this deep-rooted opposition. Accordingly, when Peel designed his LMP he avoided the establishment of a national police force and retained the familiar ancient office of constable as the basic unit of the new force. Both still feature today as distinctive characteristics of English police.[24] Peel hoped that by retaining these ancient characteristics of English policing it would persuade the public that the English police were quite a different concept from their French counterpart. Another feature which later proved invaluable in this respect was the fact that the new police were unarmed and, therefore, had to rely fundamentally on the support and cooperation of the people. As the police idea became more familiar this feature, more than any other, allowed the public to identify with the police to a degree unknown elsewhere.[25]

Peel's imprint on English policing represents an

ingenious compromise between the need to assuage the strident demands for the retention of local control over policing and the pressing need to resort to organised police forces. The brilliant simplicity of the compromise is revealed by the fact that in law the new English concept of an organised police force was nothing more than a body of constables from a defined area acting under the direction and control of a chief constable. Significantly from an Irish perspective, however, Peel cannot claim to be the first architect of the arrangement. In fact it made its' first appearance forty years earlier in Dublin.

(c) The Irish Experience

English fears of the concept of police did not extend to Britain's overseas possessions including Ireland, which was perceived as being sufficiently remote and different.[26] The traditional liberties of Englishmen would not be threatened by the introduction of this alien form of control in Ireland. Accordingly, it was in Ireland that the concept of an organised police force first made an appearance in the British Isles in 1786.[27] As with the LMP over forty years later the new Irish police force was confined to the capital city, namely Dublin. It was designed to function in a crime prevention role and retained the constable as its basic unit.[28] It differed from the LMP, however, in two significant respects. First, the force was subject to very close control from central government.[29] In this case central government meant

Dublin Castle which represented English interests in Ireland. Inevitably, that meant that the force would be viewed by most of the general public as the agents of a remote, and possibly hostile, government. Second, the force was armed and specifically structured and trained to respond with force to any breakdown in public order. These two factors combined to give the force a continental gendarmerie dimension that was patently absent from its English counterpart. As the police idea spread throughout Ireland and Britain these differences became even more marked. While Britain developed a system of local police forces which were closely identified with the people they served[30], Ireland was subjected primarily to a national police force which was always armed and always ready to respond to any hint of rebellion by disaffected sections of the population[31]. The close identification of the police with a government in Dublin which was remote and alien to large sections of the population throughout the country meant that the close association between police and public, which was a hallmark of English policing, never really emerged in Ireland.

The advent of Irish independence heralded a new approach to the concept of police in Ireland. The opportunity was taken not only to disband the old and establish a new police organisation, but also to promote a much closer identification between the new police and the Irish public. A primary ingredient in this enterprise was

the fact that the new police were unarmed. Like their English counterparts, therefore, the new Irish police would have to rely fundamentally on the support and cooperation of the public to discharge their function. Although internal subversion was always a risk, particularly in the early years of the new State, the new force quickly settled down to a traditional civil police role.[32] It also retained the distinctly English arrangement of a body of officeholders acting under the direction and control of a senior officer. The only real surviving distinction between the Irish and the English concepts of police was the Irish retention of the tradition of close central government control. Police in Ireland continue to be organised and administered as a central government service. However, given that the Irish government is now elected by the Irish people, central control over the police no longer operates as a barrier between police and public.

The concept of police in Ireland today, therefore, can be summarised as follows. First, it is personnified in the form of a public body which has been established by the State as part of the central government apparatus. The legal, constitutional and administrative status and structures of the force are quite complex and will be discussed in detail in chapters 3-6. Second, the primary function of police consists of the prevention of crime, the maintenance of public peace and order and the enforcement of the law. Although the general police function can be

classified under these three headings, the reality is that its exact parameters are very loose and ill-defined. They are discussed in detail in chapter 2. Finally, the force is generally unarmed and relies primarily on the support and cooperation of the public to discharge its function. This reflects the public service aspect of its role. In order to deliver this service, however, it will often be necessary to act coercively in circumstances where mere public support is not sufficient. Accordingly, the police are also the repository of certain resources and public powers which enable them to use force when that is necessary in order to deliver an adequate police service. This will be discussed also in chapter 2.

2. Concept of Accountability

(a) Defining The Accountability Relationship

Although the term accountability is in common usage today it is very difficult to ascribe a precise meaning to it. This is reflected in the dictionary definitions which confine themselves to a list of the various shades of meaning associated with the word account. Klein and Day have concentrated thes definitions into four sentences which they believe sum up the essence of the concept of accountability in the context of public policy and government.[33] To account is to answer for the discharge of a duty or conduct. It is to provide a reckoning. It is to give a satisfactory reason for or to explain. It is to acknowledge responsibility for one's actions. Proceeding on

this basis the concept of accountability clearly assumes the existence of at least two parties. One of these parties(A) will be under an obligation to give an explanation of his actions in some matter to the other(B). It is also implicit that there are agreed parameters or standards applicable to A's conduct in the matter. Accordingly, the onus will be on A to persuade B that his conduct is consistent with those parameters or standards. If these basic ingredients are present in the relationship between A and B it would seem legitimate to conclude that A is accountable to B. There is no requirement that the former should be subordinate to the latter in any other degree.[34] The mere assertion that A is accountable to B, therefore, is just as applicable to a relationship in which B has no power to direct A's actions as it is to a relationship in which B has control over A's actions.

When one talks of the accountability of A to B, however, the relevant issue is not just whether A is or is not accountable to B, but to what extent he is accountable. From this perspective any aspect of the relationship between the parties is relevant simply if it has an impact on the manner and extent to which A is held accountable to B. Relevant factors would include not just the mechanisms of A's duty to justify his actions to B but also matters such as: whether the scope of A's actions have been prescribed in advance and, if so, whether they were prescribed by B; whether A's actions are taken in the

discharge of a duty or in the exercise of a power; how much autonomy A enjoys over his actions; whether the nature of A's actions assume a professional expertise; the capacity of B to take remedial or preventive action against A where A's actions have failed to satisfy the relevant standards; and whether B functions as a single entity or through several intermediaries which are independent of each other.

Even if these mechanical aspects of the whole accountability relationship are charted it will still not be possible to draw a firm conclusion on whether A is sufficiently accountable to B. The relationship might be such that B can exercise a very high degree of control over A's actions and yet the latter might still not be sufficiently accountable to the former. Conversely, the accountability needs might be satisfied in a relationship where the parties are almost independent of each other apart from the mechanical obligation on A to justify his actions in some respect to B. The reason, of course, is that the sufficiency of accountability in a relationship will depend very much on what the parties require from that relationship. For example, A's activities may have very little impact on or significance for B. Accordingly, a very loose accountability arrangement would probably satisfy B's requirements. On the other hand, if A performs functions on behalf of B and the exercise of these functions has the potential to do great harm or deliver great benefits to B then it is likely that only a very tight accountability

relationship between A and B would satisfy the latter's needs. A key issue in assessing any accountability relationship, therefore, is the impact that the actions of one party will have on the other.

3. Police Accountability to the Public

(a) Introduction

In the case of police accountability to the public the parties in question are, obviously, the police and the public. The police are a body established, empowered and resourced for the purpose of delivering a police service to the public. It follows that the public automatically has an interest in the actions of the police. At the very least, the public will want to be satisfied that it is getting the quality and efficiency of service it expects from the police. It will want to be in a position to take the necessary remedial action in the event of the police service failing to meet the desired standards. At this level of generalisation the objectives of the police-public accountability relationship do not differ significantly from that applicable to the public and any other service-delivery public body.[35] However, the nature of the police function and the manner in which it is delivered are fundamentally different from the functions discharged by most other public bodies. These differences impose demands on police accountability which are not necessarily relevant to other public bodies. [36]

(b) Relevant Police Characteristics

(i) Function

The distinctive characteristics attributable to the police force can be outlined under four headings. First, there is the scope of the police function.[37] In contrast with most other public bodies the police remit is defined very loosely. As will be seen later neither common law nor statute law impose clearly identifiable boundaries to police duties. The most they offer are: law enforcement, crime prevention and the maintenance of the peace. Even these duties anticipate that the police have a legitimate service and regulatory role to play over a huge range of economic, social, criminal and general human activities. In addition to that it is acknowledged that the police function beyond these boundaries by acting as a state security service, an emergency service and a general public social service. Obviously it would not be possible for the police force to discharge all these functions fully all the time. Accordingly, it is accepted that they must exercise discretion in allocating priorities to the various duties from time to time and from place to place.[38] No other public body, apart possibly from the cabinet itself, has a jurisdiction as broad, ill-defined and as flexible as that.

(ii) Powers and Resources

The second characteristic is closely related to the first. It concerns the immense powers and resources placed at the disposal of the police. Apart from the army no other

public body is equipped with the full panoply of resources available to the police.[39] The force consists of a large body of individuals organised, disciplined and specially trained to handle a wide range of challenges. At their disposal they have: vehicles, buildings and a communications network which enable them to maintain a strong presence in every village, town and city and throughout the countryside of the State. They have computers for storing and processing intelligence, a range of specialist services such as forensic science laboratories and a sub-aqua unit, and lethal weapons. All of these resources, coupled with the moral authority of the State are available to the police in the exercise of their broad functions.

Although common law and statute law are very shy about prescribing precise duties for the police the opposite is the case with respect to powers. Both confer a huge range of discretionary powers on the police; unlike anything available to any other public body.[40] Some of these powers are so broad that they can be used in a wide range of situations, while many are so narrowly defined that they can be used only in very specific situations. The net result, however, is that the police can legitimately restrict or deny basic rights and freedoms of the individual such as the right to liberty, privacy, property and even the right to life itself. Indeed, it has been suggested that it is this broad capacity to use force

against the individual that marks the police out as distinctive from any other body.[41] A further peculiar characteristic of police powers is the fact that they vest fully in each individual member of the force from the highest to the lowest. It follows that each member of the force can, on his own initiative, summarily deprive any citizen of liberty, privacy, property and life in prescribed circumstances.

Significantly, a perusal of police powers will reveal a lot more detail about the scope of legitimate police activity than any of the general duties prescribed by law. If anything this enhances the discretion and authority of the police. Not only are they free to act in a vast range of situations where they so choose, but their intervention will often be backed up by their ability to resort to coercive powers. This combination of loosely defined jurisdiction, internal resources and broad discretionary powers establish the police as a potential force for immense good in society, but also as a potential threat. They could use their discretion to target violent individuals and organisations who threaten the life, person and property of other law abiding individuals and the State itself. Equally, however, they could use it against individuals and minorities simply because they are perceived as undesirable or as a threat by other powerful groupings in the State or by the State itself. No other body in the civil administration of the State can encompass

such capacity for good and evil.

(iii) Service

The third characteristic concerns the vital nature of the police service. While there would undoubtedly be adverse implications for individuals, sectional interests and society as a whole if some of the public services or regulatory functions available today were withdrawn, they would not compare with the absence of a police service. Modern society could hardly function as we know it today without a police service.[42] Without the law enforcement and crime prevention services of the police it is difficult to see how the basic standards of behaviour prescribed in the criminal law, and which are vital to the survival of a civilised society, would be observed. Anarchy and chaos would be an ever present danger. Indeed, even the absence of police authority in some regulatory matters such as in road traffic control and in keeping the peace would have a major destabilising effect.

Closely associated with the third characteristic is the distinctive manner in which the service is delivered. Most service delivery public bodies deliver their services directly to, and primarily for the benefit of, specific individuals who qualify as recipients of these services.[43] Most regulatory public bodies, on the other hand, may impact on the interests of specific individuals, usually in a negative manner, but the beneficiaries of

their efforts are usually the general public.[44] The police do not fit easily into either camp. Certainly a vital aspect of their function is to provide services directly to individuals. When individuals have been the victims of crime or feel threatened or find themselves in an emergency they will often turn immediately to the police for assistance. Clearly they perceive the police as a public service for their particular needs. Unquestionably, however, much of the police function is discharged for the benefit of the public as a whole. Crime prevention work, the maintenance of public order, and road traffic control are more consistent with regulatory functions discharged for the benefit of the general public or the State. Furthermore, when the police force discharges its regulatory function on behalf of the State it often does so by impacting upon the rights and freedoms of individuals. While this is a common characteristic of most regulatory bodies the police can be distinguished by the extent to which they can impact on the individual. For example, the discharge of their regulatory services for the benefit of the State will often consist of restricting or denying an individual's right to liberty, privacy, property and even life. The individual, therefore, has a lot to gain and a lot to lose from the manner in which the police choose to deliver their services.

(iv) Law Enforcement

The final characteristic of the police function which

must be mentioned here is its law enforcement aspect. Some other public bodies have a role to play in law enforcement, but in each case that role will be confined to the very narrow parameters of the body's remit.[45] The police are unique in that they carry a general obligation to enforce the law. Inevitably this obligation brings them into close association with the administration of justice. Any society governed by the rule of law must ensure that justice is administered impartially. Accordingly, the ultimate responsibility for enforcing the law rests on judges whose independence and impartially are guaranteed. The judges capacity to enforce the law impartially, however, depends heavily upon the manner in which cases are brought before them. If the impartiality of the investigative and prosecutorial agencies cannot be guaranteed impartial law enforcement by the judges cannot be guaranteed. The judges can only interpret and apply the law to those cases which are brought before them. If cases are presented in a manner which reflects a bias in favour of some offences as opposed to others, or one class of offender as opposed to another, it will result in biassed law enforcement. The dominance of the police in the investigation and prosecution processes establish them as a key player in the impartiality of law enforcement. If their independence and impartiality cannot be assured then neither can the impartiality of law enforcement. If impartial law enforcement cannot be guaranteed then the rule of law is under threat. It is this aspect of the police role, perhaps more than any other,

which confirms their uniqueness as a public body. Although they can be classified as executive as opposed to judicial in the broad separation of powers doctrine, the strong judicial aspect of their law enforcement function imparts to them a degree of independence which is quite unparalleled in the functions of any other public body in the executive branch.

(c) Objectives of Police Accountability

(i) Public Supervision and Control

These distinctive characteristics of policing must have major implications for the objectives of police accountability to the public. It is submitted that the implications can be outlined under three general headings. First, there is the need to ensure that policing is subjected to a very high degree of public supervision and control. That much is evident from the fact that the services provided by the police are so vital to the well-being of the public and individual members of the public. Not only has the law left the police with very broad discretion over what those services shall be, and how they shall be delivered, but the State has also endowed the force with immense powers, resources and organisation. Taking these two factors together it is obvious that the police can function as a major benefit to society and equally as a major menace to individuals and minorities in society.[46] It would be unthinkable that a public body bearing these characteristics would not be subject to the

closest public supervision and control. In a society governed by the rule of law the police would, of course, be accountable to the law at the suit of the individual and the State. While that would function as a valuable means of supervision and control, it clearly would not be sufficient. The law leaves too much discretion to the police for it to satisfy the accountability requirement fully. Much more is needed. The public as a whole, minorities, and even individuals, will want to be assured that the police apply their discretion and resources to deliver the police services they require, that those services are delivered efficiently and that they are delivered impartially when they impact coercively on the rights and freedoms of individuals and local communities. There will, of course, be scope for argument and conflict among individuals, minorities, the general public and the police about what is desirable in these matters. From the outset, however, effective accountability clearly requires mechanisms through which these issues can be discussed, resolved and appropriate action taken. That in turn will require access to relevant information about police policies, practices and actions in individual cases as well as mechanisms which will allow for suitable remedial and preventive measures to be taken where police policies and/or actions are not satisfactory to the public or the minorities or individuals concerned.

(ii) <u>The Delivery of Police Service</u>

The second heading concerns the need to ensure that accountability does not function as an obstacle to the efficient and satisfactory delivery of police services. The vital contribution that these services can make to the well-being of the individual and society as a whole is such that any obstacles to the maximum delivery of these services must be viewed with suspicion. Accountability can function as a major obstacle in this regard. Obviously if the demands of accountability were such that they could be satisfied only if the police force allocated sufficient resources to them, there would be less available for the delivery of police services proper. However, it is not just a question of resources. If, for example, the accountability machinery was designed to function in a manner which subjected each police officer, and the force as a whole, to a tight regime of detailed rules and procedures which had to be followed exactly on pain of severe penalty, the quality of police services would inevitably suffer. Not only would individual police officers lose the initiative to react intuitively and immediately to situations as they arise but, in order to protect their own backs, they would tend to become over cautious. The net result would be the loss of one of the most valuable contributions that the police can make to the safety and well-being of the individual and the State, namely the capacity to respond to unforeseen threats and dangers in the shortest possible time. A closely associated loss would be the reluctance of individual officers and the

force as a whole to exercise initiative in following up tentative lines of enquiry in the course of investigative or general preventative work in case it exposes them to heavier accountability demands. There is also the danger that burdensome accountability structures coupled with a concomitant curtailment of police initiative and discretion would result in lower police morale. Individuals who had joined the force with high ideals of public service in a police role would become severely disillusioned if they found themselves frustrated in this enterprise by the bureaucratic demands of excessive accountability. In order to secure the benefits of maximum police performance it would be necessary to treat the police as a professional body of experts. While it would be up to the public ultimately to set the general parameters of police functions, powers and resources it should be left to the police organisation itself to decide how best to use these powers and resources in the discharge of its functions. Norms would be set and enforced within the organisation. Insofar as it was accountable to any external body or authority that accountability should be left to the law, and outside of that only very loosely to individuals or representative bodies.

(iii) Police Impartiality

The third heading concerns the need to ensure that accountability does not compromise police impartiality in the discharge of their law enforcement role. If justice is

to be administered consistently with the rule of law it is essential that the police should be imbued with the same sense of impartiality as judges when deciding whether or not to investigate and/or prosecute in individual cases. A precondition for such impartiality is independence from external direction in such matters. There can, of course, be difficulty in determining when a direction impinges upon the impartiality of the justice process and when it does not. There is no difficulty about a direction to proceed or not to proceed in an individual case. The problems arise with more general policy directions such as a direction to prosecute all shop-lifters or a direction to maintain a heavy police presence on the streets of a neighbourhood dominated by residents of a particular ethnic origin. Such directions are definitely capable of having an indirect impact on impartiality in the administration of justice. If impartiality is to be secured to the maximum extent possible the accountability machinery must function in a manner which protects police discretionary decision-making in these matters from sectional interests.

4. Conclusion

There is obviously immense scope for conflict among the implications for accountability which flow from the distinctive characteristics of the police. Broadly speaking the implications outlined under the first heading on the one hand and those outlined under the second and third headings on the other represent opposite ends of the

accountability spectrum. The former requires strong accountability in terms of maximising the extent to which the police are responsive to the demands of the individuals and communities they serve. The latter requires that the needs of accountability should be addressed in a manner which infringes as little as possible on the freedom and independence required by the police to discharge their functions to the maximum of their potential. A balance must be struck somewhere between these two poles if an acceptable mixture of the advantages and disadvantages of each is to be secured. The object of this thesis is to assess where that balance has been struck in Ireland and to consider to what extent, if any, it is possible to make further concessions to greater accountability without significantly jeopardising the capacity of the Garda Siochana to deliver an efficient police service.

Any assessment of the extent to which the police are responsive or accountable to the needs of the community will require a prior knowledge of several matters. From the outset it will be vital to know for what exactly the police are accountable. This in turn will require an understanding of the police function. Unfortunately, in the case of the Garda Siochana, this is not a straightforward matter. Nowhere is there a concise legislative definition of the police function. To construct an image of the police function in Ireland it is necessary to piece together various strands of common law and a large volume of

disparate statutory provisions as if they were individual parts of a large jig-saw puzzle. Further complications are added by the fact that most of these common law and statutory provisions only confer powers on each individual member of the force. In theory, therefore, the police function will vary depending on how the individual members decide to exercise their powers in different situations at different times. In practice a coherent order is imposed by the fact that the Commissioner is vested with a power of general direction and control over the force. It follows that any valid attempt to define the police function in Ireland must bring together the various common law and statutory powers vested in each member of the Garda Siochana plus the relevant administrative directions promulgated by the Commissioner. An attempt has been made to do this in chapter 2.

Any consideration of how the police are rendered accountable will also require a prior knowledge of their status in the body politic. Is the Garda Siochana, for example, to be treated as 12,000 individual officers each being personally accountable to the public for how he does and does not exercise the powers that are vested in him by law? Or is it to be treated as a single corporate body which is answerable not only fo the actions and inactions of it's individual members but also for the state of the police generally? Or is it merely part of the bureaucracy of the central government which will answer for the

shortcomings of individual members and the state of the police generally in the same way that it will answer for the shortcomings of individual civil servants and the quality of public services generally? These matters are addressed in chapters 3-6. Chapter 3 analyses the legal, administrative and political structures of the force with a view to elucidating it's place in the overall apparatus of government. Chapters 4,5 and 6 grapple with the exceptionally complex issues that have ensued from the Irish adoption of the British concept of a police force as a body of common law officeholders, each vested with a wide array of coercive powers, operating under the general direction and control of a chief officer who also occupies an office rooted in the common law. This constitutional model of policing has been developed in Britain against a background of local independent police forces. Even there it has given rise to heated debate on the exact status of the police. In Ireland, however, it is planted in the alien turf of a national police force. This serves to complicate even further an already complex subject. Chapter 4 attempts to explain the peculiar British concept of police. Chapter 5 analyses it's application to the Garda Siochana; while chapter 6 highlights the gap between the constitutional theory and the practice.

The remainder of the thesis focusses directly on accountability. The analysis of the Garda Siochana in chapters 2-6 reveals that the two primary accountability

forums are the law and the democratic process. Accordingly, the remainder of the thesis considers how the law and the democratic process can respond to the accountability challenge posed by the Garda Siochana. This embraces an assessment of what the current legal and democratic processes have to offer, their shortcomings and how they can be strengthened in order to strike a more even balance between the competing accountability objectives identified earlier.

Chapter 7 deals with the response of the law and the legal process to the police accountability challenge. It concludes that the criminal process, the action in tort and judicial review all have a valuable role to play in providing accountability in the interface between individual members of the force and members of the public. However, these legal processes have not been developed specifically to deal with the peculiarities of police-public encounters and, indeed, are not always capable of responding to all of the accountability issues that arise in such settings. It is proposed that many of these issues can be dealt with satisfactorily only through an administrative complaints procedure. Chapter 8 considers how such a procedure should be designed to respond effectively to many of the genuine cases which, for one reason or another, cannot be accommodated by the legal process. Chapter 9 assesses how the new Irish citizen's complaints procedure matches up to the blueprint in chapter

8.

Chapter 10 explains how the democratic process measures up to the challenge of police accountability. It is based primarily on a survey of Dail questions and debates in both the Dail and Seanad from 1985-87(incl.). The survey focussed on questions and debates on police matters. It's objective was to assess how, and to what extent, the theory of democratic accountability applied in practice to the Garda Siochana. The overall conclusion was that the traditional democratic process has a very important role to play in ensuring that police policies and practices are responsive to the needs and complaints of the public. However, the theory promises much more than it has delivered. Chapter 11, therefore, considers various ways in which the democratic process could be strengthened to serve the needs of police accountability. Particular attention is devoted to the British concept and model of a polce authority.

Chapter 12 offers an overall conclusion on the subject of police accountability in Ireland.

Ch.2 THE GARDA SIOCHANA AS A POLICE FORCE

1. Introduction

(a) The Need for a Police Force

Among the most pressing tasks for the founders of the new Irish Free State was the establishment of a civil police force. The established forces of law and order, the Royal Irish Constabulary (RIC) and the Dublin Metropolitan Police (DMP), were disintegrating in the face of two years sustained ostracism form the community and armed attack from the IRA.[1] Although the DMP survived as a separate force until 1925 the RIC was disbanded in 1922 pyrsuant to the terms of the Anglo-Irish Treaty.[2] Not surprisingly, a wave of crime and lawlessness was sweeping the country.[3] To make matters worse the split between those who supported the Treaty settlement and the very large minority who did not was threatening to erupt in violence. The anti-Treaty minority saw no reason to lay down their arms and it was clearly only a matter of time before they would perceive the offices, institutions and supporters of the new Free State as legitimate targets. In this volatile situation the government moved quickly to establish a police force which would protect life and property, apprehend criminals, restore law and order and generally instil in the people a sense of security and stability. This, in turn, would win popular support for the fledging State and ensure its survival.[4] A sense of urgency was conveyed by the fact that the government appointed a Committee, under the chairmanship of Michael Staines,[5]

and gave it a deadline of three weeks to devise a plan for the new police.[6]

(b) The Committee's Proposals

Given the tight deadline facing the Committee, the fact that its existence and deliberations were held in secret and that it involved no fewer than nine ex RIC men, it is hardly surprising that its proposals did not envisage a radical change in structure from the RIC. The proposed new police was to be a unified force, with a maximum strength of 4,300 men, administered by a Commissioner who would be responsible to the government. The basic rank would have powers similar to, and would be the equivalent of, the British constable. The ranks would be virtually the same as in the RIC, and the rigid distinction between officers and men would be retained. Where the Committee diverged significantly from previous practice was in its proposal that the force should be unarmed. This marked a radical departure from the RIC which was a heavily armed, paramilitary force with a primary responsibility for the suppression of the frequent violent manifestations of public disaffection. By suggesting that the new police should be unarmed, the Committee gave a strong signal that the force should function as the servants of the people in its law enforcement role, rather than as the armed wing of the government. Implicit in this is the notion that the new force should fulfil its role through public support and co-operation rather then through the muscle that the

government could give it.

The change in policing policy advocated by the Committee was reinforced by its proposal that the new force should be non-political in its administration and composition. This was not meant to suggest that the police should somehow be politically independent from the government in the formulation and implementation of its policies. Indeed, elsewhere the Committee proposed that the Commissioner should be responsible to the government. It would seem that the Committee's intention was simply that the force should serve the government of the day impartially. Nevertheless, this did represent a significant departure in Irish policing. The RIC had always served only one government, namely the government of the United Kingdom, which lately was perceived as alien irrespective of which party was in power. In the new Irish Free State, however, it was envisaged that there should be frequent changes of government reflecting changes in electoral preference. Accordingly, the obligation on the police to serve the government of the day impartially would give real meaning to the notion of the Irish police being non-political in its administration and composition.

(c) Implementing the Committee's Proposals

The Committee's proposals were accepted in full by the government. Michael Staines, acting Head of the Republican

police, was appointed the first Commissioner, and recruitment began in secret immediately. The secrecy was deemed necessary in order to avoid antagonising anti-Treaty forces, but it also had the effect of weighting the membership of the new force very decidedly in favour of pro-Treaty and government supporters.[7] A further consequence was the smothering of any public input, contribution or debate on the role, structure, powers, duties and policies of the new force until it was firmly in place. The first opportunity for public input was not until July 23rd with the publication of the Garda Siochana (Temporary Provisions) Bill, 1923 which was designed to put the new force on a statutory footing for the first time. By then, however, the Garda Siochana was already part of the landscape given that the rank and file were sent out from their central barracks to take up their posts throughout the State from September 1922.[8] This apparent disregard for democratic consultation in the establishment of a primary institution of State is also responsible for peculiarities such as section 7 of the District Justices (Temporary Provisions) Act, 1923 which purported to transfer the powers and duties of the RIC, in respect of petty sessions sittings, to the Garda Siochana more than four months before the force was statutorily born.[9]

(d) <u>The 1923 Act</u>

The Garda Siochana (Temporary Provision) Act, 1923 represented the Committee's proposals, plus the

government's views on the new police, synthesised into legislative form by the Minister for Justice, Kevin O'Higgins. The opportunity for other voices to be heard prior to the publication of the Bill was denied by the secrecy surrounding the Committee's work and the government's deliberations. Nor did the Dail and Seanad stages of the Bill provide much scope for the consideration of alternative proposals as O'Higgins refused to entertain any significant amendments. His only concession to the Labour opposition was that the legislation should remain in force for a maximum period of one year to provide time for a broader appraisal of the deeper policy issues behind the creation of a new police.[10] In the event there did not appear to be any alternative thinking on policing arrangements in Ireland at the time. The 1923 temporary legislation became, almost verbatim, the Garda Siochana Act, 1924 after a debate which was notably short on alternative proposals. The Police Forces Amalgamation Act, 1925 provided another opportunity for a wide ranging discussion on the whole concept of policing in Ireland. Despite the fact that the Act was to put into effect the major policy decision of opting for a single, unified police force for the whole State, rather than the existing arrangement of one for the Dublin metropolis and one for the rest of the country, the Dail and Seanad debates were even more sterile than those which preceded the 1923 and 1924 Acts. Surprisingly, no-one suggested the alternative of several localised forces, along contemporary British

lines. The current statutory basis for the Garda Siochana, therefore, is to be found in the Garda Siochana Act, 1924 and the Police Forces Amalgamation Act, 1925. Apart from the merger with the DMP however, the substance differs only marginally from the temporary arrangements that were adopted in undemocratic haste in 1923.

(e) Continuity

Even a cursory reading of the legislation reveals that the new Garda Siochana did not represent a fundamental shift in the legal concept of policing in Ireland. Just like the RIC and DMP the Garda Siochana was established as a body of men[11] divided up into ranks[12] under the general direction and control of a chief officer.[13] Similarly, the chief officer, and other senior officers, are appointed by the political Heads of State and are removable by the same from time to time.[14] These political Heads also enjoy extensive powers to make regulations for the general management of the force; just as their predecessors could do for the RIC and DMP.[15] Even the absence of a general statutory prescription of the powers and duties of the RIC and DMP or the physical resources and weaponry which could lawfully be put at their disposal is replicated by a similar silence in the legislation establishing the Garda Siochana. It would seem, therefore, that if the public face of policing in the new State was decidedly different from what went before, explanations would have to be found elsewhere than in the

basic legal structures of the force. This continuity, however, does not make it any easier to describe precisely the basic functions and role of the force.

2. THE GARDA ROLE

(a) Introduction

(i) Establishing Legislation

A distinctive, but by no means unique, feature of the legislation establishing the Garda Siochana is the absence of a clear statutory prescription of the functions of the force. Apart from the stipulation that it shall be a "force of police"[16], there is no attempt to define what matters should be within its remit and what matters should be outside. The Dail and Seanad debates on the Bill preceding the legislation[17] reveal a clear presumption that the force was being established to discharge the traditional police responsibilities of preventing and detecting crime, keeping the peace and maintaining public order. At no stage is there any suggestion or realisation that the force could also be deployed for other purposes, such as the preservation of a certain political, moral, economic or social order in the State. To some extent this might be attributed to the absence of Fianna Fail representatives from the debates as they, at that time, should have been alive to the danger of a national police force being used as a political tool in the hands of the government of the day. Whatever the reason, the fact remains that the basic legislation does not offer a

definition of the role of the Garda Siochana. It does not follow, however, that the legislation offers no guidance on the matter.

By describing the Garda Siochana as a force of police[18] the legislature clearly intended that body to discharge the traditional law enforcement functions which had been identified with its' immediate predecessors the RIC and the DMP and all other police forces in the British Isles by the Twentieth century. This interpretation is supported by the retention of the peculiarly British model of a police force as a body of individual officeholders acting under the direction and control of a chief officer[19], as opposed to a body which enjoyed a legal personalty separate and distinct from that of its' employees. The retention of the peace officer at the centre of the new police organisation ensured that the role of the new force would be characterised by the functions traditionally associated with the peace officer. It will be seen later that these comprised the keeping of the peace, the maintenance of public order and the prevention and detection of crime.[20] It is surprising, therefore, that the statutory declaration of office, taken by each member of the force, makes reference to only one such function, namely the keeping of the peace[21]. Not too much should be read into this, however, as the declaration also contains a pledge to "discharge all the duties" of the office.

(ii) Police Powers

Further elucidation of the Garda role can be found in other legislative enactments both prior and subsequent to the enactment of the founding legislation. These enactments normally confer powers on a member to act in circumstances where, or in a manner in which, he would not otherwise have had the power to act. The subject matter of the powers can vary widely from one to the other. Indeed, for the most part they are created in a very ad hoc, piecemeal manner to deal with situations or needs as they arise. One power may be very narrow and innocuous while another may have wide ranging implications for a large number of people and for civil liberties generally. Little thought is given to how one power may interact with another. Despite this haphazard design these statutory powers do have an impact on the role of the Garda Siochana. The very fact that the legislature has authorised each member of the force to intervene in a particular situation in a manner which would be beyond the power of any other citizen, implies that such situations are of special concern to the Garda Siochana. The Garda's role, therefore, can be shaped by the contents of the piecemeal powers that are conferred on its members.

(iii) Commissioner's Instructions

The final ingredient dictating the role of the Garda Siochana is the input from those who control the force. The importance of this factor is accentuated by the fact

that the law confers many individual discretionary powers directly on each member of the force and imposes very few duties. If each member was under a legal duty to act in certain situations the capacity of those who control the force to dictate what they should or should not do would be limited. Where each member is merely conferred with a discretion to act, however, there is much more scope for those in control to lay down policies and priorities governing how that discretion should be exercised. These policies and priorities, therefore, could be just as effective in shaping the role of the Garda Siochana as the contents of the discretionary powers themselves. It is clear from the founding legislation that the Garda Commissioner has immediate control of the force. He is conferred with the power of general direction and control[22]. Any assessment of the role of the Garda Siochana, therefore, must take into account the policies and priorities that he sets for the force. Although it is not directly relevant at this point, it is worth noting that the Commissioner is not a free agent when it comes to adopting the contents of these policies and priorities. He is, after all, appointed by the government, and can be removed by the government at any time. His room for manoeuvre is also limited by government control over finance, recruitment, training and promotion. The government can use its power in these areas to dictate the contents of training programmes, the availability of specialist units and equipment and the criteria for

promotion. These matters will have an indirect effect on the contents of force policies and priorities. Indeed, it must be remembered that the contents of a garda's statutory powers are effectively determined by the government. The constitutional theory may be that the powers are conferred by the Oireachtas, but the reality is that the Oireachtas will only legislate in those terms requested or permitted by the government.

(iv) Summary

To construct a picture of the role of the Garda Siochana, therefore, it is necessary to begin with an account of the common law powers of a member. These will highlight the basic crime control and public order functions which have always been a characteristic of policing. In addition, however, it will be necessary to examine how the government has developed the role of the force through the medium of the Commissioner's power of general direction and control, through the medium of legislation enacted by the Oireachtas and through its own control over such matters as finance and general management. Taking all these into account, it is submitted that the role of the Garda Siochana today can be divided up into the broad categories of: crime control; public order; the political stability of the State; economic, moral and social regulation; public administration; and accident and emergency. Each will be dealt with in turn.

(b) Crime Control

(i) Citizen Garda

The prevention and detection of crime has always been a major preoccupation of the peace officer and his successor in organised police forces. It might seem ironic, therefore, that some of the most basic crime control powers associated with the peace officer also inhere in the private citizen at common law. At common law a citizen is generally free to do whatever he wishes; subject to the specific prohibitions imposed by law[23]. It must follow that every citizen can exercise his freedom to promote crime prevention and detection. For example, there is no legal prohibition on a citizen spending his time observing the activities of another, asking questions of, and about, another, photographing the activities of another, doing research on the background and character of another, etc. Such actions only become unlawful if they involve trespassing on private property, trespass against the person or otherwise infringe some statutory provision, bye-law or an individual's constitutional right to privacy. In Norris v. Attorney General[24] the Supreme Court appeared to accept the existence of an unenumerated constitutional right to privacy and, in Kennedy v. Ireland[25] it went on to recognise and enforce this right in the context of telephone conversations. While constitutional rights are normally enforced against organs of the State, there is no general obstacle to their enforcement between private individuals. The Private

citizen-policeman must also take into account specific statutory provisions designed to protect the privacy of his fellow citizens. For example, the Postal and Telecommunications Services Act, 1983 is a statutory provision which curbs the policing freedom of the citizen. It makes it a criminal offence to open, or generally tamper with, a postal packet[26], or to intercept telecommunications messages without proper authorisation[27].

So long as the private citizen does not infringe such legal or constitutional provisions, he is free to function as a private investigator either for profit or for the purpose of promoting law enforcement. The most dramatic incident of the citizen's crime control function, however, is his power to arrest. Any citizen may arrest a person where a felony has been or is being committed and the citizen has reasonable cause to suspect that the person concerned committed it or is in the course of committing it[28].

Since a member of the Garda Siochana does not lose his status as a private citizen on assumption of his office[29], it must follow, in the absence of specific provision to the contrary, that he can use the powers and freedoms inherent in the private citizen for the benefit of his office. Indeed, many of the powers and freedoms used most frequently by a garda in the course of his duty are

those which vest in him in his capacity as a citizen. When he is following a suspect in public, asking questions or taking photographs or gathering forensic evidence in the investigation of a crime, or effecting an arrest, he is usually doing no more than what any other citizen is fully at liberty to do. It is partly for this reason that English authorities concluded that the constable was nothing more than a citizen in uniform[30].

(ii) Professional Garda

It does not follow from the garda's equation with a citizen that the former's crime control function is no different in law from the latter's. The difference in practice is obvious simply from the fact that the garda is a paid, full-time member of a professionally trained and equipped force which is established, organised and disciplined to discharge a crime control function. The difference in law stems partly from the fact that the garda is a peace officer. It will be seen later that this marks him out at common law as having a special responsibility, over and above that of his fellow citizens, in the prevention and detection of crime. While the matter has yet to receive detailed judicial consideration in Ireland, there are indications that the Irish courts do recognise and accept that the garda does enjoy a special responsibility in the matter of crime control by virtue of his office. The issue arose tangentially in the context of private prosecutions. Although the right of private

prosecution for summary offences survives, the reality is that the vast majority of summary prosecutions are taken by individuals as bodies acting in an official capacity. Given the nature of their resources, organisation and special responsibility for crime control, it is hardly surprising that the most frequent prosecutors are gardai. In both The People v. Roddy[31] and Dillane v. Ireland[32] the Supreme Court has recognised that gardai perform a different social function from others in such matters. The clear implication is that their legal status confers on them a special responsibility in such criminal law enforcement matters.

The issue has also arisen tangentially in a constitutional context. In Kennedy v. Ireland[33], Hamilton P. made it clear that the right to hold telephone conversations in privacy was not unqualified. It was subject to public order and morality, and its exercise might be restricted by the constitutional rights of others and the requirements of the common good. It would appear that the scope of this qualification will be interpreted more broadly in the case of a garda acting in the course of his duty than would be the case for a private citizen. The difference can be attributed to the former's special responsibility for the prevention and detection of crime. Support for this view can be found in Kane v. Governor of Mountjoy Prison[34]. In this case the suspect was kept under surveillance by gardai in order that they could serve

him with a warrant for his extradition to Northern Ireland; the arrival of which was imminent. At times there were up to eleven gardai (many of whom were uniformed), and three Garda cars involved in following him openly at very close quarters. His efforts to elude them eventually resulted in his arrest for breach of the peace. His application for an order of habeas corpus in the High Court was unsuccessful. On appeal to the Supreme Court, Finlay C.J. accepted that:

> "..... if overt surveillance of the general type proved in this case were applied to an individual without a basis to justify it, it would be objectionable, and I would add, would be clearly unlawful. Overt surveillance including a number of gardai on foot, closely following a pedestrian, and a number of Garda cars, marked as well as unmarked would, it seems to me, require a specific justification arising from all of the circumstances of a particular case and the nature and importance of the particular police duty being discharged.
>
> "Such surveillance is capable of gravely affecting the peace of mind and public reputation of any individual and the Courts could not, in my view, accept any general application of such a procedure by the police, but should require where it is put into operation and challenged, a specific adequate justification for it."[35]

Finlay, C.J. found that there were circumstances in this case to justify it. In particular, there was the fact that the State had "a very clear interest in the expeditious and efficient discharge of the obligations reciprocally undertaken between it and other States for the apprehension of fugitive offenders"[36]. In view of this, he felt that a garda has a clear duty to take reasonable steps to

ascertain how an extradition warrant, which he knows is about to be issued, can be most speedily executed. Given the particular circumstances in which the plaintiff was first located, and the general character of his associates, the Chief Justice felt that the extent and nature of the surveillance applied by the gardai in the execution of their duty in this case was justified. The significance of this in the present context is that it is highly unlikely that the Chief Justice would have reached the same conclusion had the surveillance been carried out by private individuals. He clearly singles out gardai as being under a duty to serve the State in the matter of apprehending fugitive offenders. No such duty would attach to the private individual. The garda, therefore, can be identified as having a special responsibility, recognised in law, for criminal law enforcement.

(iii) Common Law Powers

The primary difference in law between the garda's and the citizen's crime control function can be found in the powers conferred specially on the former[37]. Quite clearly a garda would not be able to discharge the crime control function associated with his office today if he was confined to the powers and freedoms of a private citizen. For example, the arrest of an armed and dangerous suspect may require a power to use force, the hot pursuit of a felon onto private property may require powers of entry and search, the successful investigation and prosecution of a

criminal offence may require the power to seize material evidence, and so on. If a garda must seek out a judicial authority in order to secure an appropriate warrant when faced with any of these situations, his capacity to deal with them will be seriously impaired. It is not surprising, therefore, that when the common law developed the office of constable with a particular responsibility for the prevention and detection of crime it also developed a number of summary powers to assist him in this aspect of his office. As the demands of crime control have grown in volume and complexity, so it has proved necessary to increase the range and substance of a constable's or garda's powers frequently by statute. These powers will now be considered briefly, starting with the common law powers.

Arrest

The garda has always enjoyed broader common law powers of arrest than the citizen. The garda can arrest summarily if he has reasonable cause to suspect that a person has committed, is committing, or is about to commit a felony[38]. This is broader than the citizen's power in that it is not necessary for the felony to have been committed or to be in the course of commission. It will be sufficient if the garda has reasonable grounds to suspect that that is the case and reasonable grounds for suspecting that the person arrested is the author of the suspected felony. Furthermore, the garda can act in advance of a

felony being committed so long as he has reasonable grounds to suspect that it is about to be committed. This gives him the power to act in a preventive capacity, something which is lacking in the citizen.

A distinguishing feature of the garda's common law arrest powers is the power to use force in order to effect the arrest. Unfortunately, the common law has always been vague on the extent of this power[39]. Its general formulation is that the garda can use whatever force is reasonably necessary to secure a lawful arrest. It follows from this that the traditional practice of routinely handcuffing an arrested suspect may be unlawful where there are no grounds for suspecting that the suspect might try to escape or otherwise resist arrest[40]. Having said that, however, it is by no means clear how far a garda can go in using force to effect an arrest. Should there, for example, be some proportion between the degree of force used and the gravity of the suspected offence? Should there be some proportion between the degree of force used and the strength of the grounds for suspecting the victim? There are no British or Irish authorities to give a clear and unequivocal answer to these questions. However, by analogy with the permitted use of force by the garda in other circumstances and from judicial authority in other common law jurisdictions, it is likely that there must be some proportion between the degree of force used and the importance of making the arrest. In R. v. Turner[41] for

example, it was held that all force which the arrestor believes to be reasonably necessary to effect his purpose may be used, provided that the means adopted are such that a reasonable man placed as he was would not consider disproportionate to the end to be prevented. British and Irish authority on a similar test applicable to the use of force to quell a riot will be considered in the context of the public order function of the garda.

Detention

Another common law power closely associated with the crime control function of the garda is the power of detention. In fact this is not so much a power in its own right as a necessary corollary to the power of arrest. The essence of arrest is the "actual or notional seizure of a person for the purpose of imprisonment"[42]. It follows that when a garda effects an arrest he inevitably brings the suspect into detention. The detention, however, is purely for the practical purpose of bringing the suspect before a judicial authority. There is no such thing as a common law power to arrest a suspect for questioning, or to further police inquiries or for preventive purposes. The arrested suspect must be brought before a judicial authority as soon as is reasonably practicable[43]. Admittedly, that does not prevent the garda from using the interim period to question the suspect about his alleged involvement in criminal activity; subject, of course, to the constraints of the law, the Judges Rules and

ministerial regulations. The fact that the police have resorted to this practice in both Britain and Ireland almost as a matter of routine at least since the latter half of the nineteenth century, has created the appearance that the police enjoy a power of detention. The common law, however, has never recognised the existence of a separate power for that purpose.

Entry, search and seizure

The garda[44] also enjoys limited summary powers of entry, search and seizure at common law. While he has no general power to enter onto private property to investigate an offence[45], he can enter for the purpose of terminating a breach of the peace[46] or for preventing a breach of the peace which he has reasonable grounds to believe is imminent[47]. He can also effect an entry, using force if necessary, in order to arrest a suspect[48]. Common law powers to search persons and property are even more limited. A garda can search a suspect, consequent on arrest, for the purpose of taking into custody any dangerous weapon or other item found on that person which may be of evidentiary value[49]. It is also accepted that he may seize anything found at the place of arrest which is to be used as evidence of the offence in question[50]. This does not extend, however, to a power to search a suspect's house where there is no connection between the search and the offence for which he was arrested[51]. Apart from these exceptions the common law does not

recognise a summary power to enter and search private property or persons.

The high regard in which the common law holds the rights of private property is also reflected in garda powers of entry, search and seizure under warrant. The common law recognised such a power in only one situation; namely to search for stolen goods[52]. Although minor qualifications were developed in the nineteenth century to cover the seizure of goods not strictly comprised in a search warrant, there was no significant development in this area of the common law until Lord Denning effectively rewrote it in Chic Fashions (West Wales) Ltd. v. Jones[53] and in Ghani v. Jones[54]. In the former case he held that:

> "when a constable enters a house by virtue of a search warrant for stolen goods, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him"[55].

It follows that so long as a constable enters on a search warrant, he will have a free hand to seize any suspected stolen goods even though they bear no connection with the offence in respect of which the warrant was granted. This represents a major reversal of the common law on the matter. Even more far-reaching is his decision in Ghani v. Jones to the effect that where a constable has reasonable

grounds to suspect a serious offence, and has reasonable grounds to suspect that an article is vital evidence of its commission, and the article's owner unreasonably refuses to give it into the custody of the constable, the constable may seize the article and retain it for no longer than is necessary. Given that the owner need not be criminally implicated in the offence, this clearly represents a fundamental reversal of the common law's traditional respect for private property. Lord Denning, and the Court of Appeal, justified these developments as being necessary in order to strike a balance between the interests of society in the prosecution and correct disposition of criminal offences on the one hand, and the right of the individual to freedom from invasion of privacy and the seizure of property on the other. They argued that the balance had become distorted due to the major increase in the crimes of larceny and receiving stolen goods. Just as developments in criminal activity do not stand still, neither does the common law. It is interesting, however, that they felt that the balance could be restored by expanding the powers of the constable. This emphasises his special responsibility for criminal law enforcement.

Although the Irish courts have not had occasion in recent years to deliberate on the garda's common law powers of entry search and seizure, the indications are that they would be very receptive to the developments in England. In Jennings v. Quinn[56], for example, O'Keeffe, J. took the

opportunity to make the following statement on the garda's common law powers to seize property without a warrant in the context of a lawful arrest:

> "In my opinion the public interest requires that the police, when effecting a lawful arrest, may seize, without a search warrant, property in the possession or custody of the person arrested when they believe it necessary to do so to avoid the abstraction or destruction of the property and when that property is:
> (a) evidence in support of the criminal charge upon which the arrest is made, or
> (b) evidence in support of any other criminal charge against that person then in contemplation, or
> (c) reasonably believed to be stolen property or to be property unlawfully in the possession of that person"[57].

The fact that O'Keeffe, J. perceives the public interest as requiring this development in garda powers is clear evidence that he perceives the garda as a crime control functionnary.

(iv) <u>Statutory Powers</u>

<u>Arrest</u>

The crime control function of the garda which is so evident at common law is not contradicted by the fact that he has never been conferred with a general statutory power to apprehend persons who are suspected of having committed, or who are suspected of being in the course of committing, a criminal offence. Indeed, the legislature's acceptance of gardai as the primary law enforcement officers in the State is illustrated unequivocally by the very large number of law enforcement powers conferred upon them by statute.

Some of these are very wide-ranging. In the context of arrest, for example, there are a number of statutory powers designed to cope with inherently criminal activity[58]. The broadest of these is probably the power to arrest without warrant a person found committing an indictable offence between 9.00 p.m. and 6.00 a.m.[59] More typical are those statutory powers which are confined to offences of a specified subject matter. The Larceny legislation[60], for example, permits a garda[61] to arrest for any offence under the Acts, apart from threatening to publish with intent to extort. Some such powers are very specific indeed such as the power to arrest in connection with the hijacking of an aircraft[62]. Undoubtedly a garda's statutory powers of arrest could be expressed much more concisely, systematically and comprehensively if he was simply given a general power to arrest persons suspected of having committed or committing a criminal offence. The price to be paid in terms of civil liberties, however, would be high. In any event, such an all encompassing power would not be necessary to designate gardai as the primary law enforcement officers in the State. Every time the legislature creates a new criminal offence with an associated power of arrest, it confers that power on a member of the force. Even if the power is conferred on some other officer more suited to the subject matter of the offence, it is normal practice to extend the power to a member of the force[63]. That in itself is a very strong indication that the law designates gardai as the primary

law enforcement officers.

Detention

The garda's power to detain an arrested suspect has also been extended by statute in a manner which emphasises his crime control function. The Criminal Justice Act, 1984 provided the garda with his first general power to detain for questioning[64]. It permits the detention, for a maximum of twenty hours, of a person arrested for a criminal offence in respect of which a person of full age and capacity and not previously convicted may be punished, on conviction, by imprisonment for five years or more[65]. Virtually all the serious offences would be covered, including: unlawful homicide, most sexual offences, aggravated assaults, most larcenies, burglary, malicious damage and many drugs and firearms offences. A suspect detained under this power can be searched, photographed, fingerprinted, as well as having skin swabs or hair samples taken from him for the purpose of firearms or explosives tests[66]. Although he is not under a general duty to cooperate, he is under compulsion to answer questions regarding firearms or ammunition[67] and stolen property[68]. Adverse inferences may be drawn at his subsequent trial if he fails to account, when asked by gardai, for certain matters relevant to the offence for which he was arrested[69].

Entry, Search and Seizure

The only other class of statutory provisions directly relevant to the garda's crime control function concerns powers of entry, search and seizure. Because of the common law's traditionally jealous protection of the rights of private property, it was inevitable that the legislature would intervene in this area. At first this intervention took the form of powers to enter and search premises under a warrant[70]. Since each of them was created to cope with a specific situation in material and temporal isolation from the other, it is not surprising that the terms under which a search warrant can be issued differ widely from statute to statute[71]. Some statutory provisions confer a power to search persons only, others permit searches in relation to premises only, while yet others permit searches of both premises and persons found thereon. The relevance of these individual powers, however, has been undermined considerably by the sweeping terms of section 9 of the Criminal Law Act, 1976.

Section 9 reads:

> "(1) where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Siochana... finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings ... for such period from the date of seizure as is reasonable."

Subsection (2) adds a qualification protecting documents made for the purpose of obtaining, giving or communicating legal advice from a barrister or solicitor. A literal

reading of this provision gives it a much more sweeping scope than either of the developments pioneered by Lord Denning. It means, for example, that if a garda is searching premises for stolen goods and discovers items that he believes (purely subjective) are evidence of the commission of homosexual activities he may seize and retain them for use as evidence in criminal proceedings. The provision is a clear inducement to the garda to do a general sweep of premises when armed with a warrant issued to search for very specific items. The only feasible limitations on it are that the nature of the search must be consistent with the items specified in the warrant and once those items have been found the search must cease. Ryan and Magee suggest that it renders otiose the words in individual statutes which purport to limit the property which may be seized in a search authorised by a warrant issued thereunder. In their view it may even be unconstitutional insofar as it may infringe the constitutional obligation on the State to vindicate the property rights of every citizen from unjust attack[72]. Having said that, it clearly highlights the major crime control responsibility that is entrusted to gardai by law.

(v) Commissioner's Instructions

The Garda Siochana's preoccupation with crime control is heavily emphasised by the Commissioner's standing instructions to the force. These make it clear that the principal function of all members is to prevent and detect

crimes and offences[73]. Every member on patrol or beat duty is instructed to take action on every offence they witness; even if that action only takes the form of a caution or advice[74]. In the case of serious offences the Garda role extends to investigation for the purposes of a decision on prosecution by the DPP. The Comissioner's instructions prescribe in great detail the duty to preserve the scene of a crime and the modus operandi of an investigation team[75]. In respect of all arrests, whether with or without warrant, whether for felony or misdemeanour, each member is instructed to search for, seize and retain property in the possession or custody of the person arrested when he believes it is necessary to do so in order to substantiate a criminal charge[76]. More generally, every member of the force is expected to contribute to criminal intelligence. This will include not only the criminal records, fingerprints, photographs and background information on offenders, such as: birthplace, standard of education, physical abnormalities, occupation, special skill, marital status, dependants, home conditions, PRSI number, passport number, social welfare number and criminal associates[77]. Members are also instructed to gather low level intelligence on the background and movement of suspects from whatever legitimate source they can find it[78]. When members are detailed for duty they must be encouraged to build up a reservoir of information on the habits, haunts and activities of criminals and suspects in their area; primarily by cultivating contacts

with persons involved in community affairs[79]. The collation and dissemination of all this intelligence is facilitated by the National Criminal Intelligence Office under Commissioner Crime "C" at Garda Headquarters[80]. From these instructions it is obvious that the discharge of the Garda crime control function depends as much, if not more, on proactive policing than it does on investigation after the event. In that respect, however, it is no different from any other police force. Indeed, it is only doing, on a scale proportionate to the nature of crime in society today, what the peace officer of old did in the context of his crime control function in the less complex communities of a bygone age.

The Commissioner's general instructions also cover the detention and prosecution stages of the criminal process. In the case of the former this is hardly surprising given the garda's powers of detention under the Offences Against the State Act, 1939 and the Criminal Justice Act, 1984[81]. In the case of the latter, however, it must be remembered that when a garda prosecutes he does so in his capacity as a private individual. Nevertheless, the courts have accepted that when gardai prosecute, they perform a social function which is different from that of the individual who pursues a private prosecution. This is echoed in the Commissioner's detailed instructions on the conduct of prosecutions[82]. Indeed, a separate charging and summons application manual has now been produced for the guidance

of members. It is clear, therefore, that the prosecution of criminal offences is accepted as a primary ingredient of the Garda's crime control function.

The heavy emphasis on the crime control function is also expressed in the specialist units and technical resources that the Garda Siochana has at its disposal. Many of these serve purposes additional to that of crime investigation and prevention; but these ancillary purposes have not overtaken the crime control function of the units. These units include sections on: photography, mapping, ballistics, fingerprints, document examination, television and technical support as well as a sub-aqua unit. Each of these have access to sophisticated technology and possess the expertise to use it in the investigation of crime. The Garda Criminal Record Office and the National Criminal Intelligence Office have computers for the storage and retrieval of intelligence which equals that of police forces anywhere. The whole force is equipped with a communications system which excels that available to most other forces. Finally, the services of the forensic science laboratory are available to the force for the purpose of examining material relating to criminal matters, documenting the results of such analysis and for the purpose of giving evidence on this analysis in Court.

(c) <u>Public Order</u>

(i) <u>Overlap</u>

Closely associated with the Garda Siochana's crime control function is its special responsibility to keep the peace and maintain public order. In many situations, both functions will be synonymous as a breach of the peace or a breakdown in public order will normally encompass breaches of the criminal law. It can also happen, however, that the Garda role in the maintenance of public order will result in the lawful use of force against individuals even where no crime has been, is being or is about to be committed. There is some justification, therefore, for treating the two functions separately while making allowances for the overlap. Support for this approach can be found in the contents of a garda's powers and duties and in the nature of the resources and training given to the force. The public order powers of a garda will be considered first.

(ii) Breach of the Peace

Powers of arrest signify the crime control function of a garda more readily than his public order role. Nevertheless, it is not entirely inappropriate to treat his common law power of arrest for breach of the peace under the heading of the latter. Although breach of the peace may be classified as a criminal offence at common law and can be committed on private property, the power to arrest in respect of it is exercised most often by gardai in the context of maintaining order on the streets. The very broad scope of this power is indicated by the fact that there is no precise definition of what constitutes a breach

of the peace.[83] Broadly speaking the behaviour in question must involve violence or the threat of violence; fighting, assault and affray are all examples[84]. The use of threatening, abusive or insulting words, however, is not in itself a breach of the peace, but it is conduct from which a breach may be anticipated. Unlawful conduct which is neither violent nor an incitement to violence would not normally be sufficient, but the case law in this area is confused, thereby rendering it impossible to define the exact scope of the offence. Much will depend on the particular circumstances of each case[85].

A garda[86] can summarily arrest anyone whom he sees breaching the peace[87], or anyone who is conducting himself in such a manner that the garda reasonably apprehends a breach of the peace[88]. The close association with the maintenance of public order, as opposed to crime control, is emphasised by the fact that a garda cannot arrest after the breach has terminated; unless he is in fresh pursuit of the offender[89] or reasonably apprehends a repetition of the breach[90]. Of greater significance in this context is the fact that a garda is under a paramount duty to keep the peace[91]. This has been interpreted as conferring on him loosely defined powers to take appropriate steps to prevent a threatened breach of the peace. In Duncan v. Jones[92], for example, it was held that if a constable reasonably apprehends that the holding of a meeting at the place and time desired may

be conducive to a breach of the peace, he may require the organisers to desist from holding the meeting. A refusal to desist renders the organisers guilty of obstructing a constable in the execution of his duties. More recently, in Moss v. McLachlan[93], it was held that in order to exercise his power to prevent a breach of the peace, a constable need not fear an immediate breach before taking action. It will suffice that he has real cause to apprehend a real possibility of breach of the peace. Accordingly, it was lawful for the British police to turn back car-loads of striking miners who were on their way to participate in a picket outside a coal mine. The police had reason to believe that the picket would become the scene for a breach of the peace. The garda can also enter onto private property to deal with a breach of the peace[94] and can enter to prevent a breach of the peace which he has reasonable grounds to believe is imminent[95]. This last power is particularly controversial in that it effectively allows gardai, in certain circumstances, to enter onto private property uninvited for the purpose of keeping a check on what is going on there.

(iii) Use of Force

The common law power which characterises the Garda role in the maintenance of public order most, perhaps, is the power to use force. The exact scope of the power is clearly defined nowhere. However, it is accepted that a garda can use force to suppress a riotous assembly, to

disperse an unlawful assembly and, generally, to prevent a threatened breach of the peace. A useful example of the latter occurred in Humphries v. O'Connor[96] where an inspector in the RIC, in order to avert a potentially violent confrontation, requested a woman to remove an orange lily she was wearing. When she refused to do so, he removed it. In dismissing the woman's action for damages against the inspector, the court ruled that it was the inspector's duty to preserve the peace, and it was lawful for him to take whatever action was necessary in order to prevent a breach of the peace[97]. A key feature of this power is that it permits a garda to compel an individual to desist from behaving in a certain manner in public even though that individual's behaviour was not necessarily criminal in itself. The very broad discretionary authority which this confers on gardai marks the power out from the arrest powers insofar as they are associated with an individual engaged in criminal conduct. Accordingly, this power and correlative duty to use force highlights the Garda's special responsibility for maintaining public order.

There are, of course, some general limits to a garda's power to resort to force in order to prevent a breakdown in public order. The following words of Bowen L.J., in the context of riotous assembly, make it clear that there must be some proportion between the force used and the end to be achieved:

> "The degree of force ... which may be used in their suppression depends on the nature of each riot, for the force used must always be moderate and proportional to the circumstances of the case and to the end to be attained.
>
> "The taking of life can only be justified by the necessity for protecting persons against various forms of violent crime or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed..."[98]

A stark illustration of gardai exceeding these limits is provided by Lynch v. Fitzgerald[99]. The case arose out of an action for damages against individual members of the Garda Siochana who shot a youth dead in the course of suppressing an unlawful assembly. Hanna, J., in the High Court, after reviewing the authorities on the use of force to restore public order found that the gardai in question had so far exceeded their powers that a charge of manslaughter against them might be appropriate. He adopted the passage from Bowen, L.J., quoted above, as stating the legal limits to the use of force by gardai in their public order role.

(iv) Statutory Powers

In contrast to the constable in Britain and Northern Ireland, the garda's common law powers have never been statutorily amended or extended to deal specifically with public order.[100] It is true that he has acquired a wide range of powers to stop and detain persons going about their lawful business. While at least some of these can be used for the purpose of maintaining public order, they have

been introduced primarily for other purposes and will be dealt with later under more appropriate headings.

(v) Commissioner's Instructions

The Garda Siochana's pivotal role in the maintenance of public order is evident in the Commissioner's instructions to the force. Just like the crime control function it, too, is described as one of the principal functions of all members[101]. Specific instructions are prescribed for handling the public order problems posed by: trade disputes[102], sittings of county borough and county councils[103], vagrants[104], the execution of court orders by various officials[105] and the protection of persons and property endangered by agrarian disputes or political differences[106]. The equipment and resources available to the force also stress its preoccupation with public order. The baton, the riot shield with helmets and visors are all readily available for issue when required. It is worth noting, however, that to date plastic baton rounds, water canon or c.s. gas do not form part of the Garda arsenal. Nor does it maintain a special squad or unit for deployment in public order situations. This latter point, in particular, emphasises that public order is a concern of the whole force. In the event of the force being overwhelmed in a riot situation, it always has the option of requisitioning the aid of troops.

(d) Stability of the State

(i) Introduction

At common law the garda does not enjoy any powers or responsibilities which are specifically directed at preserving the political stability of the State. Undoubtedly, however, the force as a whole has acquired a key role in this context since its inception. Strong evidence of this can be found in the contents of several statutory powers conferred on the garda, and certain duties imposed on gardai administratively by the Commissioner. It is also the case that many of the powers and resources described under the headings of crime control and public order are equally applicable in practice to their political role; and vice-versa. There are, however, certain powers and resources which are designed primarily to enable the Garda Siochana to play a major role in protecting the State against internal subversion. These powers and resources will be considered now.

The Offences Against the State Act, 1939, as amended, is the primary piece of legislation currently in force which is concerned with protecting the State against internal subversion. Its enactment was the result of the Government having grounds to believe that the emergency posed by the Second World War would, in turn, pose an irresistible opportunity for elements within the State to resume their violent campaign for reunification. The 1939 Act, as amended, created new offences, conferred wide powers on gardai and provided for internment and the

establishment of special criminal courts to deal with this subversive threat. Although the emergency passed, the 1939 Act remained as it constituted part of the ordinary criminal code as opposed to emergency legislation.

(ii) Arrest

Section 30

The most prominent power conferred on gardai by the 1939 Act is the power to arrest without warrant under section 30.[107] It permits a garda to arrest anyone "whom he suspects of having committed, or being about to commit or being or having been concerned in the commission of an offence" under the Act or any scheduled offence, or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence. Offences under the Act are political offences such as usurping the functions of government. Scheduled offences are those scheduled by the government for the purpose of Part V of the Act which provides for a special criminal court for the trial of offences so scheduled. Currently these offenses consist of offences under: the Malicious Damage Act, 1861; Section 7 of the Conspiracy and Protection of Property Act, 1875, the Explosive Substances Act, 1883; the Firearms Act, 1925 - 71 and the Offences Against the State Act, 1939. It is worth noting that it is sufficient for a valid arrest under section 30 that the arresting officer merely suspects the individual of the requisite offence. This compares with the requirement of

reasonable suspicion which is standard for other arrest powers. Furthermore, a person arrested under section 30 can be detained for a maximum period of 48 hours without charge. He is under a statutory obligation to give his name and address, and an account of his movements and action during a specified period, and to give all information in his possession in regard to the commission or intended commission by another person of any offence under the 1939 Act or any scheduled offence.[108] By virtue of section 7 of the Criminal Law Act, 1976 he may be searched, fingerprinted and photographed and subjected to firearms and explosive substances tests. Anything in his possession may be seized and retained for such testing.

Others

There are, of course, other relevant garda powers of arrest outside the framework of the Offences Against the State legislation. Section 15 of the Official Secrets Act, 1963, for example, permits a garda to arrest anyone whom he reasonably suspects of having information on Defence Force movements, Garda operations or other information prejudicial to the safety of the State. Section 268(4) of the Defence Act gives him the power to arrest anyone whom he reasonably suspects of trespassing upon or sketching military installations. In a different category is section 25 of the Prevention of Electoral Abuses Act, 1923 which gives him a power to arrest for personation at elections. The relatively narrow scope of such powers ensure that they

will always be overshadowed in practice by the much broader section 30 power. Nevertheless, the subject matter of these powers reveals a legislative intention that the Garda should play a primary role in protecting the institutions of State, and the State itself, against threats to their political stability.

(iii) Stop

Closely associated with a garda's powers of arrest are his powers to stop individuals in certain circumstances while they are going about their lawful business in public. Some of these can be treated under the heading of political stability. The broader of these powers is found in section 30 of the Offences Against the State Act, 1939. It is exercisable in exactly the same circumstances as an arrest lawfully effected under the same section, and it imposes on the person stopped the same obligation to answer questions as the person arrested. Indeed, a garda can also search a person whom he has stopped under section 30. A close cousin is the power to stop and search vehicles under section 8 of the Criminal Law Act, 1976. It enables a garda, who has reasonable grounds to suspect that an offence specified in the section has been or is about to be committed, to stop and search a vehicle with a view to ascertaining whether anyone in the vehicle is involved in the offence or whether evidence relating to the offence is contained in the vehicle. The broad scope of this power is indicated by the range of offences specified in the section

including: murder, manslaughter, firearms offences, burglary and malicious damage involving the use of force or explosive substances. There are limitations, however. The garda must act with reasonable suspicion, thereby precluding the use of general road blocks. Furthermore, there is no compulsion on the occupants of a vehicle to answer questions. The most they must do is submit themselves and the vehicle to a search.

(iv) Entry, Search and Seizure

In view of the extensive powers of arrest and stop conferred on a garda by the Offences Against the State legislation, it is surprising that the legislation does not also confer very broad summary powers of entry, search and seizure. However, section 29 of the 1939 Act, as amended by Section 5 of the 1976 Act, permits a garda officer, not below the rank of Chief Superintendent, to issue a search warrant to a garda where he has reasonable grounds for believing that documentary evidence relating to the commission of any offence under the Act or treason is to be found in a building or other place. Once issued with the warrant the garda acquires extensive powers. Not only can he enter and search the property and seize any document or thing which he reasonably believes to be evidence of an offence under the Act[109], but he can demand the name and address of, and search, any person found on the premises even though there may be no suspicion against them. Anyone who obstructs the garda in these matters commits an

offence, and anyone who refuses to give their correct name and address is liable to arrest. Furthermore, when conducting a search under such a warrant the garda's powers of seizure are automatically extended by section 9 of the Criminal Law Act, 1976 discussed earlier under the heading of crime control.

(v) Commissioner's Instructions

The close association of the Garda Siochana with the political stability of the State is also highlighted by the military ceremony attached to their inspections, funerals, guards of honour and their manner of saluting senior officers, the national anthem and flag and dignitaries. Much more substantial evidence is provided by the contents of the Commissioner's instructions on the gathering of intelligence. In addition to the duty of all members to contribute to the gathering of intelligence on crime control matters is the duty to contribute to intelligence on subversive activity. In particular, all local suspects involved in subversive type organisations should be filed alphabetically as their activity brings them to notice[110]. Furthermore, an index of suspects' addresses is maintained and includes the type of premises, its occupier and intelligence gleaned in respect of each. When this is viewed in the context of the garda's general duty to gather and record intelligence, it would appear that the force sees the preservation of the political stability of the State as one of its foremost responsibilities. Indeed,

the standing instruction to the members in charge of sub-stations to report without delay any event of an unusual or sensational nature of which it is desirable that the Government or Commissioner should be speedily informed, suggests that the Garda functions partly as the eyes and ears of the Government.

(e) Economic and Social Regulation

(i) Introduction

The popular perception of the police today is dominated by their preoccupation with crime control, public order and State security. Very seldom is there any advertence to their important role in the enforcement of public regulations aimed at the improvement of living and working conditions in society generally. This omission is surprising not only because these matters constitute a primary responsibility of most police forces, but also because the term police, as used originally in France, referred to these matters precisely. To some extent the lack of interest in this aspect of policing today can be explained by the fact that most of the relevant regulations are backed up with criminal sanctions. Accordingly, police enforcement of these regulations is often viewed as merely another aspect of their crime control function. It can be argued very strongly, however, that this approach ignores the fundamental difference between the substance of the traditional crime control function and the enforcement of these regulations.

The Garda Siochana as a police force, has always been concerned with criminal activities which strike at the very heart of civilised society. It was the paramount need to cope with the threat to life, person and property posed by such activities that justified the establishment of organised police forces in these islands in the first place, and has justified their subsequent expansion in size, resources, sophistication and powers. The issue of enforcing the regulatory laws is of a different order altogether. The fact that these laws are backed by the criminal sanction does not mean that they are aimed at inherently criminal activities. That much is apparent from the fact that, for the most part, the maximum penalties that can be imposed for breaches are minor compared with those attaching to criminal offences such as larceny and rape. Furthermore, their enforcement does not require a police force with the powers, training, resources and traditions of the Garda Siochana. There is no principled reason why their enforcement cannot be left to other public servants; and, indeed, it often is. However, the reality has been, and is, that the Garda, and many other police forces, constitutes a very convenient body for the enforcement of these regulations. It is a nationwide orgnaisation which has members deployed on the ground throughout the State twenty four hours a day, three hundred and sixty five days a year. Using it, therefore, avoids the expense of establishing a multiplicity of enforcement bodies; each with its' own narrowly defined remit,

personnel, chain of command, administrative back-up and resources. A further attractive feature of the Garda Siochana in this context is the fact that it is already accepted and identified as the primary law enforcement body and enjoys a firmly established moral authority in such matters. Despite all these attractions, the inevitable consequence for the role of the Garda is that it will be coloured by the contents of the regulatory laws it is expected to enforce. A brief and selective survey of the relevant garda powers, Commissioner instructions and internal structure of the force reveals that the Garda Siochana is an important force in the public regulation of the State.

(ii) Social Regulation

The Garda's role under the heading of social regulation is characterised by, although not confined to, garda powers to curb public activities which would be deemed unacceptable by more socially refined persons. An illustrative example can be found in section 72 of the Towns Improvement (Ireland) Act, 1854 which permits a garda to arrest summarily anyone guilty of doing any of the following in the garda's presence: exposing animals for sale or show in unauthorised places, permitting ferocious dogs to go unmuzzled, leading animals on the footpath, loitering for the purpose of prostitution, indecent exposure, offering for sale indecent books etc., throwing stones, making bonfires, wantonly ringing doorbells,

beating carpets before 9.00 a.m., throwing rubbish from houses and hanging a clothes line across a street to mention only some. Other provisions which may be noted under this heading provide for the arrest of persons: found drunk in a public place[111], exhibiting indecent or obscene pictures or printed material in a shop window or affixing indecent material in any place where it is visible to the public[112]; engaging in street betting[113]; and gaming in a public place[114].

An increasingly important preoccupation of the Garda, which may be classified under this heading or that of crime control depending on one's perspective, is the enforcement of the drug laws. The Misuse of Drugs Act, 1977 creates a number of offences, including the possession of any controlled drug, and confers on a garda powers to arrest summarily anyone committing an offence under the Act[115]. More significant in practice, perhaps, is the power to search premises and persons[116]. These powers bear a strong parallel with the garda power to search premises and persons found therein under the Offences Against the State legislation. The emphasis on the Garda responsibility for combatting the drug culture is also reflected in the Commissioner's policy of training as many gardai as possible in the art of detecting, and coping with, the illegal trade in controlled drugs.

(iii) <u>Economic Regulation</u>

The regulatory role of the Garda Siochana in respect of economic activity extends over a very diverse range. Its enforcement of the liquor licensing laws and public transport laws has always been prominent. However, it also has an input into the regulation of betting, farming, public accommodation, slaughter-houses, chemists, factories, fishing and trading to mention only some. This input can take the form of specific powers of arrest where a garda finds a breach of the relevant regulations. For example, a garda has a power of arrest for: failure to produce a bookmaker's licence[117], any offence under the Street and House to House Collector's Act, 1962[118], and any offence under the Casual Trading Act, 1980[119]. Further powers of arrest will become available if persons found in specified circumstances do not give their name and address when asked to do so by a garda. These include persons present on licensed premises[120] or on betting premises[121]. In some situations a garda's powers will extend to stopping and searching.

The most convincing evidence of the Garda's responsibilities for the enforcement of regulatory laws must be the powers to enter onto private property simply to check that those laws are being obeyed. In this context the relevant laws mostly concern public regulation in matters of: industry, commerce, the environment, public health, public safety, consumer protection and so on. The key feature of these powers is that there need not be even

the slightest hint of unlawful activity for a garda to exercise them. They enable him to intrude into the privacy of individuals solely to check that they are complying with the relevant regulatory laws in the course of the specified activity. The extent of this interference varies from power to power. Invariably, however, it involves a garda power to enter onto private property. Beyond that it may take the form of checking the premises; inspecting machinery, equipment, goods, arrivals or records; observing activities and questioning persons on the premises. The owner, and anyone on the premises will normally be placed on a duty to co-operate. An example is found in section 26 of the Betting Act, 1931 which permits a garda to enter any registered betting premises open for business and make such searches and investigations as he shall think proper. He may ask any question in relation to the business or premises as he shall think proper of any person found on the premises; such a person is under an obligation to cooperate.

These are the sort of powers that are associated more traditionally with other government bodies and officials. Inspectors from the Department of Environment or Agriculture, for example, would be more easily identified with the enforcement of regulations on slaughterhouses; inspectors from the Department of Industry and Commerce or the Revenue Commissioners would be identified with the enforcement of regulations on betting or gaming; inspectors

from the Department of Trade would be identified with street trading regulations and so on. It is only when an offence is suspected, or when inspectors are refused lawful entry, that one would expect Garda involvement. By conferring supervisory functions on gardai over a whole range of economic activities, however, the legislature characterises the Garda as another executive regulatory enforcement agency. The effect on the ground is to encourage the Garda to engage in proactive policing. These supervisory powers can never be divorced from the force's primary role as a crime control, public order and State security agency. At any rate the connection will be made in practice if, and when, the force exercises these powers in the context of regulating economic activity. The net effect may be to convey an image of extensive police intrusion into all facets of life; such as that associated with a police State.

(iv) Commissioner's Instructions

Although there are no special units in the force concerned with the enforcement of the laws regulating economic activity[122], there is no doubting the importance attached to their enforcement in the Commissioner's instructions. These prescribe, for example, very detailed guidance for members in the discharge of their duties in respect of the licensing and operation of public service vehicles; book-making; public dancing and gaming; the licensing and sale of liquor; the control of diseases in

sheep and cattle; and the operation of fishing boats. Specific provision is also made for the supervisory role of the Garda over a whole range of other economic assets and activities including: passenger boats, merchant shipping, hotels, guesthouses, lodging premises, livestock breeding, the transit of animals, the slaughter of animals, the sale of poisons, firearms dealers, factories and trades.

(v) Road Traffic

Probably the most prominent regulatory responsibility of the force is that in respect of road traffic. For that reason alone it deserves special mention. The Garda role in this sphere is highlighted by the scope of the coercive powers specifically formulated for the enforcement of the road traffic code. Individual powers of arrest are available for refusing to show a driving licence on request[123], driving while under the influence of drugs or alcohol[124], being in charge of a vehicle while under the influence of alcohol or drugs[125], driving an animal drawn vehicle or pedal cycle while under the influence of alcohol or drugs[126], dangerous driving[127], parking in a dangerous position[128], committing an offence under the code when there is no identification mark on the vehicle[129], refusing to provide a breath specimen[130], failing to acknowledge in writing the receipt of a written statement indicating the concentration of alcohol in the blood[131], failing when under the influence of alcohol or drugs to comply with a requirement to go to the Garda

station[132] and, generally, refusing to give one's name and address when reasonably suspected of committing any offence under the Act[133]. These powers are supplemented by the general power of a garda to require a driver to stop his vehicle and to keep it stationary for such period as is reasonably necessary to enable the member to discharge his duties[134]. The duties include checking that vehicles are in proper mechanical condition[135] and that the driver has a proper current licence[136].

The special Garda responsibility for road traffic control is emphasised by the fact that the Commissioner is the road traffic authority for the State. In this capacity he has the power, with the consent of the Minister for the Environment, to make bye-laws and temporary rules for the regulation of road traffic[137]. Needless to say, his policy instructions to the force contain a mass of detail on Garda duties in this area; ranging from how the law on drunk-driving should be enforced, to the duties of a member at a traffic accident[138]. The relevance of these instructions is sharpened by the fact that a full-time traffic corps is maintained within the force. The enforcement of the traffic laws, however, is not confined to this corps, but is the responsibility of every member on outdoor duty.

(f) Public Administration

(i) Overlap

It is worth pointing out that the Garda input into the maze of economic regulations is not confined to ensuring that the laws are obeyed and that transgressions are punished. The force also plays a very significant role in the administrative implementation of them. Confirmation of this is provided by their licensing powers. In the sphere of public service vehicles, for example, the appropriate authority for the issue and revocation of licences, plates and badges is the Garda Siochana. Other examples include: the Garda input into licence applications for the sale of liquor, book-making and gaming, and the certification procedure for purchases of poisons and the standard ingredients of illicit distillation. There can be little doubt, therefore, that the Garda performs a regulatory role very distinct from that of crime control.

(ii) <u>Assisting Government Departments</u>

The fact that the Garda Siochana functions as a licensing authority for public service vehicles can be interpreted as a reflection of a much more substantial administrative dimension to its role. Indeed, there is a long history of the police in Ireland being used as a convenient tool in the general administration of the State. McDowell notes that:

> By the beginning of the twentieth century the RIC was making inquiries on behalf of the congested districts board and the board of works, collecting agricultural statistics, acting as enumerators at the census, enforcing the fishery laws and performing a

> variety of duties under the food and drugs, the weights and measures, the explosives and the petroleum acts. The department of agriculture and technical instruction greatly appreciated the help of the force in the collection of agricultural statistics and in checking foot and mouth disease[139].

If anything, the picture painted by McDowell has been enlarged in the case of the Garda Siochana. The fact that it constitutes a highly organised body of public officers under the pay and employment of the State, with a presence in every part of the State and controlled centrally from Dublin, makes it very convenient to the government as a tool for public administration. It is not surprising, therefore, that gardai can be found discharging functions which can only be described as purely administrative; functions which have more to do with assisting Government than with crime control or public order. In the agricultural sphere, for example, gardai still engage in the collection of statistics in certain parts of the country, and generally assist the Department in: the control of foot and mouth disease, rabies and serious weed infestation; the checking of animal castrations; and the compliance with the requirements of the Exportation of Animals (Irish Free State) Order, 1923. They assist the Department of Social Welfare by certifying official forms in connection with claims for unemployment benefit and assistance from persons living in rural parts. They assist the Department of Foreign Affairs by receiving applications for passports and travel identity cards outside the Dublin

metropolitan area. Their function in checking compliance with regulatory laws affecting a whole range of industrial, commercial, trading and entertainment premises can be interpreted as discharging administrative responsibilities on behalf of the Departments concerned. Not surprisingly, the force is also found assisting its own Department in administrative matters. The most prominent example here must be the power to grant, renew and revoke firearms certificates and associated duties. The force can also be found rendering administrative assistance to such diverse bodies as: the registrar of shipping[140], the receiver of wreck[141] and the adoption board.[142]

(iii) Execution of Warrants

An administrative responsibility which has always been associated with police is the execution of warrants. A garda is under a common law duty to execute a warrant for imprisonment in the absence of any legal excuse; unless directed otherwise by the Department of Justice in any individual case[143]. A District Court warrant to enforce the payment of a penalty is addressed for execution to the superintendent or inspector in charge of the relevant district. Warrants issued in civil cases for the collection of fines and costs, or for imprisonment in default of payment, are also addressed to the Garda, and must be executed immediately. The Commissioner is the proper authority to endorse an execution order for the recovery of any tax or duty or any fine, penalty or

forfeiture relating to customs and excise. These are executed on the instructions of the Revenue Commissioners. The Garda must enforce committal orders, under the Enforcement of Court Orders Act, 1940, for the imprisonment of the defendant for failure to pay money directed by the Court. Finally, extradition warrants from the United Kingdom are endorsed by the Commissioner and may be executed by any member. In all these matters, apart possibly from the execution orders for the recovery of any tax, etc., gardai are acting as officers of the Court in a ministerial capacity.

(iv) Local Administration

It should be apparent by this stage that, in addition to its other police responsibilities, the Garda functions as a very important regulatory and administrative organ of State. It might be no exaggeration to suggest that the central government could not readily discharge many of its administrative responsibilities at local level without the services of the force. One only has to look at the records that must be kept at every Garda station to realise that Garda stations are a hub of central administration at local level. The records must include: file of computer print-out of firearms certificate holders; persons licensed to sell salmon and trout; list of registered street traders; list of persons licensed to sell intoxicating liquor; list of persons giving notice of intention to fell trees under the Forestry Act 1946; list of persons to whom lottery

licences were issued; revenue book containing details of seizures and illicit distillation; record of driving licences; traffic accident book; record of drugs seized, etc.; list of licensed premises; licensing offences register; register of street traders; and a record of offences under section 49 of the Road Traffic Acts 1961/78. Records kept in district offices and divisional offices cover a whole range of additional administrative matters to which station offices can have direct access when necessary. It is worth noting that this dimension to the Garda role is by no means a novel development. In the days prior to organised police forces and the structures of local government that we know today, the Justice of the Peace was the centre of police and administration at local level. The garda's ancestor, the constable, served the Justice not only in the crime control and public order dimensions of policing, but also in the broader administrative aspects. In performing these administrative functions today, therefore, the garda is carrying on a tradition which can be traced back to the sixteenth, seventeenth and eighteenth centuries.

(g) Accident and Emergency

Each member of the Garda Siochana is under a common law duty to protect life[144]. This duty often expresses itself in the arrest of criminally violent persons who are posing a threat to the life or safety of others. It is by no means confined, however, to action in the context of

crime control and public order. Members of the force will come across, or be called out to, situations where life is in danger as a result of accidental fires, flooding, storms, the activities of mentally unstable persons and so on. Unlike ordinary citizens, the garda will be under a common law duty to take action to protect life in these situations. It is hardly surprising, therefore, that the Government also relies on the Garda Siochana to perform a central role in coping with major accidents and emergencies. Divisional, district and station offices, for example, must have copies of the hazardous substances emergency plan and the major accident plan. Indeed, it is the responsibility of the Garda in the Dublin metropolitan area and in each division to prepare a major accident plan. Responsibility for putting it into effect rests with the senior fire officer in consultation with the senior Garda officer. When the decision is taken to put it into effect, however, the Garda is expected to play a primary role in its implementation, and afterwards to take responsibility for identifying the dead and preserving evidence for subsequent inquests.

The Garda's role under this heading also embraces a range of preventive duties which can also be classified as providing administrative back up service to various Government Departments and public bodies. The Department of Fisheries, for example, must be notified where State forests are threatened by fire; air traffic control must be

notified of aircraft in distress and of any hazards to air navigation; appropriate sea rescue bodies must be notified of vessels in distress; and local authorities must be notified of blizzard conditions or other such emergencies which threaten life or property. Although the force has no statutory responsibilities with respect to nuclear or radioactive devices, the Commissioner has instructed members to inform the Nuclear Energy Board of anything improper that they become aware of in the keeping or operation of these devices under licence.

(h) Conclusion

A conspicuous feature to emerge from this survey of the substance and sources of the Garda role is the impossibility of devising a precise definition of that role. The Garda Siochana acts, and is expected to act, in a much wider range of situations than any other branch in the civil administration of the State. Not only does it cover functions, such as crime control and public order which are exclusive to it, but it is also expected to discharge functions which are more properly the preserve of other government departments and public bodies. In many respects the Garda Siochana can be described as the general factotum of central government and, perhaps, of society. This presents complications when it comes to devising public accountability structures for the force. Traditionally, there has always been a tendency to view police accountability in terms of providing checks on the

exercise of their powers in the prevention and detection of crime and the maintenance of public order. This approach, however, ignores the very diverse nature of policing. It does not take into account the fact that the police also play a critical role in preserving the political stability of the State, enforcing acceptable standards of public morality and social behaviour, supervising different types of economic activity, protecting the environment, assisting the government in the discharge of some of its administrative responsibilities, providing an accident, emergency and public welfare service and generally promoting the welfare of society. It also ignores the fact that the discharge of some of the functions are facilitated by common law powers, others by statutory powers, some by both and others by none, some are duties imposed by common law and/or statute, while others are merely the result of the government's or Commissioner's instructions. To complicate matters further, the discharge of some of these functions is assisted by the establishment of specialised units and squads within the force. Any attempt to analyse and assess the accountability structures governing the force will have to take account of all these factors.

Ch.3 THE LEGAL, POLITICAL AND ADMINISTRATIVE STRUCTURE OF THE FORCE

1. Legal Personalty

(a) Body of Individuals

The Garda Siochana we know today was established statutorily by the Police Forces Amalgamation Act, 1925. The Act stipulated that the existing Garda Siochana was to be amalgamated with the DMP to form one unified force.[1] Significantly, however, it did not go so far as to establish the new force as a separate legal entity in itself. This could have been done quite simply by giving it corporate status. The effect would have been to give the force a legal personality separate and distinct from its individual members. It would have been able to hold property, enter into contracts, sue and be sued, be conferred with specific powers and be charged with specific duties. The failure specifically to confer legal personality on the force suggests that it does not possess any legal standing over and above that of its individual members.

The 1925 Act itself lends support to this suggestion. It stipulates that the force:

> "... shall consist of such officers and men as the [Government] shall from time to time determine..."[2]

Later it will be seen that the Act envisages each member of the force, no matter how senior or junior, being vested

with the same office of garda. As holder of that office each member enjoys the full complement of police powers which are exercisable at his own discretion. By contrast, the force as a whole can enjoy no such distinct police powers. Any attempt to derive legal personality for the amalgamated force from its constituent parts will be frustrated by the fact that the constituent parts also lacked separate legal personality. The Garda Siochana Act, 1924 defined the composition of the old Garda Siochana in exactly the same terms used by the 1925 Act for the amalgamated force.[3] In the case of the DMP the relevant statutory words read:

> "...that a sufficient number of fit and able Men shall from Time to Time by the Directions of the [Government] be appointed as a Police Force for the whole of [the Dublin Metropolitan District]."[4]

Quite clearly, the legislative intention throughout is to establish a police force as a body of individuals rather than as an entity which is legally separate and distinct from its individual members. In this the Irish legislature has kept faith with one of the distinctive characteristic traits of both English and Irish policing. As explained in chapter 1 all organised police forces in the British Isles, beginning with the DMP of 1786, have been modelled on this peculiar legal structure.[5] Further examples can be found in other common law countries which have taken their lead in policing from the British. The Australian Federal Police, for example, is legally constituted by a

Commissioner, Deputy Commissioners, commissioned and non-commissioned police officers and commissioned and non-commissioned protective service officers. The relevant legislation[6] does not give the force a legal identity separate from these individual constituents. The most striking contrast is with continental European police forces Where the dominant legal entity is the force itself (or some other relevant entity within the municapality or the State as the case maybe; or, indeed, the municipality or the State itself) with the members having the status of mere employees.[7]

(b) Collective Body

Just because the Garda Siochana does not enjoy a legal personality distinct from that of its individual members, it does not follow that it cannot function as a collective body. The 1925 Act clearly envisages the force operating in practice as an organised and disciplined unit. Not only does the Act refer to it as a "force of police"[8] but provision is made for it to be divided up into hierarchical ranks of "officers" and "men".[9] Furthermore the Minister is conferred with a power to make regulations on the internal management of the force[10] while the Commissioner is vested with the "general direction and control" of the force[11]. Clearly these provisions have the potential to ensure that the individual officeholders can function collectively as an organised and disciplined force on a par with any other organised police force in the world. The

manner in which the provisions are applied, however, will also have a bearing on the extent to which the force is integrated into the structures of central government. This aspect will be emphasised in the following analysis of the legal and administrative structures of the force.

2. Ranks

(a) Hierarchical Authority

(i) Pyramid

The efficient delivery of the police service by individual officer's depends heavily on the structural framework imposed upon them. Traditionally, they have operated under a hierarchical arrangement with a chief officer at the top of a pyramid of ranks. The pyramid represents the delegation of administrative authority from the chief officer at the apex down through the senior officers to the most junior rank at the base. This pyramid of authority also corresponds with numbers in each rank. The Garda Siochana was established in conformity with this traditional ranking structure. The 1925 Act[12] provided for the ranks of Commissioner, Deputy Commissioner, Assistant Commissioner, Surgeon, Chief Superintendent, Superintendent, Inspector, Sergeant and Garda. Today the power to fix rank structure, and the official complement of each, is vested in the government[13]. So far, however, the only change in the original rank structure[14] is the addition of the rank of Station Sergeant[15].

(ii) Senior Officers

The division of responsibility among the various ranks is provided for partly by the Oireachtas, partly by the government and partly by the Commissioner. Legislative prescriptions in this matter are sparse. They provide that the Commissioner shall enjoy the general direction and control of the force, subject to regulations on the internal management of the force made by the Minister[16]. How much authority this confers on the Commissioner is something that will be discussed in much greater detail later in the context of the legal status of the force. For the present, however, it must be said that this provision is instrumental in ensuring the capacity of the force to function as an integrated unit. In particular, it permits the Commissioner to prescribe for the force standards and procedures covering both general matters and individual situations. Examples are discussed in the immediately preceding chapter. Similarly, the Commissioner exercises his power to establish a division of responsibility and authority down through the ranks. Generally speaking officers are given authority to issue operational and administrative instructions to those immediately subordinate to them in rank. For their part the subordinate officers are under a duty to obey such instructions. Probably more than any other factor it is this institutionalisation of hierarchical authority down through the ranks that ensures in practice that the force functions as an integrated unit rather than as an unwieldly

body of individuals each exercising immense powers at their own discretion.

The tasks of the Deputy-Commissioner and Assistant Commissioners are described statutorily as being to assist the Commissioner in the direction and control of the force, and to exercise such functions in that behalf as the Commissioner shall assign them respectively; subject again to any internal management regulations issued by the Minister[17]. The senior Deputy Commissioner may also be authorised to exercise or perform all or any of the powers and duties of the Commissioner in the event of the Commissioner being incapacitated by illness from performing his duties, or in the event of the office of Commissioner becoming vacant[18]. Apart from that, it is not clear what, if any, statutory difference there is in the offices of Deputy and Assistant Commissioner. It seems that a Deputy Commissioner could not exercise any direction or control over a function which has been entrusted to an Assistant Commissioner. The Surgeon would appear to enjoy a similar status to that of Deputy and Assistant Commissioner. He is appointed statutorily to perform such duties in relation to the medical service of the Garda Siochana as the Commissioner shall assign to him; subject always to the Minister's power to make regulations on the internal management of the force[19]. There is no suggestion that the Surgeon could be subject to the direction and control of a Deputy or Assistant

Commissioner, acting as such, in the performance of his functions.

(iii) Others

The legislation is silent on the division of responsibilities among the other ranks, or their relationships relative to each other. It follows that the responsibilities of each rank are wholly a matter for the Commissioner and the Minister. Both have the statutory authority inter alia to confine particular functions to particular ranks, to define the subordination of one rank to another, to establish specialist units within or across ranks. The legislation does not impose any particular or general restraints on them in this regard. In theory the Minister is the dominant partner of the two. He can circumscribe the Commissioner's freedom in these matters by exercising his regulatory power over the internal management of the force. In practice he has not exercised his power in this context and so it is the Commissioner who determines the internal division of responsibility and authority. It is also worth mentioning in this context that the Minister, and not the Commissioner, has the ultimate power to determine the distribution of the force throughout the State[20]. In practice he leaves it to the Commissioner to decide how many shall be established at any particular Garda station, while keeping to himself the power to determine the number, location and status of stations.

3. Appointments

(a) The Power of Appointment

The 1925 Act gives the government the power of appointment and dismissal over the officer ranks of Commissioner, Deputy Commissioner, Assistant Commissioner, Surgeon, Chief Superintendent and Superintendent[21]. It would appear that the government is under a duty to appoint a Commissioner and a Surgeon and to make appointments to the ranks of Chief Superintendent and Superintendent, whereas it has a discretion whether or not to appoint Deputy and Assistant Commissioners. The power to dismiss any of these officers is uniform. Any of them can be dismissed by the government "at any time". While this does not relieve the government of the obligation to follow fair procedures in any individual dismissal, it would seem that the grounds for dismissal are virtually unreviewable by the Courts[22]. The Commissioner's powers of appointment and dismissal are confined to the non-commissioned ranks or "men"[23]. His power to appoint is denoted by "shall", suggesting that he is under a duty to make appontments to each rank, while his power to dismiss is discretionary. In both situations, however, his freedom is closely circumscribed by regulations made by the Minister.

The appointments and dismissals procedures reflect a strong bias in favour of government influence over the force. Government input at the level of Commissioner to Assistant Commissioner can be accepted as standard in a

national police force. Given the critical role played by the police force in providing political stability in the State, it is inevitable that a government will want, and must, have confidence in the heads of the force. At the very least it will want to ensure that the force is willing to enforce the law impartially and vigorously in the event of an upsurge in unlawful activity which threatens to destabilise the government. Extending government input beyond this level right down to the lowest officer rank, however, suggests a desire to influence more specific operational activities of the force. It has been seen that the ranks of Chief Superintendent and Superintendent perform key roles in the formulation and application of specific law enforcement policies and priorities on the ground. It is they who will head the divisions throughout the State and it is they who will have direct operational charge of specialist units. The successful delivery of policies on the ground will depend heavily on the calibre and exertions of the Chief Superintendents and Superintendents. The placing of their appointment and dismissal in the hands of the government, rather than the Commissioner, expresses a desire to subject them to a test of political as well as professional acceptability. A knock-on effect is the undermining of the Commissioner's automony. He is confined to appointments and dismissals up to and including, the rank of inspector. With the possible exception of inspector in some parts of the State these appointments and dismissals must be regarded as normal

management matters which could easily be delegated to an Assistant Commissioner or Chief Superintendent.

While these arrangements clearly facilitate central, political influence over the force, it does not follow that they permit partisan political input. The government of the day will not be able to use these powers of appointment and dismissal to shape the middle management of the force to its liking simply because it happens to be in office. Influence can be exercised only when vacancies arise; and these are unlikely to occur in sufficient numbers during the lifetime of a particular government to enable it to achieve its desired objective. One possibility is for a government to dismiss a sufficient number of existing officers in order to fill the vacancies with their favoured candidates. While this might be legally feasible it would surely produce a political outcry of such magnitude that a government would not contemplate it. Since 1972, however, an alternative approach is possible. The Garda Siochana Act of that year empowered the government to determine, from time to time, by Order the ranks into which the force would be divided and the maximum number permissible in each rank. Previously these matters could be determined only by an Act of the Oireachtas. It is now possible, therefore, for the government of the day to enhance its patronage over the force by issuing an Order increasing the complement of any or all of the officer ranks. It would then be in the government's power to fill the vacancies so created. To

date it must be said that there is no evidence of the power being used for this purpose.

Although the Commissioner is given the powers of appointment and dismissal over the lower ranks his discretion can be curtailed by the Minister. Indeed, regulations made by the Minister, pursuant to his powers under the 1925 Act, impose detailed requirements on eligibility for appointment to the force. The Commissioner must act within the parameters of these regulations. Similarly, the Commissioner's power of dismissal can be excercised only subject to very detailed ministerial and legislative prescriptions. The effect of this is that a decision to dismiss a member can normally be taken only on specific grounds and after complying with a complex judicialised procedure. It can happen that the Commissioner's intentions to dismiss a member would be frustrated by compliance with the procedures. However, the ministerial regulations have reserved the disciplinary power of summary dismissal for the Commissioner's benefit. The statutory procedures for dismissal are confined solely to citizen complaints against the Garda; and will be examined later. In the present context it will be sufficient to give a brief outline of the ministerial regulations on appointments, promotions and dismissals in order to clarify their encroachment upon the Commissioner's discretion.

(b) Appointment Regulations

(i) Background

The first ministerial regulations governing appointments to the force were issued in 1924[24]. They prescribed that a candidate had to be male, unmarried, between the ages of 19 and 27, of certain height and chest measurements, of good character and health, fitted mentally and physically for the performance of the duties and possessed of a certain educational standard. A candidate was automatically disqualified for carrying on any other office or employment, or any business for hire or gain, or if his wife, without the consent of the Commissioner, kept a shop or carried on any business. If a candidate could satisfy these requirements his appointment to the force was solely within the discretion of the Commissioner. Although it is not absolutely clear from the regulations, it would appear that the Commissioner was the arbiter over such matters as what constituted satisfactory references of good character and a pass in a qualifying examination. The question of whether a candidate was of good health and physically and mentally fit for the duties was a matter for the Surgeon. The Minister, however, did not retain any specific functions or input into the ongoing process of appointments.

(ii) Trainee Eligibility

The regulations were revised in 1937[25], again in 1945[26] and, most recently in 1988[27]. In the process

some requirements were relaxed and others stiffened; but overall the procedure has become much more complex and more amenable to ministerial influence. Under the 1988 regulations a candidate for appointment must apply to be accepted as a trainee. To be eligible a person must: be between the ages of 18 and 25 inclusive[28], satisfy the Commissioner that he is of good character;[29] have obtained not lower than a grade D in at least five subjects (including Irish, English and Mathematics) in the Leaving Certificate Examination of the Department of Education or in another examination which, in the opinion of the Minister, is of a standard not lower than the standard of the Leaving Certificate;[30] have been successful in a competition of such standard as the Civil Service Commissioners, after consultation with the Minister, shall determine[31]; and have been certified by the Surgeon to be in good health, of sound constitution and fitted physically and mentally to perform the duties of a member[32]. A male applicant must also be not less than five feet nine inches in height and built in proportion[33]. A female must be not less than five feet five inches in height[34].

It is clear from the eligibility requirements that the role of the Commissioner has been reduced and that of the Minister increased. The Commissioner's input is now confined to the question of what constitutes good character. The educational standards and the general mental aptitude of candidates have been taken out of his

hands and entrusted to the Department of Education and the Civil Service Commissioners. Ministerial influence is introduced through the obligation on the latter to set standards in consultation with the Minister, and through the Minister's power to certify another examination to be not lower than the standard set by the Leaving Certificate Examination.

(iii) Admission of Trainees

The admission of eligible candidates as trainees would appear to be within the absolute discretion of the Commissioner[35]; subject to the general constraints imposed upon him by the employment equality legislation and finance. In compliance with the employment equality legislation[36] the regulations require the Commissioner to assess the manpower requirements of the force in regard to two categories of duties: (a) those which involve coping with violent persons or situations; and (b) those which, in the interests of privacy or decency, should be performed by persons of a particular sex. On the basis of these requirements he must determine the minimum number of persons to be admitted who will be capable of coping with category (a), and the minimum number to be admitted who will be capable of coping with category (b). Although the regulations do not specifically stipulate it, the clear implication is that the Commissioner's discretion over admission should be exercised in such a manner as to ensure that at least the minimum requirements for each category

will be satisfied.

The Commissioner's general freedom to admit trainees is heavily dependent on financial considerations. The cost of providing premises and facilities for training purposes and the remuneration of trainees are matters which the Commissioner must take into account. Indeed, the Commissioner's expenditure on these items is expressly subject to the approval of the Minister[37]. Ultimately it is the political decision of the Minister which will determine whether the Commissioner can admit any trainees in a particular year; and, if so, how many[38]. Ministerial control in this matter is strengthened by the fact that, for obvious practical considerations, the number of trainees admitted by the Commissioner in any one year will be fixed in accordance with the number of vacancies there are in the rank of Garda. Not only is the maximum number of persons in each rank, including that of Garda, established by government Order[39], but the Commissioner's freedom to fill vacancies within that maximum number is subject to ministerial sanction. It must be emphasised, however, that this political involvement is confined to generalities, and does not extend to a power to direct the Commissioner in the admission of an eligible individual as a trainee.

The financial power of the Minister also acts as a constraint on the Commissioner's control over the training

of trainees. The regulations empower the Commissioner alone to make provision for training; subject to the proviso that matters involving expenditure will require the approval of the Minister.[40] Accordingly, the Commissioner's decisions on all the fundamentals of training such as: the remuneration of trainees, the length of the training period, material facilities and equipment, and the format of the examination will be subject to the approval of the Minister.

An interesting feature of the trainee scheme is that the conditions of service of trainees may be governed by contract between the Commissioner and each individual trainee[41]. It follows that the Commissioner is in a position to include whatever terms he desires in these contracts; subject to the approval of the Minister for matters involving expenditure. Presumably the Commissioner would include a term which required a trainee to perform duties prescribed by him and to perform them at his direction. The regulations specifically provide that the contract may contain a condition that the Commissioner may at any time terminate the contract if he considers that the trainee is not fitted physically or mentally to perform his duties as a trainee and is not likley to become an efficient and well-conducted member[42]. By putting the relationship between the Commissioner and trainees on a contractual footing it is likely, although by no means certain, that the regulations give the Commissioner a

greater managerial control over trainees than that which he enjoys over full members of the force.

(iv) Appointment and Enrolment

The final stage in the appointments procedure is the appointment and enrolment of trainees to the force itself. The 1925 Act vests this power of appointment in the Commissioner alone. However, there is still room for political involvement of a general nature. The regulations prescribe[43] that the Commissioner can only appoint and enrol a person as a member if that person: has successfully completed his period of employment as a trainee; has been certified by the Surgeon to be in good health, of sound constitution and fitted physically and mentally to perform the duties of a member; has been passed by the Commissioner as generally suitable for appointment; and is available to be appointed and enrolled within a reasonable time of being offered the appointment[44]. Within these parameters the Commissioner is left with what appears to be an absolute discretion in the appointment of individuals; subject only to the requirements of the employment equality legislation mentioned earlier. The scope of this discretion is enhanced by the fact that it is he who determines what would amount to the successful completion of a trainee employment period, and by the fact that it is he who determines whether a person is generally suitable for appointment.

(v) Special Appointments

There are two situations in which the Commissioner's sole authority over individual appointments is compromised. The first concerns the situation where the Commissioner wishes to appoint a person to the force on account of that person's special technical qualifications. The regulations permit[45] him to appoint such a person in disregard of the formal requirements discussed above. The power is subject to the person being of good character, good health, sound constitution and fitted physically and mentally to perform the duties which he will be assigned in the force. The net effect is that the person can be appointed even though he has not successfully completed the requisite training period and even though the Surgeon has not certified him to be fit for the general duties of a member[46]. It would also appear that a consequential effect of the exemption from successfully completing the trainee period is an exemption from the strict physical, mental, educational and age eligibility requirements for admission as a trainee. The special power of appointment, therefore, effectively permits the Commissioner, in individual cases, to circumvent most of the general controls imposed on his power of appointment by the 1988 regulations. The practical significance of the special power will depend on what is embraced by special technical qualifications in this context. Since it is not defined in the regulations the Commissioner will be able to interpret it broadly before he need fear any interference by the Courts in the

form of a judicial review. The compromise is that he can exercise this power only with the consent of the Minister. In practice, therefore, the scope of this power and its application in individual appointments will be a matter for the Minister.

The second situation is provided for in reg.12 of the 1988 regulations. It stipulates that the government, if it thinks that it is in the public interest to do so, may authorise the Commissioner to appoint and enrol a specified person as a member without regard to the normal requirements. When so authorised, the Commissioner may appoint and enrol such a person immediately. Just like the first special power, this is paramount to giving the Commissioner a power of appointment freed from the general requirements imposed on all normal appointments by the 1988 regulations. Indeed, it is an even broader power in that there is no need for the person concerned to possess special technical qualifications; nor need the Commissioner satisfy himself that the person is of good-character and in suitable physical and mental health. This power of appointment, however, is clearly dependent on political direction. Before the Commissioner can exercise the power in any individual case the government will have to be satisfied that it is in the public interest to do so. It follows that, in practice the government will determine whether the Commissioner can appoint the individual he wishes to appoint in any case under this power.

Furthermore, reg.12 clearly envisages the government initiating a recommendation to the Commissioner. While the nominal power of appointment will remain with the Commissioner, his discretion to refuse a government recommendation will always be tempered by his own vulnerability to dismissal by the government.

(vi) Probation

Finally, when the Commissioner appoints and enrols a trainee, or other person, to the force, the appointment is made to the rank of garda[47]. The new member must serve a probationary period of two years, and the Commissioner may dismiss him at any time if he considers that the member is not fitted physically or mentally to perform his duties as a member, or is not likely to become an efficient and well-conducted member[48]. On the basis of Garvey v. Ireland[49] it is likely that the Commissioner would have to give the probationer an opportunity to be heard in his defence before taking such a decision. It may also be possible for a court to review the vires of a probationer's dismissal given that the Commissioner's power of dismissal is exercisable only in certain specified circumstances.

4. Promotion

(a) Background

The Police Forces Amalgamation Act, 1925 gives the Commissioner the sole power of promotion to all ranks up to and including Chief Superintendent[50]. It is envisaged,

however, that the exercise of this power will be the subject of regulations issued by the Minister. The first such regulations were issued in 1925.[51] These were revised in 1960 and again, most recently, in 1987.

The 1987 regulations impose curbs on the Commissioner's freedom to make promotions. The fact that the power to make the regulations lies with the Minister suggests that there is scope for partisan political involvement. The reality is, however, that for the most part the contents of the regulations can be justified on purely professional grounds. The Commissioner is clearly the dominant authority in all individual promotions up to the rank of Assistant Commissioner at least; but he must operate within the parameters of the regulations which allow for inputs from the Minister and a Promotions Advisory Council (PAC). The Council is specifically provided for in the regulations[52]. Its general functions are to:

> "(a) keep under review and advise the Commissioner in relation to promotions and competitions for promotion and the system of and procedures for promotions, and
>
> (b) oversee and regulate (on behalf of and subject to the overall control of the Commissioner) competitions for promotions".[53]

Its input is clearly in a subordinate capacity to that of the Commissioner. This is emphasised by the fact that all its members are appointed by the Commissioner[54]; although he is not given a specific power to remove any of them.

The Council consists of a chairman, who must be a member of the Garda Siochana not below the rank of Assistant Commissioner, and nine ordinary members. The latter consist of: two Chief Superintendents[55], a nominee of the Garda Representative Association (GRA), a nominee of the Association of Garda Sergeants and Inspectors (AGSI), a nominee of the representative body for Garda Superintendents, a nominee of the representative body for Garda Chief Superintendents and three persons nominated by the Minister[56]. It is worth noting that the composition of the Council is heavily weighted in favour of Garda personnel, and the independence of non-Garda members is compromised by the fact that they are appointed by the Minister and must come from a narrow professional background. The term of office for a member is three years, but each is eligible for re-appointment.

(b) Procedure

(i) Garda to Inspector

The promotions procedure can be analysed for three different categories: promotions up to and including the rank of Inspector; promotion from Inspector up to and including the rank of Chief Superintendent; and promotions from Chief Superintendent to Assistant Commissioner. Before a member can be a candidate for promotion from garda to sergeant, or from sergeant to inspector, he must satisfy specific eligibility requirements. He must pass the relevant written examination, known respectively as the

sergeants promotion examination[57] and the inspectors promotion examination,[58] and possess such level of intelligence, demonstrated by intelligence assessment, as is satisfactory in the opinion of the relevant interview board.[59] The contents of the examination and intelligence assessment will clearly have a major influence on the calibre of personnel promoted. It is worth noting, therefore, that the syllabi for both examinations is determined by the Commissioner. However, his discretion is not absolute. He can determine the syllabi only on the advice of the Council, and with the approval of the Minister.[60] The Commissioner's role is further constrained by the fact that he has no input at all into the intelligence assessments. The nature of these is determined by the Council, subject to the consent of the Minister. They are carried out by a person who, in the opinion of the Minister formed after consultation with the Council, is qualified to carry out the assessments.[61] It is clear, therefore, that even at the lowest level of promotions, ministerial input rivals that of the Commissioner in the matter of promotional criteria. When it comes to making the individual promotions, however, the Commissioner's authority is much stronger. Successful candidates are selected through competitions held by an interview board. In the case of promotion to sergeant, the board consists of a Chief Superintendent, a Superintendent and a person having knowledge of and experience in personnel management in an organisation other than the

Garda Siochana. The same format applies for promotion to inspector, except that the senior ranking officers are Assistant Commissioner and Chief Superintendent. All the members of the board are appointed by the Commissioner in both cases. The final appointment, if any, to the rank of Sergeant and Inspector, will be made by the Commissioner from among those selected by the relevant interview board.[62] Although there is no mention at all of the Minister, it should not be assumed that he has no influence at this stage of the procedure. It must be remembered that the senior officers sitting on the interview boards will have been appointed to their posts by the Government, and they depend on the government for further promotion. Furthermore, the Commissioner can only promote successful candidates to vacancies which the Minister has sanctioned for filling.

(ii) Inspector to Chief Superintendent

The second category of promotions from Inspector to Superintendent and from Superintendent to Chief Superintendent is much more simplified.[63] The selection procedure consists primarily of competitions held by interview boards.[64] The structure of the boards is similar to that for the first category. For promotion to Superintendent, the senior ranking board members are the Commissioner or a Deputy Commissioner and a Deputy or an Assistant Commissioner, while the third member must have knowledge of and experience in the selection of persons for

appointment to senior management positions in an organisation other than the Garda Siochana.[65] For promotion to Chief Superintendent the board will consist of the Commissioner, a Deputy Commissioner and a third person having the same qualifications applicable to the third person of the Superintendent's board.[66] The Minister is not given a specific input as the board members are selected by the Commissioner after consulting the Council.[67] If anything, however, the Minister's influence is even stronger in this group of promotions. Not only do the senior ranking officers on the boards owe their appointments to the government, but all appointments to the ranks of Superintendent and Chief Superintendent vest in the government. Indeed, the government is not even under a specific legal obligation to make individual appointments from the pool of those selected by the boards. Current practice, however, is to appoint from the board's selections although there have been occasions in the past, under the old regulations, where the government has ignored the Commissioner's recommendations when making senior appointments.[68] The fact that there have been no such cases under the current regulations suggests that the board's choices have always been to the government's satisfaction. This, in turn, suggests a strong degree of harmony between the government and the operation of the selection procedures at this level.

(iii) Chief Supertendent to Assistant Commissioner

Selection of members for promotion in the third category can be effected either by means of a competition held by an interview board identical to that for Chief Superintendent,[69] or simply by a specially convened meeting of the Commissioner and such of the Deputy and Assistant Commissioners as are able to be present.[70] The choice between the two methods is for the Commissioners to make after consultation with the Minister. It is inevitable at this level that the selection procedure will be heavily influenced by the Minister's preferences. The Commissioner and the Minister are likely to have similar views on suitable candidates. Even in the unlikely event that they do not the Commissioner will know that the government will not appoint anyone to such a sensitive post unless it has full confidence in him. Accordingly, there is little point in selecting an individual who is out of favour with the Minister of the day.

The regulations make no reference at all to promotion to the rank of Deputy Commissioner. The implication, presumably, is that this is a matter solely for the government. Since a Deputy Commissioner can find himself acting for the Commissioner in certain situations, it is inevitable that the government will view his appointment as on a par with that of the Commissioner. Both are essentially political as opposed to promotional appointments. In practice, however, the government will consult the Commissioner and take his views into account

when making such an appointment.

(iv) Others

The promotion procedures described so far are those which relate generally to the force. There are, of course, minor variations to deal with promotions within specialised sections. For example, an interview board must include, in addition to its normal composition, a person having experience in specialised work pertinent to the relevant section.[71] Furthermore, a garda will only be eligible to apply for promotion to the rank of sergeant in one of the specialised sections if he has such technical qualifications, knowledge and experience as may be determined by the Council.[72] Eligibility to apply for promotion above the rank of sergeant can be confined if the Council so determines, to members who have such technical qualifications, knowledge and experience as determined by the Council.[73] It is also the case that members who were recruited to the force through the special appointments procedure for persons with special technical qualifications and assigned to one of the specialised sections are not eligible for transfer or promotion to any other section or part of the Garda Siochana.[74] Members serving in one of the sections at the rank of sergeant or above are not eligible for transfer in the same rank to any other section or part of the force unless they have passed the sergeants or inspectors promotion examinations, whichever is applicable.[75] The specialised section of the force to

which these variations apply are listed in the Schedule to the regulations. They are: garage, band, fingerprint, telecommunications, mapping, ballistics, photography, computer, printing and documents. It is worth noting that the detective branch or special units, such as the special branch, are not the subject of separate treatment in promotion procedures.

5. Discipline

(a) Disciplinary Power

The Police Forces Amalagamation Act, 1925 gives the Commissioner the power of dismissal over the lower ranks, and the power of demotion over all ranks up to and including Chief Superintendent. Like his powers of appointment and promotion, it is envisaged that these powers will be the subject of regulations issued by the Minister. Nothing further is said in the legislation about the Commissioner's disciplinary authority. However, it is a feature of police forces that a chief officer is automatically the disciplinary authority for his force. In the case of the Garda Siochana, the Commissioner's power of general direction and control over the force implicitly marks him out as the disciplinary authority. He can decide what duties to impose on individual members, where to post individual members from time to time and the promotion of individual members up to and including the rank of inspector. The manner in which he discharges these tasks can have an immediate impact on discipline throughout the

force. However, where it is alleged that an individual member has infringed a specific provision of the disciplinary code, thereby exposing him to the threat of dismissal, demotion or other formal punishment, it is necessary to follow fair procedures before that threat can be implemented. These fair procedures are provided for in the Discipline Regulations issued by the Minister.

(b) Regulations

The first Discipline Regulations to be issued for the force by the Minister were contained in the Garda Siochana (Designations, Appointments and Discipline) Regulations, 1924. They were revised in 1926[76] and, most recently, by the Garda Siochana (Discipline) Regulations, 1971. Special measures dealing with citizen complaints against Garda personnel are to be found in the Garda Siochana (Complaints) Act, 1986 which will be examined later in a different context. For present purposes it is sufficient to offer a brief outline of the internal regulations issued by the Minister in 1971.

(c) Procedure

(i) Outline

The regulations, themselves, contain a code of disciplinary offences.[77] The implication is that the Commissioner's power to dismiss, demote or to impose any of the other penalties contained in the regulations, is confined to the specifically defined offences. Having said

that, however, it must be accepted that some of the offences are phrased so broadly as to render this technical constraint of little practical relevance. Examples are: conduct prejudicial to discipline or likely to bring discredit on the force;[78] wilful disobedience of any lawful order;[79] and failing to behave with due courtesy towards a member of the public.[80] The procedure is initiated "where it appears that there may have been a breach of discipline".[81] The matter must be investigated by an "Investigating Officer" appointed by an "Appointing Officer" who must be of a rank not lower than Chief Superintendent.[82] On completion of the investigation, the Investigating Officer submits his report to the Appointing Officer.[83] If the latter decides to proceed further under the regulations he must complete a discipline form in respect of the alleged breach of discipline.[84] This form, along with other relevant particulars, are supplied to the member concerned.[85] All the documents are subsequently forwarded to the Commissioner who must decide whether to terminate or continue the proceedings.[86] If he decides to continue, he must appoint either one[87] or three[88] officers to hold an inquiry.[89] If the Commissioner feels that the alleged breach of discipline is of a sufficiently serious nature, he may direct that information given at the inquiry should be given on oath.[90] The Commissioner also has the power to nominate an officer to present the case against the member concerned; alternatively it can be presented by the

Investigating Officer.[91] Otherwise the procedure at the inquiry is under the control of the presiding officer (in the case of a three member inquiry he will be the most senior officer of the three)[92] subject to the general procedural framework laid down by the regulations.[93]

The inquiry must decide that the member is or is not in breach of discipline as alleged, or that the facts established constitute a less serious breach than that alleged.[94] A report of the inquiry's decision, together with any relevant statements, and the inquiry's recommendation for disciplinary action (if any) is sent to the Commissioner.[95] It is then up to the Commissioner to decide what disciplinary action (if any) to take in the event of the member being found in breach of discipline.[96] The formal disciplinary options open to the Commissioner are: dismissal, reduction in rank, temporary reduction in pay,[97] reprimand or caution.[98] The member concerned may apply to the Commissioner for a review of the inquiry's decision, or a review of the penalty imposed by the Commissioner himself, or both.[99] In this event the Commissioner may affirm or set aside the inquiry's decision[100] and affirm, revoke or mitigate the penalty he has imposed.[101] Alternatively, he may refer the application to an appeal board[102] and, indeed, he must adopt this course where dismissal or reduction in rank has been imposed.[103] An appeal board shall consist of three persons nominated by the Commissioner.[104] The

chairman is selected from a panel nominated by the Minister, and must be a District Justice or barrister or solicitor of at least seven years standing.[105] The other two members must be members of the force selected from a panel of five persons nominated by the Commissioner.[106] This panel must consist of: one from the rank of Superintendent, two from the rank of Chief Superintendent and each of the others must be of the rank of Assistant or Deputy Commissioner. Again, it is the Investigating Officer, or an officer appointed by the Commissioner, who will present the case against the member concerned.[107] Apart from that, the procedure is under the control of the chairman; subject to the general requirements of the regulations. The options open to the appeal board are, where relevant: to affirm or set aside the decision of the inquiry; or to decide that the facts established constitute a less serious breach of discipline from that found by the inquiry;[108] or to affirm, vary, or revoke the penalty imposed by the Commissioner. It seems that the Commissioner must accept and implement the appeal board's decision.[109]

(ii) Summary Dismissal

That completes the outline of the internal disciplinary procedure. It is necessary to point out, however, that it is possible for the Commissioner to short circuit these formal procedures in very limited circumstances. The regulations enable the Commissioner to

dismiss a member, not above the rank of inspector, in summary fashion.[110] This can be done in three situations.[111] First, where the Commissioner is not in any doubt as to the material facts, and the relevant breach is of such gravity that the Commissioner has decided that the facts and breach merit dismissal and that the holding of an inquiry could not affect his decision. Second, where disclosure of facts relating to the breach of discipline would, in the opinion of the Commissioner, be liable to affect the security of the State or do serious and unjustifiable damage to the rights of some other person or have similarly grave consequences.[112] Third, where the member has failed to attend for duty over such period and in such circumstances that it can be presumed that his intention has been to abandon his membership of the force. This is clearly a very powerful discretionary power to place in the hands of the Commissioner. However, the regulations do require the Commissioner to give a member affected, in the first two situations, an opportunity to advance reasons against his proposed dismissal.[113] The Courts have accepted this as being sufficient to satisfy the norms of constitutional justice, given the public interest in the maintenance of a disciplined police force.[114] A more potent limitation is the stipulation that the power can be exercised in individual cases only with the consent of the Minister.[115]

(d) <u>Commissioner v. Political Authority</u>

Overall, it is apparent that disciplinary authority over the force is very much a matter for the Commissioner. Apart from the actual making of the regulations direct political input is characterised by its almost complete absence. The Minister figures only twice in the procedure: first, through his function in maintaining a panel of chairmen for the appeals board; and second, through his power to withhold consent to the summary dismissal of a member. The only independent input comes in the form of the chairman of an appeals board. Everything else is a matter for the Commissioner, and officers of the force, acting within the general parameters of the law and regulations. It is important, however, not to confuse the disciplinary control vested in the Commissioner by the regulations with the broader picture of discipline within the force. For example, it cannot be taken for granted that the discipline regulations apply fully to all ranks up to and including the Deputy Commissioner. The regulations, themselves, do not contain any specific provisions confining their application to particular ranks. Nevertheless, there are compelling reasons to believe that they have only limited application to officer ranks and do not apply at all to ranks above that of Chief Superintendent.

The Police Forces Amalgamation Act, 1925 confers on the government alone the power to dismiss officers. The intention to confer this power exclusively on the

government is indicated by the fact that the relevant section only gives the Commissioner the power to demote and degrade the officers. The clear implication is that the Commissioner does not have the power to dismiss officers. Furthermore, the Commissioner could not be conferred with such a power through the medium of regulations made pursuant to the Act. Indeed, the power of summary dismissal defined in the regulations is specifically confined to members not above the rank of inspector. In any event, the fact that the Act specifically permits the government to dismiss an officer "at any time" precludes the possibility of an officer claiming the right to be dealt with through the procedure laid down by the regulations. He is, of course, entitled by law to an opportunity to be heard in his defence; but that opportunity need not be elaborate or formal. It follows that a very major component of the Commissioner's disciplinary control is ceded to political authority. This is all the more significant given the fact that the officer ranks constitute both the top and the middle management of the force.

The Commissioner's disciplinary control is further undermined by the liklihood that the disciplinary regulations do not apply at all to the ranks above Chief Superintendent. This is suggested by the fact that the power to dismiss any Deputy or Assistant Commissioner and the Surgeon is contained in a separate section of the Act

from the power to dismiss any officer below the rank of Surgeon. In the former section[116] there is no mention of a power of demotion, while the latter also contains a power, exercisable by the Commissioner, to degrade any officer below the rank of Surgeon.[117] The implication is that officers of Surgeon rank and higher cannot be demoted at all. The only possible application of the discipline regulations to these top ranks, therefore, would be in matters which would not attract a penalty of dismissal or demotion. A perusal of the regulations, however, suggests that they are not intended to apply to these ranks at all. Given the seniority of these ranks, and the fact that their maximum establishment in 1971, excluding the Commissioner, was five,[118] one could expect that they would be the subject of special treatment. It is difficult to imagine, for example, a Deputy Commissioner being the subject of an investigation and formal inquiry conducted by his fellow Deputy and at least one other officer from a lower rank. That, however, would be the inevitable result in the event of a disciplinary charge being preferred against a Deputy Commissioner under the current regulations.[119] The compelling conclusion is that the regulations do not apply to these ranks. It follows that the Commissioner cannot exercise any formal disciplinary powers over these ranks; that is reserved exclusively for the government. The Commissioner, however, can still exert his authority over these ranks by his residual power to allocate functions among them.

If this analysis of the scope of the Discipline regulations is correct, it follows that there is no set disciplinary procedure for the most senior officers. This was acutely apparent in the dismissal of former Commissioner Garvey. In relation to that dismissal it was intimated in the Supreme Court that if dismissal was for alleged misconduct, the Commissioner must be given a hearing and an opportunity to rebut the allegations. The Supreme Court, however, gave no further details on what form the procedure should take. There is both a similarity and a contrast in the British approach to this question. The similarity is that the authority with the power to appoint and dismiss the most senior officers is also the disciplinary authority for the less serious transgressions of these officers. The contrast is that the British regulations do lay down formal procedures to be followed.[120]

6. Location within Central Government Apparatus

(a) Introduction

There is more to the legal, administrative and political structures of the Garda Siochana than is immediately apparent from the body of regulations governing the structure and internal management of the force. The Garda Siochana's status as a national police force makes it inevitable that it will have a close structural relationship with the apparatus of central government. A complete picture of the force's legal, administrative and

political structures cannot be drawn, therefore, without a full understanding of the extent to which it is integrated into the machinery of central government. It follows that it is necessary to give a brief outline of the machinery of central government with a view to identifying the Garda Siochana's place within it.

(b) Outline of Apparatus

(i) The Government

Bunreacht na hEireann provides for a broad separation of powers between the three major organs of State[121]: the Oireachtas,[122] the Government and the Courts. At the bottom is the democratically elected chamber known as the Dail. It is the equivalent of the House of Commons in the Westminister Parliament. The second chamber, or Seanad, is not directly elected by the people, and functions, in a manner similar to the British House of Lords. The third tier of the Oireachtas is the President. The government[123] must consist of not less than seven and not more than fifteen members of the Oireachtas.[124] While not more than two can be members of the Seanad,[125] in practice all are normally members of the Dail. The Taoiseach, or prime-minister, his deputy and the Minister for Finance must be members of the Dail.[126] The other members are appointed by the President on the nomination of the Taoiseach[127]; but only after the Taoiseach's choice has been approved by the Dail.[128] If a Taoiseach ceases to retain the support of a majority in the Dail he, and the

other members of the government, must resign.[129] Alternatively, the Taoiseach can advise the President to dissolve the Dail and if, on its reassembly, the Taoiseach enjoys the support of a majority he does not have to resign.[130] The only qualification to this alternative is that the President has a discretion to grant a dissolution where the Taoiseach has ceased to retain a majority in the Dail.[131]

The 1937 Constitution, following the style of its predecessor, avoids prescribing any detail on the structure or modus operandi of government. It does, however, stipulate that the government should prepare estimates of receipts and expenditure,[132] and that it must meet and act as a collective authority.[133] Furthermore, both Constitutions envisage the establishment of departments of State by law, and the assignment of each department to the charge of a Minister.[134] To get a fuller picture of the structure of central government, therefore, it is necessary to look first at the legislation which gives expression to this expectation; namely the Ministers and Secretaries Act, 1924 as amended.

(ii) Department of Justice

Initially, the 1924 Act established eleven departments of State.[135] They are: President of the Executive Council (now Department of the Taoiseach), Finance, Justice, Local Government and Public Health, Education,

Lands and Agriculture, Industry and Commerce, Fisheries, Posts and Telegraphs, Defence and External Affairs. Amending legislation has changed the titles and statutory remits of some, while new ones have been established and some abolished.[136] The Department of Justice has the most relevance for the Garda Siochana. Its remit in the 1924 Act is defined thus:

> The Department of Justice shall comprise the administration and business generally of public services in connection with law, justice, public order and police, and all powers, duties and functions connected with the same (except such powers, duties and functions as are by law reserved to the [Government] and such powers, duties and functions as are by the Constitution or by law excepted from the authority of the [Government] or of [a Government Minister]) and shall include in particular the business, powers, duties and functions of the branches and officers of the public service specified in the Second Part of the Schedule to this Act, and of which Department the head shall be, and shall be styled, an t-Aire Dli agus Cirt or (in English) the Minister for Justice.

The branches and officers of the public service specified in the second part of the Schedule are:

> "All Courts of Justice and the Officers thereof save insofar as the same are reserved to the [Government] or are excepted from the authority of the [Government] or of a [Government Minister].
> Police.
> The General Prisons Board for Ireland and all Prisons.
> The Registrar of District Court Clerks.
> The Public Record Office.
> The Registry of Deeds.
> The Land Registry.
> The Commissioners of Charitable Donations and Bequests for Ireland."

(c) Location within Justice Department

(i) An Integral Part?

The inclusion of police in the remit of the Department of Justice suggests that the Garda Siochana may consitute an integral part of that department. The significance of the point is enhanced by the fact that the 1924 Act confers the status of corporation sole on a Minister in his capacity as head of a department.[137] This means that his office personifies the department in law for all the activities of the departmental civil servants acting in their capacity as such. It follows that if the Garda Siochana is to be understood as an integral part of the department of Justice individual gardai will be subject to the ultimate direction and control of the Minister for Justice who, in turn, will be responsible in law and to the Dail for their actions in the course of their duty. However, this possibility must be a non-starter. Later, it will be seen that the legal status of a garda is incompatible with that associated with a civil servant. This incompatibility is indicated by the fact that a garda, by virtue of his office, is conferred with powers which can be exercised only at his discretion. Admittedly, there is judicial authority to the effect that a garda is a servant of the State;[138] but that is a different concept altogether from a civil servant of the government. The former refers to anyone engaged in the public service and, as such, includes: judges, soldiers, officers and employees of public bodies as well as gardai and civil servants of

the government and even government Ministers.[139] Civil servants of the government comprise only those departmental civil servants who function at the direction and control of their political heads.

The terms of the Police Forces Amalgamation Act, 1925 also render it unreal to regard the Garda Siochana as an integral part of the Department of Justice. As explained earlier, the force's lack of legal personality does not detract from a clear legislative intention that it should function in practice as a distinct and separate unit. The possibility that it could still somehow constitute an integral part of the department of Justice must be excluded by the fact that the general direction and control of the force is vested in the Commissioner.[140] The most that the Minister for Justice can do is issue regulations on matters affecting the administration and internal management of the force.[141] The Act patently does not subordinate the Commissioner, in his direction and control of the force, to the authority of the Minister. Finally, there is the fact that the membership of the force up to and including the rank of inspector is appointed by the Commissioner pursuant to a procedure which is quite separate and distinct from that pertaining to departmental civil servants. Taking all these matters together the unavoidable conclusion is that the Garda Siochana cannot be understood as an integral part of the Department of Justice.

(ii) Analogy of Revenue Commissioners

Further support for this conclusion can be derived from the example of the Revenue Commissioners.[142] A Board, to be known as the Revenue Commissioners, was established by the Revenue Commissioners Order, 1923. It was vested with all the jurisdictions, powers and duties which had been conferred or imposed by law on the British Commissioners of Customs and Excise and Commissioners of Inland Revenue. Each subsequent Finance Act has included a provision to the effect that all taxes imposed or continued by the Act "are hereby placed under the care and management of the Revenue Commissioners". It was envisaged, therefore, that the functions of tax assessment and collection for the State would be discharged on the authority of the Revenue Commissioners who would be appointed by and hold office at the pleasure of the Taoiseach. Admittedly the 1923 Order stipulated that the Commissioners would be subject to the control of the Minister for Finance and must obey all orders and instructions which might be issued to them by the Minister. By convention, however, the Commissioners act independently of ministerial control when exercising the statutory powers vested in them in regard to the liability to tax of the individual taxpayer.[143]

It follows that the analogy between the Garda Siochana and the Revenue Commissioners is evident at two critical points. First, each has been vested with the necessary

legal powers and duties to deliver an essential executive function of State. Second, each has been established as a distinct organisational unit enjoying a degree of independence from political authority. The relevance of the Revenue Commissioners in the present context derives from the fact that the Ministers and Secretaries Act, 1924 listed them as part of the statutory remit of the Department of Finance in the same manner as police was listed under the department of Justice. If this development was sufficient to render the Revenue Commissioners an integral part of the Department of Finance then it could have analogous implications for the Garda Siochana. However, in his scholarly study of the Revenue Commissioners Sean Reamonn concludes that the 1924 Act was not intended to have that effect; nor did it produce that effect.[144]

(d) A State-Sponsored Body?

(i) General Nature

The apparatus of central government is not confined to government departments. The need to free the performance of some executive functions of central government from the civil service bureaucracy and day-to-day ministerial control has led to the development of an entity known generically as the state sponsored body.[145] Although it emerged initially as a vehicle through which the State could engage in certain commercial ventures more efficiently than would have been possible through

traditional civil service structures, it has become a standard device through which the State can administer certain executive tasks of central government. Today many state sponsored bodies can still be found operating in the market place as major industrial or commercial corporations,[146] while some are engaged in the provision of resources or expertise to industry, commerce and agriculture[147] and others function as police or regulatory bodies for specific economic activities and sectors.[148] Given this diversity it is inevitable that there will be differences in legal structure among these bodies. On the whole, however, a pattern can be detected. For the most part, each body is established by its own legislation independent from that founding the departments. This normally provides for a Board, the members of which are appointed and are removable by the appropriate Minister. The legislation will also prescribe the powers and duties of the Board, and these will usually include the power to appoint its own officers, employ its own staff and generally to take charge of its own financial affairs. While a Board will have a multiple membership the legislation will establish it as a corporation sole. Although the government will often have the capacity indirectly to influence the general policy and functioning of the Board, it will have no legal power to do so directly unless the legislation specifically confers such a power.

(ii) Incompatibility with Garda Siochana

Although the Garda Siochana's remit extends far beyond the specific economic activities or sectors to which most state sponsored bodies are confined, it is tempting to see the force as part of that generic category. It is a body which is owned and financed by the State; it enjoys a legal existence external to the government departments; its chief officers are appointed by the government and it is expected to discharge executive functions on behalf of the State without having to be directed by a Minister. Unfortunately there are a few structural differences between the Garda Siochana and a typical state sponsored body which would make it difficult to depict the former as an example of the latter. These differences are highlighted when attempting to identify the Board of the Garda Siochana. The only entity which even remotely resembles a Board is the Garda Commissioner by virtue of his power of general direction and control over the force. As will be seen later, however, when the Oireachtas creates police powers it does not confer them on the Commissioner with a view to his exercise of them through the medium of the members of his force. On the contrary, police powers are conferred directly by law on each member of the force to hold and to exercise independently of the Commissioner or any other executive authority. Indeed, there is not even a statutory description or definition of the police powers and functions of the Commissioner or the force as a whole; probably because they are not significantly different from those attaching to each individual member of the force.

Once again the peculiar concept of the force being essentially a body of officers exercising powers and duties under the administrative control of a chief officer is prominent. No other state sponsored body is structured on this basis. Furthermore, the Commissioner does not enjoy financial autonomy over the force. Nor does he have the powers to appoint and remove his most senior officers, to frame regulations on discipline or promotion or to fix pay, pensions, etc. Taking all these matters into account it would be difficult to equate the Commissioner with the Board of a state sponsored body. Given the absence of any other entity within the Garda Siochana which could be satisfactorily described as the Board it must be concluded that the Garda Siochana cannot qualify as a state-sponsored body.

(e) Administrative Relationship with Justice Department

(i) Introduction

Just because the Garda Siochana cannot be located easily within the mainframe of the central executive apparatus, it does not follow that its relationship with government must be analysed purely in terms of its own establishing legislation. There must be some signficance in the fact that police is assigned to the statutory remit of the Department of Justice by the Ministers and Secretaries Act, 1924. It is necessary to tease out the full implications of this arrangement before proceeding, in a later chapter, to focus on the legal status of the Garda

Siochana.

(ii) Interpreting s.1 of the Ministers and Secretaries Act, 1924

The loose wording of section 1(iii) of the 1924 Act, which sets out the remit of the department of Justice, is capable of at least two interpretations. At its widest it could be interpreted, in the case of the police, as conferring police powers and functions on the department. In reality this is a most unlikely interpretation. The traditional practice with police powers in both Ireland and Britain, as has been seen, is to confer them statutorily on each individual member of the police force. The concept of vesting the general police power in the force as a collective whole or in a single individual has never been a feature of normal policing arrangements in these islands. If it was intended to break with this traditional practice and confer a general police power on the Minister for Justice very clear and specific legislative provision would be required to give it effect. Section 1(iii) of the 1924 Act can hardly satisfy this requirement.

There are, indeed, several clear pointers in section 1, and in the 1924 Act as a whole, which suggest that there was never any intention to give the department control over the exercise of all police powers and functions. If it was the intention to make such a fundamental break with traditional practice very clear and specific legislative

provisions would be required to give it effect. The Minister, just like the police, cannot exercise any coercive police powers in the absence of clear statutory or common law authority to the contrary. The 1924 Act does not contain such provision. Nowhere is it suggested that the department should have "control" over the exercise of police powers, or even over policing generally. Admittedly, it does say that the department's remit shall include "the business, powers, duties, and functions of the branches and officers of the public service" specified in the second Schedule which, of course, includes the police. That, however, must be interpreted against the background of the opening words which are: "The Department shall comprise the administration and business of public services ...". The intention is clearly to charge the department with responsibility for the administrative aspects of policing; i.e. the administrative services and facilities which would be necessary for an efficient exercise of police powers and discharge of police functions. Support for this interpretation is forthcoming from the wording of the other departmental remits. Of the other ten, eight do not mention the word control at all. Like Justice, they put the emphasis on general background administrative responsibilities. Of the two that do, the Department of the Taoiseach actually prefixes it with the adjective administrative, while the other, the Department of Defence is the exception which proves the rule. The Department of Defence is the only one which is given direct control over

the powers, duties, and functions vested in a branch of the public service, in this case, the defence forces. There is, of course, a very good reason for the exception of Defence. A State's defence forces are traditionally placed under the ultimate control of the political head or heads of that State. It follows that the government Minister with special responsibility for the forces should have a general responsibility for their deployment as well as their general administration, subject to any specific statutory provision to the contrary. The use of the word "control", therefore, is appropriate and deliberate in the definition of the Department's relationship with the defence forces. This suggests that the absence of the word "control" from the other remits is significant. It is submitted that it supports the view that the legislative intention was merely to allocate to the departments general administrative responsibilities, rather than executive control, over the various public services.

Further support for this narrow interpretation is derived from the fact that the powers, duties and functions of a department are "assigned to and administered" by its Minister. Since the department has no legal personality it could not act otherwise than through its Minister. It is significant, however, that the word "administered" as opposed to "exercised" is used. This clearly suggests that the Minister was never intended to have any power to exercise or to direct the exercise of individual police

powers and functions.

In this context a useful contrast can be drawn with the office of Attorney-General. Although this office originated at common law, it acquired a range of statutory powers and duties over the years.[149] The Ministers and Secretaries Act 1924, put the office on a statutory basis, using a formula which bears a close resemblance to that for the departments.[150] Not only, however, is the Attorney-General given the "administration and business generally" of specified public services but he is also "vested" with the "business, powers, authorities, duties and functions formerly vested in or exercised by "his predecessors at common law. He is further given the "administration and control" of the "business, powers, authorities, duties and functions" of certain specified branches and officers of the public services. The difference of wording used in the Attorney-General's remit can be explained by the fact that he was intended not just to discharge certain administrative responsibilities but to continue to exercise the common law and statutory powers previously exercised by his common law predecessors. If the legislative intention was that the Minister for Justice was to exercise the powers vested in the police at common law and by statute, similar wording would have been used.

Finally, the presence of section 9(1) of the 1924 act confirms that the legislature clearly intended to

distinguish between control over the exercise of powers and functions and administrative back-up to the exercise of those powers. Section 9(1) empowers the government to dissolve boards of commissioners or statutory authorities established under British rule and which are exercising any function of government and discharging any public duties in relation to public administration in the State. The government is empowered to transfer all or any of the jurisdictions, powers, duties and functions of such a dissolved board or body to the appropriate Minister. If section 1 of the 1924 Act had already vested all the business, powers, duties and functions of the branches and officers of the public service in the appropriate Ministers, there would be no need for section 9(1).

(iii) Scope for Departmental Input

Just because section 1 does not, in itself, permit a Minister to control all aspects of the delivery of all the public services within his remit, it does not follow that it confers no power on him at all. The statutory allocation of the administration and business of a range of public services to the Minister must imply at least that he has the power to establish and maintain administrative structures through which these services can be delivered efficiently and satisfactorily. (In this context the term "public services" is being used in a very broad sense to denote not just actual public services but all public functions normally discharged by government, including

those which impose obligations on citizens). Just how much control this will give him over the delivery of these services in individual cases will depend on whether specific statutory authority would be required for the service in question and on whether the service has been statutorily vested in a body which is wholly or partly independent of the department.

If the provision of a public service will affect rights or obligations in a manner not already covered by the common law, statutory authority will be required. Neither government Ministers nor the government as a whole enjoy any inherent power to confer legal rights or impose legal obligations on individuals. Only the Oireachtas can do this. It follows that the Minister cannot use his administrative responsibilities conferred by section 1 to provide public services where those services would affect legal rights or obligations. If legal rights or obligations would not be affected there is no reason why the Minister could not provide services on his own initiative. All that would be required is for him to put the necessary administrative arrangements in place and ensure that the necessary funds are provided for in the annual Appropriation Act. This is most likely to arise in situations where the service in question takes the form of benefits to individuals, groups or communities in the form of funding or physical resources. Fine examples are the schemes for the compensation of crime victims and for civil

legal aid. Casey cites these as examples of the executive power of State in action.[151] It is submitted, however, that they might more appropriately be classified as the Minister for Justice exercising the administrative responsibilities conferred upon him by section 1 of the 1924 Act. Of greater practical relevance is the fact that in matters such as these non-statutory schemes the Minister is free to arrange the administrative structures in such a way that he can dictate the delivery of the service generally and in each individual case subject, perhaps, to the principles of judicial review of administrative action. If the delivery of the service is governed by common law or statutory provision the Minister may still retain his responsibility for its general administration. What that consists of in practice, however, will vary depending on the contents of the relevant common law or legislation. What can be said is that the Minister could not rely on his administrative power to deliver the service in a manner inconsistent with the law. In the case of police it has been seen already that the Minister enjoys certain statutory powers to make regulations on various aspects affecting the administration and internal management of the Garda Siochana. A fuller picture of the scope of, and limits to, the Minister's control over the delivery of the police service will become evident from an analysis of the legal and constitutional status of the Garda Siochana.

Ch.4 THE LEGAL AND CONSTITUTIONAL STATUS OF THE POLICE: THE BRITISH DIMENSION

1. Introduction

Although the establishment of a new police force was perceived as a vital ingredient in the creation of the new State the 1922 Constitution makes no reference to it at all. Such references as there are to institutions or procedures in criminal law enforcement are confined to the role of the courts. The investigation and prosecution stages of the criminal process are ignored completely; apart from the indirect repercussions of individual rights such as the inviolability of the liberty of the person[1] and dwelling of each citizen[2] or the right to a trial in due course of law[3]. Bunreacht na hEireann goes only one step further in that it contains an express provision on the prosecution stage. This takes the form of the Attorney-General's office being put on a constitutional footing, and confirmation of his established role in the prosecution of offences upon indictment[4]. Again, however, there is no mention of the police as an institution with special responsibilities in the investigation and prosecution of criminal offences.

A peculiar feature about the omission of the police from Bunreacht na hEireann is the fact that the framers of the Constitution were not ignorant of the central importance of the police as an institution in the public administration of the State. Arts. 53-63 make specific

provision for the continuance of various bodies upon the adoption of the new Constitution. The relevant bodies are: the Dail, the Government, the Departments of State and the Civil Service, the Courts, the Attorney General, the Defence Forces and the Police. Apart from the police and the civil service all these bodies were specifically provided for by the 1922 Constitution and the Ministers and Secretaries Act, 1924. They were to function as the principal organs of government and the State. It follows that when specific provision was made for these bodies in the new Constitution, adopted in 1937, there would be confusion or uncertainty about the status of those bodies as established by the 1922 Constitution and the 1924 Act. Would they continue to function subject to the provisions of the new Constitution, or would they have to be dissolved before being re-established? Arts. 53-63 answer this question in favour of the former. The fact that the police and the civil service are specifically included, however, deserves some comment since neither were mentioned substantially in either the 1922 Constitution or the 1924 Act.

The inclusion of the civil service can be explained easily by the fact that it is an integral part of government in the sense that the political heads of government rely directly on it to discharge their functions. Since it was created originally to serve the government established under the 1922 Constitution, it is

understandable that its status in the post Bunreacht na hEireann period would require clarification. In a similar vein the police force was established by government action on the authority of an Act of the Oireachtas. However the key difference is that the force was designed to function on its own initiative and, for the most part, independently of the government. In that sense it was no different from any other body established to discharge public functions by the government pursuant to an Act of the Oireachtas. Presumably, therefore, its legitimacy would have been preserved, in common with most other public bodies, by Art. 50 Bunreacht na hEireann[5]. The fact that the framers of Bunreacht na hEireann saw fit to include the police force specifically along with the other bodies mentioned in Arts. 53-57 suggest that they recognised it as one of the major institutions of State. It would seem, therefore, that their omission to make substantive provision for its role cannot be ascribed to oversight or ignorance.

It is difficult to ascribe precise reasons for the decision not to provide for the police in either of the two Constitutions. With respect to the 1922 Constitution it might be assumed that the framers were heavily influenced by the prevailing British Constitutional perspective on the police. As will be seen later, the police in Britain was not perceived as an institution of government in its own right. The British Constitutional theory of police has always been based on the notion that police power rested in

the hands of each citizen. The policeman, or constable, therefore was nothing more than a citizen in uniform discharging, on behalf of his fellow citizens, the collective law enforcement responsibilities of the community. The fact that these constables were organised into disciplined forces under the direction and control of a chief officer did not affect that theory even by the early twentieth century. The survival of the theory in the face of organised police forces can be attributed, at least partly, to the fact that the police forces were organised and operated on a local footing with only a limited input from central government. The result was that police power in Britain at the turn of the century was perceived as something inherent in the people as opposed to something emanating from the State. It is understandable, therefore, that the police did not acquire the status of an important institution of government in Britain at that time. If the framers of the 1922 Constitution were influenced by the contemporary British perspective on police, that might explain their failure to provide for it in the Constitution as one of the major organs of State. The difficulty with this suggestion is that, whatever may have been the case in Britain, police in Ireland throughout the nineteenth century was always very closely associated with central government. Indeed, during some periods the government patently depended on its police to preserve its power to govern. Furthermore, when the founders of the new State reconstructed the police they opted for a national model in

contrast to the British tradition of local forces. This suggests, if anything, that the framers were not heavily influenced by British concepts of police when forming the Constitution. This argument applies with even greater force to the authors of Bunreacht na hEireann. They had more than a decade of experience of the new policing arrangement, and yet they decided not to make provision for it in the new Constitution. Nor can the omission be explained by the idea that the 1937 Constitution stuck closely to its 1922 predecessor. Among the many changes that were made was provision for the Attorney-General. Given the key importance of police as an institution in the State, it is difficult to believe that no consideration at all was given to the office of Garda Commissioner.

It is much easier to identify a very significant consequence of the Commissioner's omission from the Constitution than it is to explain the reasons for his omission. If provision had been made for the office of Garda Commissioner as one of the major offices of State, with his special responsibily being the direction and control of police power, it would inevitably have guaranteed his operational independence from government. That much is apparent from the analogy of the Attorney-General. When the constitutional status of the Attorney-General was under scrutiny in McLoughlin v. Minister for Social Welfare Kingsmill Moore J. explained that:

> "...the Attorney-General is in no way the servant of the Government but is

> put into an independent position. He is a great officer of State with grave responsibilities of a quasi-judicial as well as of an executive nature. The provisions for his voluntary or forced resignation seem to recognise that it may be his business to adopt a line antagonistic to the Government, and such a difference of opinion has to be resolved by his ceasing to hold an independent position. He is specifically excluded from being a member of the Government which again underlines his independent position"[6].

This analysis flows from the fact that the Attorney-General is specifically provided for in certain terms in the Constitution. There would appear to be no reason why the Garda Commissioner could not have been provided for in similar terms. Indeed, the analogy between the two offices is close. Neither office was created by Bunreacht na hEireann. The Attorney-General was established statutorily by the Minister and Secretaries Act, 1924[7] while the Garda Commissioner's statutory base is to be found in the Police Forces Amalgamation Act, 1925[8]. The former's primary functions include: acting as an advisor to the government on matters of law and legal opinion, the assertion of public rights in ligitation and the control of all prosecutions on indictment[9]. The latter, by virtue of his direction and control of the national police force, acts as advisor to the government on matters of public order, security and criminal activity, and he is responsibile for initiating the vast majority of summary prosecutions. In addition, he commands that branch of the civil administration which is vested with a monopoly on the

lawful use of force as an instrument of law enforcement. Both officers clearly hold key positions in the general government of the State. The failure to enshrine the office of Commissioner in the Constitution, however, has deprived him of the independence enjoyed by the Attorney-General in the discharge of his public functions.

A further consequence of the Commissioner's omission from the 1937 Constitution is that the legal and constitutional status of the Garda Siochana must be sought in relevant statutory provisions and judicial decisions. A full understanding of these will, in turn, require a preliminary consideration of some key characteristics of the legal and constitutional status of the British police. At first glance this might seem surprising given that British policing is organised on a local basis. The Garda Siochana, by contrast, is established as a national police force placed firmly within the structures of central administration. Despite this divergence, it must be remembered that the concept of organised police forces was first put into effect in these islands in Dublin at the prompting of a British administration.[10] It was a British administration which established the RIC as a national police force under the de facto control of the central government. These, and other police experiments in Ireland, occurred during a period when successive British governments were developing their own organised policing structures.[11] It is understandable, therefore, that the

police organisations in the two jurisdictions should bear some distinctive legal and constitutional characteristics in common, even though they may differ in other respects. When the founders of the new Irish State established the Garda Siochana they retained some of these characteristics which today can be identified as hallmarks of British policing. It follows that a preliminary consideration of these common characteristics in their British setting is essential before their significance in the context of Irish policing can be teased out fully.

(2) The Office of Constable

(a) The Norman Constable

At the very heart of British police organisation is the office of constable. It will be seen later that, legally speaking, police forces in Britain are nothing more than a body of individuals occupying the office of constable and acting under the direction and control of a chief constable. Despite the centrality and importance of this office there is some dispute over its exact origins.[12] It is generally accepted that it was imported into England by the Normans in 1066. At that time, however, the office was very different from its namesake today. In the early years of the Norman administration it was most closely associated with very senior military officers. There was, for example, a Lord High Constable of England who was the most senior military officer with the responsibility for mustering an army for the defence of the

Realm.[13] Although he also functioned as a judicial officer[14] his jurisdiction was confined to matters arising from war both within and outside the Realm. In 1389[15] this was restricted to such matters which were not determinable by common law, and in 1399[16] it was further restricted to matters arising outside the Realm only. The military nature of the office was emphasised by his frequent absence abroad with the King's army. During these absences the functions of the Lord High Constable were performed at home by the Constable of the Exchequer. He was personally appointed by the Lord High Constable, and acted mainly as a ministerial officer of the Royal Court in much the same manner as the Marshal of England.[17]

Another constable associated with the early Norman administration was the constable of the castle, or castellan. The Normans extended their rule in England primarily by establishing a network of strongly fortified castles throughout the country. These castles, served as a basis for suppressing local resistance, maintaining order and as foci for the extension of central administration throughout the Realm. Normally the castle would be put under the charge of a sheriff, but it was also quite common for it to be entrusted to the safe-keeping of a constable.[18] Just like the Lord High Constable, this constable of the castle was essentially a military officer. It was his responsibility to ensure that the castle's defences were adequate and sufficiently prepared to ward

off an attack.[19] He is also seen leading troops to assist the King in the defence of the Realm against external attack and, indeed, accompanying his men to the continent in pursuit of the King's campaigns there.[20] In more peaceful times he is seen acting as a custodian of prisoners where his castle is used as a jail.[21] It would also appear that at one time he may have exercised judicial functions by holding pleas of the Crown. That, however, was forbidden by Magna Carta.[22]

There is some slight evidence to suggest that there were other constables in the early Norman administration who were not preoccupied with military matters. There was, for example, a constable of the Court of Common Bench who enroled essoignes and performed other ministerial acts for the Court.[23] However, very little else is known about him. While there are sparse references to other constables who may not be covered by those already mentioned,[24] the clear weight of the evidence is that the term signified a high ranking Royal official with primarily military responsibilities.

At some point in the two centuries consequent to the Norman invasion, the term constable was used to designate a local official who discharged certain police and military functions at local level. The precise origin of this office is disputed. Blackstone holds that the hundred, or head, constable originated with the Statute of Winchester

in 1285, while the petty or township constable did not appear until the reign of Edward III.[25] However, an ordinance for the preservation of the peace, dated 1242,[26] provides that in every vill there shall be established one or two constables according to the number of the inhabitants and the decision of the sheriff, mayor, reeves or bailiffs. Similarly, a chief constable shall be established in the hundred, and at his command all men sworn to arms in his hundred shall assemble and shall be obedient to him in carrying out necessary measures for the conservation of the peace. These chief constables, in turn, shall obey the sheriff and two appointed Knights in carrying out necessary measures for the conservation of the peace. Ritson takes this ordinance of 1242 as the starting point for the local office of constable.[27] Simpson, however, argues that, in the absence of any directions in the ordinance respecting the mode of appointment, it is an unlikely starting point.[28] He explains that the responsibilities attached to the constable by the ordinance already attached to the vill at common law, and had always been discharged through its head man, or tithingman.[29] The most that the ordinance did, therefore, was apply the appellation constabularius to this figure when his peace-keeping and military responsibilities to the central government were in issue. Underneath the mantle of the local constable, however, there existed the office of tithingman, a local office rooted in custom.

(b) The Anglo Saxon Tithingman.

(i) As Representative of the Vill

The tithingman emerged as an integral part of the Anglo-Saxon system of policing.[30] This was based on the notion that every person should have a surety or borh, i.e. a lord or protector who would be responsible for protecting them in court in the event of their committing a crime or failing to pay a debt. Those who could not attach themselves to a protector were required to combine with others in the same position so that the collective group could provide security for each of its members. These collective groups were known as tithings. From the time of Canute onwards the tithing would appear to have been established as the principal unit of policing. Under the laws of Canute every freeman over the age of twelve had to be a member of a tithing. If a member of a tithing committed a crime the other members had to produce him in court and pay any fine incurred if the individual member could not pay it. If the guilty man was not produced the tithing had to pay a fine and a forfeiture to the injured party. Each tithing elected one of its members as a head man or tithingman to act as its representative at local assemblies, such as the court leet, and to take primary responsibility for the discharge of its self-policing responsibilities. To assist him in the latter task the tithingman enjoyed certain customary authority over his fellow members. For example, he could intervene to prevent or terminate breaches of the peace, he could demand surety

from those he found breaking the peace, he could confine such persons in the stocks until such surety was forthcoming, he could act against suspected wrongdoers on the basis of reports from other credible persons even though he himself had not witnessed the wrongdoing, he could take surety from a suspected wrongdoer, he was protected from liability for injuring or killing a wrongdoer who resisted his authority in maintaining the peace and he had the special responsibility for organising the tithing in a hue and cry after a wrongdoer who had evaded or escaped custody.

These were by no means the only powers or duties of the tithingman. As the office developed many more were added. They are sufficient, however, to substantiate his designation by later authorities as a conservator of the peace at common law, or peace officer. To understand this designation it is important to point out that the "peace" maintained by the tithingman in Anglo-Saxon times was not the Kings peace, but a local peace. In those days "the King's peace did not extend to all places at all times, but only to all places at some times and to some places at all times."[31] Each freeman, however, had a "peace" of his own. It was possible, therefore, for an act of illegal violence to be no breach of the King's peace, but a breach of some lesser man's peace. Each freeman had, of course, the authority and responsibility, by custom or at common law, to protect and maintain his own peace. The collective

expression of this authority and responsibility in the tithingman meant that the powers and duties of his office were none other than those which vested collectively by custom or common law in the local community. It is in this sense that his authority is described as original - it was inherent in him as representative of the local community. A useful contrast would be a Royal officer deriving his authority from the Sovereign, whose interests he represented at local level. Such an officer's authority could not be termed original. The tithingman, however, was not a Royal officer representing the interests of the Crown, but a local officer elected by the community to take primary responsibility for the police matters that had always vested in the community by custom or common law.

(ii) <u>As Constable</u>

The office of tithingman and, in particular, its status as a conservator of the peace or peace officer, is critical to an understanding of the office of constable which emerged under the Normans in the thirteenth century. Far from discarding the Anglo-Saxon system of self-policing the Normans actually strengthened it to such an extent that Lyon could describe it as "the most efficient police system of Western Europe."[32] Under the Normans, however, the office of tithingman came to be relied on more and more as an instrument of the Sovereign. This was achieved primarily through the sheriff who functioned as the Royal representative throughout the Realm in matters of local

government generally, but particularly in the maintenance of the peace and the administration of law and justice. It was at the sheriff's court or tourn, held twice a year, that all tithings were inspected by the sheriff; depleted ones were brought up to strength and tithingmen were elected or appointed.[33] The sheriff was also given the authority to require tithingmen to make reports of all kinds of matters falling within their knowledge. These could range from roads and bridges not being kept in proper repair, to information on suspicious persons and strangers. Although many of these matters would have always fallen within the traditional responsibility of the tithingman, the fact that he was frequently discharging that responsibility on the directions, and for the benefit, of the sheriff as representative of the Crown reflected his emerging secondary status as a Royal Officer.

The tithingman's development as a Royal officer was accelerated as a result of an upsurge in political and social unrest in the thirteenth and fourteenth centuries. During this period the peace of local communities, and the country generally, was threatened by a disaffected peasantry, bands of discharged soldiers roaming the country, a dramatic increase in vagrancy, rivalry between powerful barons and the danger of invasion from abroad. In consequence, central government interference in local policing arrangements during this period was characterised by the need to ensure that the country was militarily

prepared, and that there was no opportunity for internal organised rebellion to get off the ground[34]. To these ends a series of Royal writs and edicts were issued requiring all freemen to be armed with weapons suitable to their station,[35] all males over the age of fifteen years to take an oath to maintain the peace,[36] the institution of the system of watch and ward in the towns,[37] local communities to make presentments to grand juries of all kinds of matters within their knowledge ranging from roads and bridges in need of repair to information about suspicious persons or strangers.[38] These measures required a body of Royal officials to oversee their implementation. The general responsibility fell on the sheriff as the primary representative of Royal authority throughout the Realm. In 1195, however, Richard I also appointed certain knights throughout the country to ensure that all males over the age of fifteen took an oath to maintain the peace. These knights were later designated conservators of the peace and, ultimately, Justices of the Peace. Finally, the ordinance of 1242, and later the Statute of Winchester 1285, imposed specific responsibilities on the local constables to implement the provisions contained in the Assize of Arms for the conservation of the peace and to maintain watch and ward. Furthermore, it was stipulated that the constables would follow the instructions of the sheriff and the wardens of the peace in taking the necessary measures for the conservation of the peace.

Given the historical connotations of the term constable, combined with the quasi-military responsibilities heaped on the new officers and their subordination to the other Royal officials, it is difficult to avoid the conclusion that they were representatives of the Crown. Indeed, if the chief constables of the hundred and the petty constables of the vill had been established as completely new offices in their own right there would have been no difficulty in settling upon their designation as Royal officers and nothing else. Unfortunately, it would appear, as asserted by Simpson,[39] that these new offices of constable were none other than the ancient office of tithingman, with additional responsibilities. In other words, the office of constable was merely the designation to be applied to those tithingmen who were charged with the special quasi-military peace-keeping responsibilities imposed on them by the Sovereign authority. This notion of the office of constable having a dual status of a part local, part Royal nature finds support in early authorities on the subject. Lambard, for example, explains that not all tithingmen were constables, but all constables were tithingmen:

> "...petie Constables were devised in towns and parishes, for the aide of the Constables of the Hundreds, so of latter times also, Borsholders, Tythingmen, Headboroes and suche like, have been used as petie Constables, within their own boroes and tythings. And yet not so universally, but that some of them have at this stage none other but their old office. For in some of the westerne parts of England, you shall see that there may be many tythingmen in one parish, there only one of them is for the Queene that is, a Constable, and the rest do serve but as the

auncient Tythingman did."[40]

Although the designation of constable eventually displaced its ancient predecessor, the tithingman, it is worth noting that the duality of the office was still a prominent feature as late as the end of the sixteenth century.

(c) The Constable as Ministerial Officer of the Crown

The dual nature of the office of constable has had two major consequences for its status. First, the constable, in his capacity as a Royal Officer developed rapidly as a ministerial officer of the Crown. Not only had the seeds of this development been sown in the emerging relationship between his predecessor and the sheriff, but the first early written records of the constable specifically rendered him subject to the directions of the sheriff and the conservators of the peace in his peace-keeping functions. This subordinate connection with Royal authority expanded rapidly after the conservators of the peace became established as justices of the peace.[41] The relevant legislation gave the justices of the peace a brief to:

> "...(2)..restrain the offenders, rioters and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence; (3) and to cause them to be imprisoned and duly punished according to the law and customs of the Realm, and according to that which to them shall seem best to do by their discretion and good administration; (4) and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past; (5) and to take and arrest all those that they may find by indictment, or by suspicion, and to put

> them in prison; (6) and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people....(7) And also to hear and determine at the King's suit all manner of felonies and trespasses done in the same country according to the laws and customs aforesaid..."[42]

The scope of these peace-keeping powers and duties were indicated in a speech by Lord Keeper Egerton to the Star Chamber in 1599. He explained that not only were they to take care that the peace of the Realm was duly observed and kept, but they were also to foresee and prevent all matters and actions by which it might be violated or broken. In addition, they were to search out all offences and to see the offenders severally punished according to law.[43] Their peace-keeping responsibilities, therefore, were both executive and judicial. To these were added, over a period of time, many diverse duties of a local government nature.[44] Under the Tudors and Stuarts, according to Maitland,[45] the justices of the peace became rulers of the county, carrying into effect both judicially and administratively the many detailed statutes relating to the police and social economy. In fact, the practice of committing to them all the affairs of the shire had become habitual by 1689. Nor did the practice stop then. If anything, the scope of the administrative functions of the justices of the peace multiplied after the revolution.[46]

The justice of the peace, unlike the sheriff,[47] did not have a body of subordinate officials to assist him in the discharge of his onerous and extensive duties. The

void, however, was rapidly filled by the constable, as the justice of the peace began to displace the sheriff as the primary Royal officer of local government from 1378 onwards.[48] The close subordinate relationship between the justice of the peace and the constable was most evident in the quarter and petty sessions presided over by the former.[49] Every three months, the high and petty constables, the grand and hundred juries and all litigants were bound to appear at the county quarter sessions. Both judicial and administrative business was transacted there: the county rate was accounted for and a new rate levied; the state of roads and bridges was enquired into, as was the welfare of the poor; disputes between private litigants were settled and presentments were received; complaints against county and parish officers were investigated; and sometimes enquiries would be held into such matters as vagrancy, drunkenness, the keeping of the sabbath etc. Where remedial measures were required the justice of the peace would make the appropriate order and, more often than not, instruct the constable to see that it was carried out.[50] It was quite normal, therefore, to find the justice of the peace directing the constable to arrest named individuals, to prosecute certain types of offender, to prevent certain fairs from being held, to step up supervision over various trades, to apprehend vagrants, to supervise the watch etc. Many of these matters would already come within the scope of the constable's duties at common law or statute,[51] but it was just as likely that

the scope of the constable's duties would be determined by what the justice of the peace directed him to do.[52] It is understandable, therefore, that Hawkins labelled him the "Justice's man".[53] The relationship was sealed in 1662 by a statutory enactment which confirmed what had already been the practice namely that justices of the peace could appoint constables.[54] The constable had truly developed into a ministerial officer of the justice of the peace who, in turn, owed his authority to the Crown.

(d) <u>The Constable as Peace Officer.</u>

The second major consequence of the dual status of the office of constable is that it retained all the powers, duties and privileges which attached to the tithingman by custom. In particular, the constable retained his status as a conservator of the peace at common law, with the original authority attaching to that status. Unfortunately these powers and duties of the constable lacked the distinct magisterial quality that was associated with justices, coroners and other conservators of the peace. The constable provided the peculiar, possibly unique, spectacle of a public officer with original authority in matters pertaining to the keeping of the peace, but confined to functioning only in an executive or ministerial capacity. This feature combined with the huge volume of ministerial responsibilities heaped on the constable by statute, and the fact that he discharged these duties primarily at the direction of the justice of the peace,

obscured the original nature of his office and conveyed the impression that he was nothing more than a ministerial officer of the justice of the peace. Simpson explains the confusion, however, by pointing out that the source of the constable's authority as a conservator of the peace differs from that of others holding the same status.[55] The constable's peace-keeping authority is none other than that which customarily devolved upon the collective members of the old vill or township. The others, however, took their peace-keeping authority exclusively from the King who entrusted to them both executive and magisterial responsibilities in the keeping of the peace. This subtle difference, however, was not always apparent and it was left to authorities such as Lambard to keep alive the "original" or "ancient" side of the constable's office.[56] Indeed, Lambard even sets out in great detail the powers that attach to the office as conservator of the peace, although he does not make any attempt to distinguish between those which he enjoyed at common law and those which originated in statute.[57]

The constable's common law status as a conservator of the peace, or peace officer, survived his integration into statutorily based, organised and disciplined police forces.[58] More significant is the fact that the relevant legislation in Britain and Ireland made no attempt to establish the constable as the sole receptacle of the common law status and attributes of the ministerial

conservator of the peace. It simply re-iterated that the constable, in his new status as a member of an organised police force, would retain all the powers, duties, privileges etc. that he had enjoyed at common law. The mere fact that he had outlived most other holders of the status of ministerial peace officer at common law, therefore, did not mean that the office of ministerial conservator of the peace and that of constable were one and the same. As explained earlier, the common law had always recognised the existence of an office of ministerial conservator of the peace; but it did not originate as the office of constable. The constable merely grew into the office after having been introduced for quite different purposes. So long as no statutory provision has abolished this ancient common law office, outside of its expression in the office of constable, it must follow that it still exists and is capable of being held by individuals who need not be called constables. The exact title used would be a mere cosmetic matter. So long as there was a clear intention that a particular office should hold the status of a common law ministerial peace officer, the exact title applied to the officeholder should be irrelevant. Certainly, if the officeholder was given the appellation constable that would be evidence of a clear intention that he should possess the relevant powers, duties etc of the ministerial peace officer at common law as well as the statutory powers and duties which have accrued to the office of constable over the centuries. If, however, the

officeholder is not given the appellation constable, it should still be possible to deduce an intention to confer on him the status and attributes of a ministerial peace officer. In that eventuality the officeholder in question would merely acquire the common law attributes of the peace officer.

This view of the common law office of ministerial peace officer having an existence independent of, but closely associated to, that of constable finds support in other common law jurisdictions today. In Canada, for example, Stenning claims that "the major attributes of the status of "peace officer" are to be found in literally hundreds of statutory provisions of which those of the Criminal Code...are the most well known."[59] A recent inventory of federal legislative provisions identified no fewer than 162 federal statutes in which peace officer powers are granted to various officials.[60] Even in Canadian police forces it is evident that the status of peace officer is viewed as being virtually interchangeable with that of constable for the purposes of policing. Members of some police forces, such as the Royal Canadian Mounted Police (RCMP) are given the status of peace officer only;[61] members of some, such as municipal police forces in British Columbia, have the status of constables only;[62] some, like the Newfoundland Constabulary, are silent on the matter;[63] while the majority are content with either. A typical illustration of the last category

is found in section 15(5) of the Nova Scotia Police Act which reads:

> "Each provincial constable shall have the power and authority to enforce and to act under every enactment of the Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a provincial constable."

Variations on this recognition of the separate, but related, existence of the two offices are to be found in Quebec,[64] Alberta,[65] Saskatchewan[66] and New Brunswick.[67] There is nothing unusual, therefore, in saying that an official can enjoy all the powers, duties and attributes of the old common law peace officer without carrying the appellation constable.

(3) The Independence of a Peace Officer

(a) From his Employer

It will be argued later that a garda enjoys the status of peace officer at common law. If this is the case, then certain consequences must follow. The most immediate is that he succeeds to the original authority associated with that office. For the most part, of course, this will be no different from the peace-keeping authority that inheres in each citizen at common law. As explained earlier, it also entails a few powers and, in particular, peace-keeping duties which have not attached to the citizen. This can be explained by the fact that the ancient peace officer was expected to play a leading role in marshalling the rest of

the community in the discharge of its peace-keeping responsibilities. In any event, the original authority attaching to the office at common law provides a source for the common law powers regularly exercised by gardai in the course of their duties.

Another important consequence is the independence of gardai. At first sight it might seem anomalous to say that a garda enjoys independence in the exercise of his office. His membership of a hierarchical, disciplined organisation would seem to preclude any notion of independence. However, the fact that the constable is now an integral part of a similar arrangement in British and commonwealth policing has not prevented courts,[68] two Royal Commissions[69] and other commentators[70] from describing him as constitutionally independent in the exercise of his office. The issue has arisen primarily in the context of whether the constable could be classed as a servant of the public body which employs him. A substantial American and Canadian jurisprudence[71] on the subject had already built up by the time it was first addressed by an English court. The net effect of these early authorities was that a government or municipal authority could not normally be held vicariously liable in tort for the wrongs of the constables whom it employs. The reasoning, however, had nothing at all to do with whether the employing authority could exercise control over its police force.[72] The justification was that the duties performed by the

constables were statutory duties performed not for the peculiar benefit of their employers, or any other special interest, but for the benefit of the public at large.[73] The constable, therefore, could not be a servant of his employers in the sense required for vicarious liability to apply. There was no suggestion that this absence of vicarious liability necessarily entailed the independence of the constable from the control of his employers in the exercise of his office.[74]

When the issue was first confronted by an English court in Fisher v. Oldham Corporation[75] McCardie J., in the King's Bench Division, cited both American[76] and Canadian[77] authority, among others, in reaching the conclusion that when performing the duties of his office a constable could not be regarded as the servant or agent of the municipal authority that appointed him. McCardie J.'s analysis, however, differed from the American and Canadian authorities. He seemed to put great store by the fact that when the constable acted as a peace officer he exercised an original as opposed to a delegated authority. He found support for this approach in a decision of the Superior Court of Quebec in Rousseau v. La Corporation de Levis[78] and in a decision of the Australian High Court in Enever v. The King.[79] In the Rousseau case the Quebec court followed the American case of Wishart v. City of Brandon[80] in concluding that a municipal authority could not be held vicariously liable for a wrongful arrest

effected by two of its constables. Contrary to Wishart, however, the Quebec court also drew a connection between the absence of vicarious liability and the municipal authority's inability to give instructions to its constables concerning the manner in which they fulfil their functions. This is reflected in the following passage:

> "The duties of these constables are set forth and prescribed in the statute itself, and they are imposed upon them in the public interest. Under the statute the council is empowered only to provide for the appointment and removal of constables. The service for which they are appointed is public and the City of Levis can have no special or private interest in it. This alone should make plain that these constables are neither the servants nor the agents of the council. It has no authority to give them orders or instructions concerning the manner in which they fulfil their functions. They are employed under the authority of the Sovereign rather than by the Council itself. This higher authority has charged the council to appoint the constables to a function which serves the interests of the State rather than those of the council; it has, moreover, expressly defined their duties, even specifying their functions in some detail."[81](emphasis added).

The Enever case took the matter a step further by associating the constable's independence from higher executive control with the original nature of his authority as a peace officer. The following passage in which this association is expressed was quoted by the Cardie J. in Fisher:

> "Now, the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself...A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."[82]

McCardie J. described this passage as "most weighty and most instructive". That helps explain why he put so much emphasis on the independence of the constable for his decision in Fisher. He reasoned that if the municipal authority was held vicariously liable for the torts of its constables, it would follow that the authority would be entitled to demand a measure of control over a constable's power to arrest and prosecute offenders. Since that would conflict with the original nature of the constable's authority, McCardie J. concluded that the municipality could not be held vicariously liable for his torts.

McCardie J.'s association of the vicarious liability issue with the degree of control which the local authority could exercise over its constables reflected the state of the law on vicarious liability at that time.[83] An employer would be vicariously liable for the torts of his employee only if he enjoyed the authority to direct his employee on how he should perform his functions. If a local authority was held vicariously liable for the wrongs of its police constables, therefore, it must follow that the local authority enjoyed full powers of control over those constables. Even at the time of Fisher, however, the bond between the vicarious liability of an employer to direct his employee on the manner in which he performed his functions was beginning to loosen.[84] It was not long after, indeed, that the approach had switched to considering all aspects of the relationship between the

persons concerned.[85] This raised the possibility of an employer being held vicariously liable for the torts committed by another who could be described technically as an employee, even though the employer could exercise less than complete control over the manner in which the employee performed his functions. Similarly, it opened up the converse possibility of one person being vicariously liable even though he could exercise some measure of control over the activities of another. This uncoupling of the doctrine of vicarious liability from the degree of control exercised by an employer over an employee should have resulted in the Fisher reasoning being discredited, even if the decision itself might not have been affected. That, in turn, should have permitted the status of the office of constable and, in particular, his independence from the directions of an employer or other higher authority to be considered afresh. Unfortunately, when the issue arose again this opportunity was not seized.

In Attorney General for New South Wales v. Perpetual Trustee Co. Ltd.[86] the Judicial Committee of the Privy Council had to decide whether a constable, appointed and employed by the government of New South Wales, was a servant of the government for the purposes of the action per quod servitium amisit. For this action to succeed it would have to be shown that the domestic relationship of master and servant, reminiscent of the time when the master had a quasi-proprietary interest in his servant's services,

applied. The court found that the relationship between a constable and the government could not qualify as the constable was a public officer whose authority was original, not delegated, and was exercised at his own discretion by virtue of his office independently of contract. In reaching this conclusion the court expressly approved the analysis of the office of constable handed down by McCardie J. in Fisher and, in particular, his association of the absence of a master-servant relationship between the constable and the municipality on the one hand, and on the other hand the municipality's legal powerlessness to instruct the constable in the exercise of his law enforcement or peace-keeping powers. Indeed, the Judicial Committee specifically quoted with approval the following "vivid illustration" from McCardie J. of how "inappropriate it would be...to describe the relationship between the municipality, in the form of the local watch committee, and the police officer as that of master and servant:"

> "Suppose that a police officer arrested a man for a serious felony? Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released? Of what value should such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice."[87]

The judgements in the Fisher and Perpetual Trustee Co. cases have become the bedrock upon which has been built the

convention that the constable is legally independent from external direction in the exercise of his powers. Founding itself specifically on Fisher, for example, the Royal Commission on the Police, reporting in 1962, concluded that:

> "The legal status of a constable is an officer exercising original powers at his own discretion. He is not the servant of a local authority or any other body."[88]

The presumption here is that the constable, in the absence of clear statutory authority to the contrary, cannot be bound by executive instructions on how he should exercise, or not exercise, the powers vested in his office by law. However, both this presumption and the authority upon which it is based is open to criticism. In particular it must be pointed out that just because a master-servant relationship does not prevail between a constable and his employer for the purposes of vicarious liability or the action per quod servitium amisit, it does not follow automatically that the constable cannot be bound by instructions from his employer, or any other appropriate authority. Both Fisher and Perpetual Trustee Co., it must be remembered, considered the master-servant relationship only in the context of vicarious liability and the action per quod servitium amisit respectively. The most that they can establish, therefore, is that neither the municipal authority nor the government enjoy as much authority over their constables as a private employer would enjoy over the services of his employees. That, however, is not inconsistent with either the municipality or the government

having a limited power to issue binding instructions to their constables relating, for example, to general law enforcement policy. Indeed, it is significant in this context that the only illustration used in both cases is a very extreme example of a watch committee giving a direction to one of its constables to act unlawfully in an individual case. There should be little difficulty in accepting that an employer has no lawful authority to give unlawful directions to his employees concerning the manner in which they should perform their duties. Furthermore, as Marshall points out, the reasoning and decision in the Perpetual Trustee Co. case is applicable to a soldier or civil servant as much as it is to the constable.[89] It has never been suggested that either of these are not bound by the lawful directions of their employers. The sweeping assertion that a constable cannot be bound by directions from his employer concerning the exercise of his powers, therefore, must be viewed with suspicion.

In a particularly incisive analysis of the office of constable, Marshall explains that there is no historical foundation for the notion that the constable is independent from higher executive authority in the exercise of his office.[90] In particular, he points out the absence of any case law or textbook authority for the proposition before 1900. Indeed, he finds that the whole emphasis, historically, was on the constable being subject to the directions of the justice of the peace in both general

policy matters and individual cases. He also finds that the content of the statutory regulations on constables and their implementation, at least up until 1930, does not reflect any incompatibility between the office of constable and the subordination of the constable to directions from his employers. The fact that the thesis of independence has emerged against this background, Marshall puts down to a combination of the retention of a predominantly local system of policing and the fear of partisan political interference with the police function which became a feature of watch committees in the mid nineteenth century.[91] If the police had been established as a single, national force, argues Marshall, any notion of independence of the constable would have foundered against the necessity of public accountability to Ministers and Parliament.[92]

It would appear that Marshall's views suffer from a similar weakness to that which he identifies in the views embraced by the Royal Commission. While the latter has focused on the original nature of the constable's office to the detriment of his role as a ministerial officer to the part-judicial, part-executive justice of the peace, Marshall has done the reverse. He fails to give due credit to the fact that the legal status of the constable does differ significantly from any other employee. Unlike other employees the constable occupies an office. In the exercise of that office he enjoys not only the peace-

keeping and law enforcement powers that inhere in every individual at common law, but also a range of other powers vested directly in the office at common law and by statute. The fact that those powers are vested directly in the office by law means that the constable cannot be bound by the directions of others in the exercise of those powers. The discretion to exercise these powers resides in him. If he exercised them on the direction of another authority he may be guilty of abdicating his power to that authority; and that would be ultra vires.[93] Certainly, he could be requested to exercise his powers in a particular case as, for example, where he is asked to arrest someone. In law, however, it would be a matter for the constable to decide whether or not to accede to the request. If he effected the arrest and it transpired that there were insufficient grounds for him personally to form the necessary suspicion to render it valid, it would be no defence for him to argue that he had been asked or directed to arrest by a higher authority. On the other hand, there should be no legal difficulty in a higher authority giving binding directions to a constable which fall short of compelling him to exercise his powers in any particular way in an individual case. Examples would be: an order to keep a suspect under surveillance, to quell a public disturbance, to ensure compliance with the road traffic code in a particular place at a particular time etc. None of these orders compel the constable to exercise, or not exercise, his powers in any individual case. They merely put him in a position where

he will have to exercise his discretion whether or not to exercise the powers that are lawfully open to him in the circumstances. As far as the law is concerned whatever decision he takes in each individual case will be a matter for him. This is a reflection of the dual nature of the constable's office described earlier. It also illustrates how difficult it can be to separate the two aspects of the constable's office in practice.

(b) From his Chief Officer.

So far the discussion has revolved around the independence of the constable form his employers in the exercise of his powers. In practice, of course, such directions are most likely to emanate from, or be channelled through, his superior officer. It is this situation which poses the greatest challenge to the notion of the constable's independence. Today a constable, although an officeholder, will be a member of an organised and disciplined force of police under the leadership of a chief officer. In addition to being governed by public regulations on appointments, promotions, retirement, dismissal, discipline, pay etc., the members of these forces are also subject to the "direction and control" of their chief constable.[94] Likewise, a garda is statutorily subject to the general direction and control of the Garda Commissioner,[95] while the constables of the New South Wales police are subject to the superintendence of their Commissioner.[96] The question arises whether these

statutory formulae are sufficient to subject the exercise of the discretionary powers vested in the constable to the control of the chief officer. To give an affirmative answer, however, would imply that the statutory provision had effected a fundamental revision of the status of the office of constable. Instead of being vested with original authority exercisable solely at his own discretion, the constable would be more like any other public official who had the authority to take decisions on his own initiative, but always subject to the overriding directions of his superiors in both general matters and in individual cases. That this was not the legislative intention for the constable or the garda is clear from the fact that the respective legislatures have continued to confer new discretionary powers directly on the constable and the garda. As explained above, if the constable or the garda exercised these powers solely on the direction of his chief officer he would be failing to exercise the discretion conferred on him by law; and that may be ultra vires. To answer the question in the affirmative, therefore, would be a contradiction in terms.

It is one thing to say that the chief officer's statutory power of direction and control over his force cannot displace the discretionary nature of the powers vested in each member, it is quite another to define the point of separation between them. The crunch arises in situations where the chief officer gives operational orders

requiring members to act in an individual case. For example, if a chief officer instructed his members to keep a suspect under surveillance, would that be within his power of direction and control? Presumably it would be. Furthermore, it need not be interpreted as an interference with the constable's discretionary powers so long as it is understood that it is a matter for the constable to decide which, if any, of his powers he should use in the course of that surveillance. However, by virtue of his statutory subordination to the direction and control of his chief officer he would be under a duty to deploy himself for the purposes of that surveillance, and to consider whether or not he should exercise any of his powers for that purpose. Exactly the same would apply where the chief officer instructs his members to restore order where a riot had broken out. These instructions might even detail how the members should co-ordinate their efforts; they might include general directions such as, for example, to make no arrests unless absolutely essential or to try to arrest the ringleaders. Even that would still leave it up to the individual constable to decide whether or not to arrest a particular person. In other words, his discretion at the point of enforcement would remain intact. The conclusion must be that the chief officer's statutory power of direction and control permits him to issue both general and detailed instructions to his constables on how they should approach specific law enforcement situations. However, when it comes to an exercise of coercive powers the

constable must exercise his own discretion in each individual case. This can be illustrated by the example of a chief officer instructing a constable to arrest an individual in circumstances where there were no lawful grounds for making the arrest. If the constable accedes to the request it can be no defence for him, in an action for unlawful arrest, that he was acting on the superior orders of his chief officer.[97] The discretion to make the arrest is his and he must answer for it in law.

Although the above analysis might appear sound in principle, what little case law there is on the matter does not provide unequivocal support of it. In both the Fisher and Perpetual Trustee Co. cases the assertion of the constable's independence was sufficiently broad to protect him against directions from his chief officer. It must be said, however, that in neither case was any reference made to the relevant statutory provisions governing the authority of the chief officer. Nevertheless, the Royal Commission seemed to accept the broad interpretation, as it explained that the constable was not "the servant of a local authority or any other body"[98] (emphasis added). To counterbalance this, there is the oft-quoted dictum of Lord Denning MR. in R v. Commissioner of Police of the Metropolis, ex parte Blackburn[99] to the effect that the chief officer has an absolute power:

> "...to decide in any particular case whether inquiries should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of

> his resources on any particular crime or area. No court can or should give him direction on such a matter."[100]

The assertion that it is for the chief officer to decide whether a prosecution is brought or whether an arrest is made renders it difficult to reconcile this statement with those passages in Fisher, Perpetual Trustee Co. and the report of the Royal Commission which confirm the original nature of the authority vesting in the office of constable. To confuse matters further, Denning M.R. actually cites all these authorities with approval in the Blackburn case. It is possible, however, that Denning's dictum can be distinguished on the basis that he is asserting the independence of the chief officer from executive direction in these matters. In other words, he is citing these powers of the chief officer as attributes of his own status as a constable, and not as an incident of the chief officer's statutory power of direction and control over his force of constables. Support for this distinction can be found in the fact that nowhere does Denning M.R. cite the relevant statutory provision. He proceeds, instead, on the basis of the chief officer's common law duty as a constable to enforce the law.

Another awkward case which emphasises the directive authority of the chief officer at the expense of the independence of the constable is Hawkins v. Bepey.[101] A chief inspector who had preferred informations against the defendants died before an appeal against their dismissal

could be heard. The defendant submitted that the chief inspector alone was the prosecutor in the case and, consequently, the appeal lapsed on his death. The Divisional Court, however, rejected this contention. Pointing out that, pursuant to his statutory power of direction and control over his force, the chief constable had issued instructions that "as a general rule...all informations relative to proceedings in magistrates courts shall be laid by the chief inspector or inspectors," the court concluded that the chief inspector in this case was acting as the representative of the chief constable. In other words the real prosecutor was the chief constable. With respect, it is difficult to see how the court could have reached this conclusion from the chief constable's instruction. The instruction, itself, makes it clear that it is laying down only a general rule. It does not purport to deprive most members of the force of their inherent power as constables and citizens to lay informations in magistrates courts. To hold otherwise would imply that the chief officer could use his power of direction and control to strip his constables of powers they have enjoyed by virtue of their office, and as citizens, from time immemorial. That this was patently not the intention of the legislature is confirmed by the fact that the legislature specifically vests all members of the force with the status, powers, privileges etc of constable. Furthermore, there is no suggestion in the instruction that in laying the informations the chief inspector or

inspectors would act otherwise than in their capacity as constables or citizens. Very specific words would be required to support the notion that they were doing so only as agents of the chief constable. An alternative interpretation of the instruction is that it was designed merely to facilitate administrative convenience in matters of prosecution. In other words, it would be the equivalent of an instruction that, as a general rule, members of the traffic branch should concentrate on road traffic offences. Such instructions are clearly within the chief officer's power of direction and control, but they do not imply that the affected members of the force somehow lose their independence in the exercise of their powers as constables. This interpretation has the added advantage that it is more consistent with principle.

The authority of the decision in Hawkins is also undermined by the fact that Watkins J. relied on the remarks of Denning M.R. quoted above to support his decision. As already explained, however, these remarks should not be interpreted literally in this context. Finally, Watkins J. also points out that no-one suggested that the chief constable's instruction was in any way improper. This implies that very little, if any, argument was devoted to the principles against which the instruction and the chief constable's power of direction and control should be interpreted. It is submitted, therefore, that Hawkins should not be accepted as sound authority for the

proposition that a chief officer has the power to dictate whether or not his constables should exercise their discretionary powers in any individual case.

Strong support for the constable's limited independence from his chief officer is found in the judgement of Browne L.J. in R. v. Metropolitan Police Commissioner, ex parte Blackburn.[102] In that case the Commissioner had issued an instruction that all suspected offences relating to the sale of obscene publications should be referred by officers in the field to a centralised squad. In seeking an order of mandamus to compel the Commissioner to enforce the law on the sale of obscene publications the applicant argued that the Commissioner's instruction had the effect of removing from constables their lawful powers of arrest in obscenity cases. In dismissing this contention, Browne L.J. said:

> "Apart altogether from the indisputable fact that the Commissioner had no authority to divest constables of their lawful powers of arrest and any attempt by him to do so would be of no avail, their Lordships were satisfied that the practical effect of the Commissioner's instructions was not to remove their powers of arrest."[103]

This is clear authority for the proposition that a chief constable's power of direction and control over his force does not permit him to interfere directly with the exercise of a member's discretionary powers.

A practical illustration of the correctness of this proposition is found in the judgement of the House of Lords

in McKee v. Chief Constable for Northern Ireland[104] Acting on the instructions of his sergeant, a constable had arrested the plaintiff on suspicion of being a terrorist. The relevant statutory power[105] did not require that the constable's suspicion should be reasonable; it would be sufficient if it was honestly and genuinely held.[106] The plaintiff sued for damages on the ground of unlawful arrest. His action failed in the High Court but succeeded in the Court of Appeal, whose decision was subsequently overturned by the House of Lords. In the course of his judgement, which was adopted by the other members of the House, Lord Roskill described as crucial to the validity of the arrest the finding of the trial judge that when the constable went to effect the arrest he was "convinced in his own mind that the [plaintiff] was suspected of being a terrorist and that he himself suspected him of being a terrorist."[107] He acquired this suspicion from what his sergeant had told him about the suspect, and he was firmly convinced that his information was correct. Clearly, the Court was taking the view that "what matters is the state of mind of the arresting officer and of no one else."[108] It follows from this that if the constable had effected the arrest simply because he was directed to do so by his superior officer, his action would have been open to challenge. His power to arrest comes directly from the law and cannot be conferred by his superior officer. He must decide on the basis of what he knew, or on the basis of what he was told and believed, whether he should go ahead

and make the arrest. If he decided to act, and it transpired subsequently that he did not have the requisite suspicion, he and he alone would be liable for the wrongful arrest. The situation which arose in McKee, therefore, is not only a reminder of the constable's independence, but it is also a classic illustration of how technical that independence can be in practice by virtue of the constable's membership of an organised and disciplined police force under the direction and control of a chief officer.

The conclusion must be that principle and the weight of judicial authority point in favour of the constable being under no legal compulsion to exercise, or refrain from exercising, his powers in any individual case at the behest of a superior officer.

(4) The Independence of the Police

(a) Introduction

The centrality of the constable in British police organisation, coupled with the formal legal status of the office, tends to obscure the issue of political control in British policing. Since the police powers of a constable vest in him directly at law by virtue of his office and are exercisable only at his discretion, it can be argued that the question of political control should not arise. If it is accepted that a constable is not subordinate to the directions of his employer or chief officer in the exercise

of his discretionary powers it must follow, in the absence of clear statutory authority to the contrary, that he cannot be subject to the executive control of any political authority in such matters. It will be seen later that a formidable theory of police independence from political control, based on this aspect of the independence of the office of constable, has been developed in Britain. However, it must be said that the issue of the constable's independence in the exercise of his discretionary powers is not necessarily coterminous with the issue of political control over the police. It is perfectly feasible to band a body of constables together under the executive control of a higher authority without denying the independence of each constable to exercise his powers as he thinks fit. This can be achieved by confining the higher authority's control to matters such as: how, where and when the constables should be deployed; what physical and administrative resources should be put at their disposal; to what matters they should pay particular attention; what administrative procedures they should follow when exercising their powers or discharging their duties etc. None of these matters infringe the constable's prerogative to decide whether or not to exercise any of his discretionary powers in any individual case. It must be said, however, that whoever has control over these secondary matters is clearly in a position to exert a dominant influence over how the discretionary powers of the constables will be exercised. The mere fact that

constables are deployed in specific areas, or on specific missions, with instructions to achieve specific objectives effectively determines which, if any, powers the constables will exercise and, if they are exercised, why and against whom. Furthermore, the constable's training and physical resources, coupled with the administrative regulations governing their operations, will dictate the manner in which they exercise their powers and their treatment of those persons affected. All this is in addition to what the constables do in compliance with the instructions of their higher authority in situations which do not require them to consider the exercise of their discretionary powers.

Quite clearly the public face of policing will be shaped primarily by the manner in which the higher authority exercises its executive control over the body of organised and disciplined constables. The independence of each individual constable in the exercise of his discretionary power will still be significant in occasional, individual cases and may even act as a general restraint on the executive power of the higher authority. In practice, however, the constable's independence must be understood in the context of his membership of an organised and disciplined police force which is under the executive control of a higher authority. The question of political control of the police, therefore, cannot be answered fully by the proposition that a constable is independent from

external direction in the exercise of the powers of his office. Much more pertinent in practice is the extent to which his higher authority is a political body or is, in turn, subject to the executive control of a political body. In both Britain and Ireland the higher authority is himself a constable or peace officer and a member of the force.[109] In the former he is vested with the power of direction and control over his force, while in the latter he has the power of general direction and control. In both jurisdictions, therefore, the issue of political control over the police becomes the question of to what extent, if any, is a chief officer subject to the executive control of a political body. Even though this thesis is concerned only with the position in Ireland there are very sound reasons for considering the position in Britain also. First, there is recent case-law in Britain directly in point. Since the current statutory and common law position on the status of a chief officer is so similar in both jurisdictions, this case-law will be of direct relevance in Ireland. Second, when the Garda Siochana was first established on a statutory footing in the early 1920's the relevant statutory provisions appeared to confer greater autonomy on the Commissioner than that associated with his contemporaries in Britain. The process through which the doctrine of police independence managed to be established in Britain during the course of the twentieth century, therefore, offers a useful context against which to interpret and assess the degree to which the Garda

Commissioner is statutorily independent from the executive control of a political body.

(b) The Statutory Basis

At the time of transition from British to Irish rule, policing structures in Britain were based primarily on three pieces of legislation. The first, in terms of chronological order and importance, was the Metropolitan Police Act, 1829 which provided an organised and disciplined police force for the London Metropolitan area for the first time. The Act required the Home Secretary to appoint two Commissioners (later reduced to one)[110] who had the power, subject to the approval of the Home Secretary, to appoint and dismiss constables for the metropolitan area and to make orders and regulations for the discipline and efficiency of the force and for the provision of buildings and equipment.[111] Once appointed, the constables were subject to the orders of the Commissioner.[112]

The London Metropolitan force is of particular significance for the Garda Siochana because it was the only British police force not subject to some form of local control. Like the Garda Siochana its establishment and maintenance were the direct responsibility of central government. Indeed, in the case of the London force the legislation specifically provided for a much more direct subordination of the Commissioner to central government.

Not only was he appointed and removable by the Home Secretary, but he was also subject to such orders "as shall be from time to time directed by the [Home Secretary] for the more efficient administration of the police".[113] The preamble to the 1829 Act also states that the Commissioner would act "under the immediate authority of the [Home Secretary]". While these measures fall short of explicit statutory authority to issue instructions on operational matters to the force there is no doubt that the Home Secretary exercised, and was accepted as having, such authority.[114] Throughout the nineteenth and early part of the twentieth centuries he regularly issued operational instructions to the force and answered in Parliament for its practices and policies.[115]

Policing throughout the rest of Britain was organised on a local basis, with each borough and county having its own separate police force.[116] Borough forces were provided for first by the Municipal Corporations Act, 1835. It required a borough council to appoint a watch committee from the members of the council.[117] This committee had the responsiblity of appointing a sufficient number of constables to police its area.[118] No statutory provision was made for the office of chief constable. Ultimate authority over a borough force was shared between the watch committee and the local justices. Initially, the former were given the power to make rules, orders and regulations for the guidance of the force and for its discipline and

efficiency.[119] By 1856, however, the constables were rendered subject to the lawful orders of the watch committee [21] in the same manner as they had been subject to the lawful orders of the justices since 1835.[120] These statutory provisions left no room for doubt over the subordination of the borough police forces in operational matters to higher external authority. The fact that this higher authority took the form of an elected body, as well as the justices of the peace, represented a major innovation in traditional policing arrangements in Britain.

Provision for county police forces was first made by the County Police Act, 1839. This empowered[122] the county justices, subject to the approval of the Home Secretary, to appoint a chief constable[123] who, in turn, could appoint other constables subject to the approval of two or more justices.[124] Although the chief constable was given the general disposition and government of his force[125], he was subject to the ultimate direction of the justices in the same manner as the borough forces. The significant difference was that there was no elected council in the county comparable with that in the borough. This vacuum, in police matters, was partially filled by the Home Secretary. He had the power to make regulations for the "government, pay, clothing and accoutrements and necessaries of such constables".[126] His approval had to be obtained for the size of the force,[127] and the choice of a chief constable[128] and he could consolidate a

borough and a county police force[129]. A specific power to give lawful, operational directions to the force was not included.

Local political control over the county police entered the scene in 1888 with the enactment of the Local Government Act of that year. It provided for elected county councils for the first time,[130] and gave them a substantial role to play in police matters. A standing joint committee had to be established in each county.[131] This was to be composed of an equal number of councillors, drawn from the county council, and an equal number of justices drawn from the quarter sessions for the county.[132] The Act explicitly conferred on the county council and the standing joint committee all the "powers, duties and liabilities of quarter sessions and of justices out of session with respect to the county police".[133] These bodies, therefore, acquired the power not only to appoint and dismiss a chief constable but, more importantly, to issue directions to the force on operational law enforcement matters.[134] The justices' powers in those matters were also expressly preserved.[135] If anything, this rendered the county police forces even more subject to operational control from external authority than their counterparts in the boroughs. The former had to contend with the statutory authority of the whole council in addition to that of the standing joint committee and the justices. Furthermore, they were also subject to more

indirect control from central government through the medium of the Home Secretary's several regulatory powers.

It is now generally accepted that the operational activities of county and borough police forces in Britain were the subject of regular interference by their respective committees.[136] Michael Brogden's study of the Liverpool police[137] reveals, for example, that in its first eleven years a sub-committee of the watch committee met daily to supervise the force's operations. This sub-committee issued, on average, one order each week on the disposition of officers in response to requests from local property owners. As the pattern of policing became more routinised such interference diminished but did not disappear. There was, of course, clear statutory authority for such interference.[138]

(c) The Development of the Police Independence Theory

Given the formal statutory position, coupled with the practice at the turn of the century, it is difficult to see how any notion of police independence from political authority could have taken root in Britain. Nevertheless, that is exactly what happened. In the course of the twentieth century it has become settled law and practice that a chief constable is independent in operational matters from the executive control of any external authority. In effect this means that he has an absolute discretion, subject only to the law, to decide what

operational policies and priorities he should set for his force, and how he should direct the members of his force in individual operations. The significance of this development for the Garda Commissioner is that it is based on the fact that a British chief officer occupied the office of constable and, as such, could not be subject to external direction in the matter of how he exercised the power or discharged the duties of that office. If it is accepted that the Garda Commissioner is a peace officer at common law, as explained earlier, there would appear to be no reason why he should not enjoy a similar independent status. Indeed, in the case of the Commissioner the argument for independence is much stronger given that he, unlike his British counterparts, was never statutorily subordinated to the operational control of any other authority. It must be said, however, that the independence theory has been the subject of trenchant criticism which has been fuelled, rather than quenched, by the manner in which it received the ringing endorsement of the English Court of Appeal.

The theory itself became firmly established in the Report of the Royal Commission on the Police, published in 1962. Its origins, however, can be traced back to a mixture of local authorities defaulting in the exercise of their statutory powers of control,[139] Chief Officers acquiring greater professional expertise,[140] increasing centralisation and interference from the Home office[141]

and judicial decisions. The first two of these factors encouraged chief constables to formulate and implement their own policing policies independently of their local authorities.[142] The capacity of the local authorities to resist the growing de facto independence of the chief police officers was severely undermined by the third factor, namely increasing interference from the Home Office. Given the fact that the Home Secretary's statutory control over the county and borough forces was weak compared to his control over the LMP, it is necessary to say something about how he managed to undermine the role of the local authorities in favour of the chief constables.

The key to the Home Secretary's impact was finance. Up until 1856 all the police forces were financed almost wholly from local charges.[143] In that year it was provided that, in future, each force would be eligible for a grant of not more than one-quarter of the total cost of pay and clothing[144] (this was later increased to one half[145] and, finally in 1918,[146] one half of the total cost of a force). Coupled with this was the establishment of the inspectors of constabulary.[147] It was the duty of these inspectors, working directly under the Home Secretary, to visit each of the police forces in the country, to inquire into their state and efficiency and to report their findings on each force to the Home Secretary.[148] The inspectors report was a primary factor which the Home Secretary took into account in deciding

whether or not a force was entitled to the full grant.[149] This device has been described as "one of the greatest inventions of the nineteenth century".[150] The counties and the boroughs found that the central government grant was a source of revenue which they could not do without. Invariably, they were willing to comply with any preconditions which were necessary for its receipt. There have been a number of cases where the Home Secretary has either withheld, or threatened to withhold, the police grant until a local authority complied with his wishes. In every case the local authority succumbed. Lustgarten cites the example of Monmouthshire county council which called for the resignation of its chief constable because of his stance on the policing of the area during the general strike. The chief constable refused to go and the Home Office withheld the grant until the call for his resignation was rescinded six months later.[151]

Through the medium of the inspectorate the Home Secretary was able to convey central government standards and policies to the local justices, chief constables, borough councils, county councils, watch committees and standing joint committees. These diverse bodies were only too willing to comply in order to secure the grant, to avoid being declared inefficient and, ultimately, to avoid being amalgamated with another force. The Home Secretary, therefore, was able to exert a general influence over the operational policies and practices of all the police

forces, including the borough forces, even though his statutory power to do so may have been lacking.

The Home Secretary's grip was tightened further by the Police Act 1919 which gave him the power to make regulations for the:

> "government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces in England and Wales and all police authorities shall comply with the regulations so made."[152]

This would enable the Home Secretary to impose uniformity on these critical aspects of the police organisation throughout the country. Although it stops short of giving him a direct power over operational matters, it clearly puts him in a powerful position to exert an indirect influence on them nationally. His power to determine rates of pay, for example, can be used as a very persuasive carrot to encourage chief constables and local authorities to implement the policies and practices that he prefers.[153] Satisfactory levels of remuneration boosts the morale and output of the rank and file which, in turn, are of primary concern to the chief constables and local authorities. The centralising impact of the 1919 Act was strengthened by the Home Office practice of setting up police colleges and district training centres for recruits throughout the country. Referring to this, the Royal Commission on the Police reported that its effect had been:

> "to invest the central departments with responsibility for both the policy and practice of basic training and education throughout the police service."[154]

Finally, the device of the administrative circular provided the means whereby the Home Office could not only assume the role of directing police policies and practices nationwide, but could be seen to do so. The Royal Commission explained that these circulars were used by successive Home Secretaries to explain the effect of new laws to chief constables, but that they also contained:

> "suggestions that the adoption of a common policy on prescribed lines would make for uniformity and be satisfactory in other respects."[155]

The increasing involvement of the Home Secretary in provincial policing was at the expense of the local authorities. As their remit over policing diminished, so also did their commitment and capacity to closely supervise the policies of their chief constables. This enabled the chief constables to assert their independence in operational matters to a much greater degree than was possible in the nineteenth century.[156] All that was needed to complete the process was for their operational independence to be enshrinned in law; and that was deemed to have been achieved in Fisher v. Oldham Corporation.[157]

The Royal Commission concluded from the Fisher case that chief constables were constitutionally independent from political control not only in matters of law enforcement in individual cases, but also with respect to their general operational policies. This conclusion suffers from the same defects that were discussed earlier in the context of the effect of Fisher on the independence

of the office of constable or peace officer. In addition, however, it suffers from the mistake of equating the status of chief constables with that of ordinary constables simply because both occupy the office of constable. It fails to recognise and deal with the implications for the chief constable's legal status of the fact that he is the statutory head of his force and in that capacity was statutorily amenable to directions from the local justices, watch committees, standing joint committees or other appropriate authority in the operational deployment of his constables.[158] This failure is all the more remarkable given that the Commission does give tacit recognition to the fact that the immediate control of a police force lies in the hands of its chief constable.[159]

It would be misleading, however, to suggest that the Commission was responsible for extracting this notion of police independence from the Fisher case. It is much more likely that it was simply accepting the interpretation that was already current. In their evidence to the Commission, for example, the Association of Chief Police Officers (ACPO) asserted that a chief constable was independent from his police authority in matters of law enforcement, and that this independence was based on the constitutional status of the office.[160] There is also evidence to suggest that this view was prevalent in other influential circles. The Committee on Police Conditions of Service, reporting in 1949, expressed the opinion that "the police

authority have no right to give the chief constable orders about the disposition of the force or the way in which police duties should be carried out."[161] It would appear also that the Home Secretary adopted a similar attitude in contrast to his approach in the nineteenth century.[162] This was put into practice in the case of the LMP. Marshall notes that while there was never any doubt in the nineteenth century about the Home Secretary's right to issue instructions on law enforcement matters to the Commissioner, by the 1930's he had begun to disclaim responsibility.[163] Furthermore, in his evidence to the Royal Commission the Home Secretary claimed that he "could not be questioned...about the discharge by individual police officers of the duties of law enforcement" because he had no power to issue instructions to the Commissioner on such matters.[164]

Although the Royal Commission concluded that the police were independent of political control, it felt that this was not necessarily a healthy situation.[165] Indeed, it proposed that the responsibility for efficient policing vested in local authorities should disappear and be statutorily conferred on the Home Secretary. While it is not made explicit, it seems that the Commission envisaged the Home Secretary having the power to direct a chief constable on general matters of law enforcement policy. The government, however, interpreted the Commission's recommendation as a proposal to give the Home Secretary

responsibility without control, and rejected it accordingly. Unfortunately, it did not also reject in emphatic terms the corresponding proposal that responsibility for efficient policing should be taken out of the hands of the local authorities. Consequently, the Police Act, 1964, which resulted from the Commission's report, gave the power of direction and control over a force to its chief constable,[166] and confined local police authorities to a duty to provide an adequate and efficient force for their areas.[167] The statutory power enjoyed by their predecessors to issue operational instructions to their forces was sank without trace. In a circuitous way, therefore, the legal basis underpinning the chief constable's independence from political authority had been strengthened immeasurably by the Commission's recommendation that a chief constable should be subject to accountability to central government.

(d) Judicial Sanction for the Independence Theory

The latest chapter in this saga is the decision of the English Court of Appeal in R v. Commissioner of Police of the Metropolis, ex parte Blackburn[168] which seems to have put the operational independence of the police beyond question. The issue which gave rise to this case was a policy instruction from the Commissioner to his senior officers telling them not to take proceedings against clubs for breach of the gaming laws unless there were complaints of cheating or they had become the haunts of criminals.

The applicant sought an order of mandamus to have this policy instruction reversed. Although the Commissioner gave an undertaking to revoke the instruction, the Court of Appeal took the opportunity to declare the independence of the police in the strongest terms. Its view was summed up in the following, often-quoted passage from Lord Denning:

> "...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. That appears sufficiently from Fisher v. Oldham Corporation and the Privy Council case of A.G. for New South Wales v. Perpetual Trustee Co. (Ltd.).
>
> Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was done when prosecutions were not brought for attempted suicide; but there are some

> policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law."[169]

There can be no doubt that this passage contains a strong declaration of police independence. What is not so clear is just how extensive this independence is meant to be. Although Denning asserts that the Commissioner is "independent of the executive" and is "not subject to the orders of the Secretary of State", all the examples he gives are of law enforcement in individual cases. There is a very strong implication, however, that the Commissioner's independence is deemed to extend at least as far as general policy directions. Salmon L.J. did not seem to have any hesitation about this when he asserted that :

> "constitutionally it is clearly impermissible for the Home Secretary to issue any order to the police in respect of law enforcement."[170]

Presumably, "any order" in this context would include operational instructions on individual cases and policy instructions generally. In any event, Denning's examples suggest that the Commissioner's independence extends to matters of how he should deploy his men for the purpose of law enforcement. Clearly this goes well beyond a constable's freedom to decide whether or not to exercise discretionary police powers in any individual case. It amounts to a fundamental assertion of police independence from executive interference in operational law enforcement matters generally.

Despite the immense significance of such a proposition, and its novelty as far as case-law is concerned, Denning fails to support it convincingly.[171] A notable feature of his judgement is that he bases the thesis of police independence on the Fisher and Perpetual Trustee Co. cases without clarifying exactly how they support it. The reasoning implicit in his judgement is that a constable is not anyone's servant and, therefore, cannot be subject to the directions of any executive authority. Just like the Royal Commission he fails to advert to the fact that the ratios of Fisher and Perpetual Trustee Co. did not lay down any general rule that a constable could not be the subject of directions from a superior authority. They merely found that he was not the servant of his employer for the purposes of vicarious liability and the action per quod servitium amisit respectively. To extend this into a general principle that a constable could not be the subject of directions from an executive authority in the exercise of law enforcement functions would run counter to the statutory provisions which, prima facie, subordinated him to such executive authority in the form of the old watch committees, standing joint committees and county councils. Neither Denning nor the Royal Commission before him, however, even adverted to these provisions. Furthermore Denning fails to explain (in fact, he totally ignores) why a constable should be independent from any executive authority in law enforcement matters. The irony is that if he had based himself on the

1964 Act his observations would have had a much stronger foundation. By founding himself on Fisher and Perpetual Trustee Co., however, he rests his thesis on a common law basis. In doing so he fails to explain not only how he finds authority for his thesis in the cited case-law, but also how it supersedes the conflicting statutory provisions which he ignores.

Another weakness in Denning's judgement, which is reciprocated in the Royal Commission's views on the matter, is the assimilation of the office of constable with that of chief constable. Having asserted the independence of a constable from executive authority, he simply assumes that a chief constable must enjoy the same independence because he, too, enjoys the office of constable. This clearly ignores the fact that the chief constable, unlike the constable, has the extra power and responsibility of directing and controlling the constables in his force. Since there is no suggestion of any constitutional impropriety in the office of constable being under the direction and control of a superior officer, it is difficult to see how there could be any such impropriety in that superior officer being subject to direction and control from an executive authority. If there is, Denning certainly does not explain how or what it is. Despite its flawed reasoning and the considerable amount of criticism that it has attracted, the English Court of Appeal's doctrine of police independence has the support of police,

government and the courts and, therefore, has survived.

5. Conclusion

Police is such a prominent and integral part of law and government today that it is almost unthinkable that there should be any uncertainty surrounding the legal and constitutional status of a police force. It is clear from this chapter, however, that the development of the concept of police in Britain has not been accompanied by comprehensive measures on the finer points of the legal and constitutional dimension. Boiled down to its' essentials the problem is that the legislature has attempted to constitute a police force as a body of individual officeholders acting under the direction and control of a chief officer and subject to common regulations in matters such as: appointments, training, uniform, pay, discipline etc. A further twist is added by the fact that the office occupied by the individual members is rooted in the common law and, as such, carries with it certain characteristics, privileges, powers and duties. Unfortunately, the legislature has not defined how these common law attributes relate to an environment where the member is expected to function as an integral part of a statutorily-based, hierarchical and disciplined organisation. If anything, the legislature has complicated the situation even further by statutorily conferring a whole range of diverse powers directly on the office to be exercised by the incumbent at his own discretion. As if that was not enough there is the

further problem of the chief officer's control over his force being shared with the local police authority and central government. The respective roles of these three bodies have changed relative to each other over the past 160 years and, even today, it is not possible to be precise about the exact limits of their respective inputs in every situation.

The British courts have contributed to the confusion by formulating a doctrine of police independence. Broadly speaking, they take the line that each member of a police force is independent when exercising the functions of his office, and a chief officer is independent from higher executive authority in operational matters. As yet, however, the doctrine has not been refined to the extent that it is possible to say when a member of a police force is, and is not, exercising the functions of his office and where the dividing line between operational and non-operational police matters falls.

Clearly the constitutional status of the police in Britain is very different from that pertaining to other public services. Since the development of the concept of police in Ireland was so intertwined with that in Britain it is quite likely that the Garda Siochana today shares many of the constitutional peculiarities associated with the British police. If so this will have immense significance for police accountability in Ireland. At the

very least it will mean that it will not be possible to consider police accountability solely within the context applicable to other public services. The peculiar nuances associated with the police will ensure that it will have to be examined de novo. First, it is necessary to chart the legal and constitutional status of the Garda Siochana in greater depth.

Ch.5 THE LEGAL AND CONSTITUTIONAL STATUS OF THE GARDA SIOCHANA

1. The Status of the individual member

(a) As an officeholder

An analysis of the legal and constitutional status of the police in Ireland must begin with the question of whether each member of the Garda Siochana occupies an office in the manner that each member of a British Police Force occupies the office of constable. Unfortunately, the Irish legislation does not address the legal status of the individual garda directly.[1] Nevertheless, it does contain three features from which it can be deduced that each member of the force is an officeholder as opposed to a mere employee. First, section 11 and the fourth schedule to the 1925 Act sets out the declaration that must be made by each officer or other member of the force. This declaration refers to the member being employed "in the office of ....." The blank is left to be filled in by the appropriate office which could be: Commissioner, Deputy Commissioner, Assistant Commissioner, Surgeon, Chief Superintendent, Superintendent, Inspector, Station Sergeant, Sergeant or Garda. The basic office, therefore, is garda, which would be the equivalent of constable in British police forces.[2] Section 11 itself states that no officer or other members of the DMP or Garda Siochana shall be capable of holding "office" in the new force unless he has made the declaration. The clear implication is that every member of the force occupies an office.

The second pointer in this direction is the absence of any specific reference to members of the force as employees. All the officers of the force are "appointed", as opposed to employed, by the government,[3] while the men are "appointed" by the Commissioner.[4] By contrast the personnel of most other public bodies, outside the departmental civil service, are normally employed as opposed to appointed by their respective Boards. Admittedly, the legislation does refer to gardai being in the employment of the Government. It is unlikely, however, that this is meant as a reference to any strict employer - employee relationship between each member of the force and the Government. Indeed, the courts have come out against any notion of the relationship being that of employer-employee. In Attorney-General & Minister for Defence v. Ryan's Car Hire Ltd.[5] the Supreme court had to decide whether the action per quod servitium amisit would lie in favour of the plaintiffs where a servant of the defendants had negligently injured a sergeant in the Air Corps resulting in the temporary loss of his services to the State. Following[6] Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.[7] it held that the action would not lie as the relationship between the State and a member of the armed forces did not amount to that of master and servant. The status of a member of the armed forces was dictated and regulated by statute and statutory regulations. Unlike a private employee his appointment, removal, pay, conditions of service, obligation to follow

orders, punishment for breach of orders etc. are all dictated by regulations as opposed to contract or agreement. This finding applies as much to a garda as a soldier.[8] Indeed, in the Perpetual Trustee Co. case the subject was a constable, and Viscount Simmonds specifically dealt in the following terms with the point about the constable taking an oath to serve the Crown:

> "It appears to their Lordships that in such a context the use of the word "serve" is of negligible significance. It is the traditional word in the context of subject and Sovereign and does not by itself import the relation of master and servant in the ordinary sense of those words."[9]

It would seem, therefore, that there is no inconsistency in the terms of the garda's declaration and the assertion that he occupies an office as opposed to having the status of an employee.[10]

The third feature which suggests that a garda occupies an office is that all the incidents of his position are determined by statute and regulations as opposed to contract or agreement. His appointment, promotion, discipline, retirement, pay, pension, duties and powers are all fixed by statute and regulation. That is what one would expect in the case of an office, and what one would not expect in the case of an employee. Admittedly, each member must act under the general direction and control of the Commissioner. However, that subordination emanates from statute as opposed to contract. Of particular significance in this context are a garda's powers. Each

member of the force automatically enjoys the full complement of police powers by virtue of his status as a member. These powers are not conferred on the force as a whole, nor on the Commissioner to delegate down the line and retract when he sees fit. On the contrary, they are vested directly by law in each individual member just as if each member occupied an office. This is illustrated in the legislative format used every time it is deemed necessary to create a new police power.[11] Invariably, the relevant legislation will vest the new power in "a member of the Garda Siochana"; meaning every individual member of the force. The very fact that all police powers are vested in each member of the force, irrespective of rank, suggests not only that they are all officeholders, but also that there is something fundamental in common to all their offices right across the ranks.

(b) Continuity of Constable

It is one thing to conclude that each member of the force occupies an office, it is quite another, however, to define the legal status of that office. It would be tempting to assume that it is none other than the ancient office of constable. This office, which was a key feature of policing in England from at least the twelfth century, was introduced into Ireland as an integral part of the English colonisation of the island. The members of all the organised police forces from the Dublin Police of 1786 to the RIC of 1836 were appointed to this office. Similarly,

the traditional English arrangement of local constables being elected or appointed by grand juries, parish councils, courts leet, or magistrates also applied in Ireland.[12] The office of constable, therefore, was very much a feature of the policing arrangements in Ireland right up to the transition from British to Irish rule in 1922. Indeed, in the case of the DMP it survived up to 1925. It might be reasonable to conclude, therefore, that when the Irish administration formally established a new police force in 1923 it would retain the long tradition of the office of constable as the basic unit in the new force. In favour of this interpretation is the fact that the legal structure of the RIC was clearly used as a blueprint for its successor the Garda Siochana.

Although the relevant Dail and Seanad debates are completely silent on the matter it would appear that the legislative intention was to dispense with the characteristically English office of constable and replace it with an office having a more indigenous Irish identity. This view is based on an interpretation of section 19(1) of the 1924 Act and section 22 of the 1925 Act. Section 19(1) reads:

> "Every mention of or reference to the Royal Irish Constabulary or any inspector, sergeant, constable or other officer or man of the Royal Irish Constabulary (other than provisions relating to the pay, allowances, pensions, distribution or internal management, or to the liability for the cost of the Royal Irish constabulary) contained in any statute or statutory rule, order or regulation in force in Saorstat Eireann immediately after the passing of

> this Act shall be construed and take effect as a mention of or reference to the Garda Siochana or a superintendent, inspector, sergeant, garda or other officer or man (as the case may require) of equivalent rank in the Garda Siochana, and if any question shall arise whether generally or in any particular case as to what is the equivalent rank, such question shall be determined by the Minister whose decision shall be final."

Section 22 of the 1925 Act contains a similar provision with respect to the application to the Garda Siochana of statutory references to the DMP.[13] These sections are the key provisions on continuity from the police of the old State to the police of the new State. The intention is clearly to vest in the members of the Garda Siochana all the legal powers and duties which were previously vested in their respective predecessors in the RIC and DMP to the extent that they have not been repealed by the 1924 or 1925 Acts. The format used, however, is very significant. If it was intended to confer all the incidents of the office of constable and the office itself on the members of the Garda Siochana the legislature would have adopted a formula similar to that used not only for the RIC but also for all other organised police forces which had been established in Britain and Ireland. In the case of the RIC, for example, the relevant provision is section 11 of the Constabulary (Ireland) Act, 1836 which reads:

> "...all such Chief and other Constables and Sub-Constables shall have all such Powers, Authorities, Privileges and Advantages, and be liable to all such Duties and Responsibilities as any constable duly appointed now has or hereafter may have, either by the Common Law or by virtue of any Statute now or hereafter to be in force in Ireland."[14]

This all embracing provision is clearly aimed at conferring

the common law office of constable and all the common law and statutory powers, duties and privileges associated with the office on each member of the constabulary.[15] Section 15 of the 1924 Act and section 22 of the 1925 Act, by contrast, confine themselves to the transfer of the powers and duties of members holding particular ranks to the members holding the equivalent ranks in the Garda Siochana. Furthermore, the transfer does not extend to the common law powers and duties as it is confined to those contained in any statute, statutory rule, order or regulation. Since the office of constable and many of its important attributes are rooted in the common law it follows that they have not been transferred by these provisions. Nor is it possible to argue that section 11 of the 1836 Act itself has been carried over to the Garda Siochana by section 19(1) of the 1924 Act because the latter carries over only those relevant statutory provisions which were "in force in Saorstat Eireann immediately after the passing of [the Garda Siochana] Act [1924]". Since section 11 of the 1836 Act is one of the statutory provisions repealed by the 1924 Act it cannot have been in force after the passing of the 1924 Act.[16] The conclusion must be that the legislature had no intention of conferring the office of constable on members of the Garda Siochana.

If a garda does not occupy the office of constable it must follow that he does not enjoy the common law powers and privileges of the office nor shoulder the common duties

attached to it, unless these can be derived from some other lawful source. The significance of this is considerably undermined by the fact that most of the powers used by a garda today derive either from his status as a private citizen or from statute.[17] There are, however, some important situations in which a garda is called upon to act in circumstances not covered by the common law powers of the citizen or specific statutory enactments. Examples are: the power to arrest an individual where the garda has reasonable grounds to suspect that a felony has been committed and has reasonable grounds to suspect that the individual concerned has committed it; the power to enter onto private property to prevent a breach of the peace; the power to use no more force than is reasonably necessary to restore public order; and the duty to prevent a breach of the peace. These attach to the constable at common law.[18] Since a garda does not occupy this office, however, it would seem that he would require statutory authority to act in these circumstances. Despite the absence of such authority the courts have never questioned the existence of a garda's power or duty in such circumstances. It is as if they automatically assume that a garda has the power and the duty in all those situations where a constable has been able to act at common law. Since the Garda Siochana is a statutory creation and its members have not been specifically conferred with the office of constable, the question must be asked how have its members acquired these peculiar powers and duties. The

answer must be the common law. Indeed, when the origins of the office of constable were examined earlier it transpired that it had developed from an even older office at common law. It was from this older office of conservator of the peace or peace officer that the constable actually acquired many of his common law powers and duties which are associated in Ireland today with the Garda Siochana. It is submitted, therefore, that there is no reason why individuals cannot be appointed to this ancient office without the appointees having to carry the title constable. The real question is whether the office occupied by the individual incorporates the ancient common law office of peace officer in the same manner as the latter is incorporated in the office of constable.

(c) <u>The Garda As Peace Officer.</u>

If it is accepted that the common law office of peace officer is not restricted to holders of the office of constable there is no inherent reason why it cannot find expression in the office or offices held by members of the Garda Siochana. When the Oireachtas established the Garda Siochana it patently omitted to confer the status of constable on the members of the new force. Given the long established practice of retaining the office of constable in the organised police forces of the British Isles, and of other common law jurisdictions, this omission must be viewed as deliberate. It can be explained, however, by a desire to replace the distinctly English term constable

with something that might appeal more to the emerging nation's sense of separate identity. It can also be interpreted as a convenient method of dispensing with the many statutory powers and duties that had accrued to the office of constable over the centuries. That that appears to have been an intended consequence is confirmed by the specific inclusion of a provision to retain a limited number of the statutory powers and duties which had attached to the constables of the RIC and the DMP.[19] There is no need to conclude, however, that the legislative intention was to prevent the members of the new force from holding the common law office of peace officer. In fact the surrounding circumstances and the contents of the legislation reflect a very distinct intention that the members should enjoy all the peace-keeping and law enforcement powers traditionally associated with this office.

The first pointer in this direction is the fact that the legislation which put the Garda Siochana on a statutory footing did not specifically mention, let alone create, a common office for all members. The most that it did in this respect was divide the force up into hierarchical ranks, the lowest of which, corresponding to the rank of constable, was the garda. As explained earlier, however, there was a clear legislative intention that each member of the force, irrespective of rank, would be the holder of an office. It was as if the legislature was assuming that an

office already existed and that each member of the force would automatically acquire it on appointment. There are a number of interrelated factors which strongly support the submission that this office is none other than the common law office of peace officer.

First, there is the fact the Garda Siochana was established as a "force of police."[20] Even by the middle of the eighteenth century this designation "police" was being used to denote the peace-keeping, law enforcement and regulatory functions which, by that time, had become the preserve of the constable.[21] By the beginning of the twentieth century it had become synonymous with the organised forces of constables established to discharge these functions more efficiently. The fact that the legislature chose to designate the Garda Siochana a force of police suggests that it intended the members of the force to discharge those peace keeping and related functions which had always been associated with the constables and their predecessors. Second, and closely associated with the first, is the fact that the Garda Siochana was not established as a corporate entity with clearly defined powers and functions. Instead, it was constituted a body of individual officeholders acting under the general direction and control of a chief officer with no clearly defined powers and functions at all. It was as if their powers and functions were assumed. Such an assumption could only be made if they were peace officers,

in which case their primary powers and duties would be known at common law. The subsequent history of the Garda Siochana provides further support for this interpretation as the members have had their common law police powers expanded statutorily in the same fashion as constables and peace officers elsewhere.

The third, and most conclusive factor, supporting the proposition is found in the declaration required from each member of the force. The key words are:

> "...I will see and cause the peace to be kept and preserved, and...I will prevent to the best of my power all offences against the same."[22]

These words suggest that each member is being appointed to discharge the community's responsibilities in the keeping of the peace in the same sense that the ancient tithingman and his successors in the office of peace officer have been doing down through the centuries. In the absence of any clear statutory provision to the contrary, it must follow that each member of the Garda Siochana succeeds to the office of peace officer at common law. The mere fact that he is not specifically conferred with the office of constable, or given the appellation constable, cannot be sufficient to avoid this conclusion.

To date there has been no judicial consideration of whether a garda is a peace officer at common law. In one respect this seems surprising given that some of the powers regularly exercised, and some of the duties frequently

performed, by gardai can be justified only if they are common law peace officers. On the other hand, it can be argued that this merely confirms a widespread acceptance that the members of the Garda Siochana are peace officers. The issue has arisen indirectly in the context of garda prosecutions. In the State (DPP) v. District Justice Ruane[23] the DPP had attempted to withdraw a summary prosecution which had been brought by a garda. Although the garda had initiated the prosecution in his own name, and as a common informer, he did so in the course of his duty. This meant that he was using public funds for the purpose and was not liable to have an order for costs awarded against him personally. Nevertheless, the Supreme Court found that the DPP had no legal authority to interfere in the prosecution as the garda was acting in his capacity as a common informer, and not on behalf of the DPP.[24] Walsh J. noted that since the prosecutor was a policeman his function in bringing the prosecution was different from that of other common informers, but not to the point of extinguishing his status as a common informer.[25] Although Walsh J. did not remark upon it, the analogy with the ancient office of constable, tithingman or peace officer is complete. The fact that a garda retains all the legal attributes of a private citizen simultaneously with his special responsibility to discharge the law enforcement functions of every citizen may be unusual, but it is a characteristic which he shares with these other officeholders.

If each member of the Garda Siochana enjoys the status of peace officer, irrespective of rank, it would be convenient to use a common designation, equivalent to constable, when referring to this aspect of his office. The obvious choice for such a designation would be "garda". The force as a whole is styled the Garda Siochana and the designation of members of each rank, apart from the rank of garda, is often prefixed with the term garda; as in Garda Commissioner, Garda Superintendent, Garda Sergeant etc. Clearly the term garda is something that all members of the force have in common. Its suitability is also demonstrated by the fact that it happens to be the designation for the lowest rank in the force. Since all members are appointed first to this rank it must follow that each member will be conferred with the office of garda on joining the force. Like the status of peace officer, therefore, it is a common denominator for all members, just as constable is for all members of a British police force. A practical advantage of this approach would be realised in the phraseology of statutory police powers. Instead of conferring a power on "a member of the Garda Siochana" the Oireachtas could simply confer it on a garda. It would be understood that the power was thereby vested in every member of the force.

(d) Independence of a Garda

If it is accepted that the office of garda accedes to the common law office of peace officer it must follow that the former incorporates the common law attributes of the

latter. At the very least this means that the garda is vested with those common law powers and duties which have been associated traditionally with police officers in these islands. Furthermore, it must mean, by analogy with the constable, that he is independent in the exercise of his powers. The independence enjoyed by a constable in his relationships with his employer and chief officer is based on his status as a common law peace officer. Given that the statutory relationship between the garda and his employer on the one hand and his chief officer on the other is not significantly different from his British counterpart, it must follow that he enjoys an independence in these relationships similar to that enjoyed by the constable. If anything, the garda's claim to independence must be more clearcut. The possibility of his employer having the power to direct him like any other employee, for example, is negated by the very nature of the relationship between a garda and his ultimate employer; namely the State. This was discussed earlier in the context of a garda being an officeholder, and it was established that the garda could not be viewed as a servant of the State in the traditional sense of the master-servant relationship.

The only authority that the Garda Commissioner could have to direct a garda in the exercise of his office is to be found in section 8(1) of the Police Forces Amalgamation Act, 1925 which reads:

> "The general direction and control of the amalgamated force shall, subject to regulations

> made under or continued in force by this Act, be vested in the Commissioner of the amalgamated force who shall be styled and known as the Commissioner of the Garda Siochana."

If anything, this provision is even looser than its British counterpart[26] which does not qualify the chief constable's direction and control with the adjective "general". The inclusion of this term in the Irish provision suggests a definite legislative intention to deny the Commissioner the power to issue binding instructions to a member on how to exercise his powers in any individual case. This would be consistent with a recognition of the garda'a status as an officeholder. It would, of course, permit the Commissioner to issue general directions and guidelines on how the members of the force should exercise, or not exercise their powers, in specified situations. These, however, would be no more than policy guidelines which each member of the force should take into account in the exercise of his office. Ultimately, in an individual case it will be a matter for each garda to exercise his own discretion whether, and in what manner, to use his powers.

One question which the inclusion of the word "general" raises is whether the Commissioner would have the power, for example, to instruct his members to keep a particular person under surveillance, or to secure the arrest of an individual. Since such instructions would envisage the Commissioner exercising a power of direction and control in an individual case, as opposed to general categories of cases it is possible that they might be beyond his power.

An alternative interpretation, however, would be that the inclusion of the term "general" merely signifies that the Commissioner has a power of direction and control over all matters that would come within the general ambit of police responsibilities. In other words it refers to the general subject matter over which the Commissioner's power extends, rather than to a distinction between individual and general cases. That this is the more likely interpretation is indicated by the structure of the subsection which makes it clear that the Commissioner's power of general direction and control over the force can be restricted by regulations made by the Minister. If no regulations were made therefore, the Commissioner's power would be "general". In any event, to opt for the other interpretation would be to impose a restraint on the Commissioner's power which was not known to his predecessor in the RIC, nor to his counterpart in Britain, nor to the chief officers in other commonwealth countries and which would be inconsistent with the practice of the force since it was established.

(e) Conclusion

It would seem reasonable to conclude, therefore, that the legal status of a member of the Garda Siochana is a peculiar one. First and foremost he is the holder of a public office which is vested with a range of powers, duties and privileges which have been conferred on it at common law and by statute. In the exercise of these powers and privileges and in the performance of these duties in

individual cases, he is totally independent; responsible to no-one only the law itself. Unlike any othe public officeholder, however, the garda finds himself (in the company of about 12,000 other identical officeholders) a member of a disciplined force organised in hierarchical ranks and under the general direction and control of a chief officer. While this strange combination can sometimes obscure the fact that a garda is the repository of a whole range of powers which he exercises on his own responsibility, it does not erase it. It is also worth pointing out that the garda's status is by no means unique. Having inherited it from the old common law office of peace officer it is no surprise to find that he shares it today with the members of many commonwealth police forces who inherited the same status from the same source.

2. The Status of the Garda Siochana

(a) Introduction

Although the Garda Siochana in law is nothing more than a body of individuals occupying the office of garda and operating under the general direction and control of a chief officer it does not follow that the legal status of the individual garda is conclusive of the legal status of the Garda Siochana. The very fact that the members of the force are subject to the direction and control of the Commissioner renders it imperative to determine whether he, in turn, is subject to the direction and control of a higher authority. Again the similarity with British

policing is apparent. It is worth recalling in this context that the activities of gardai do not always, or even mostly, involve the exercise of police powers. The resources they have at their disposal, and the moral authority of their office, enable them to make a decisive contribution to the quality of life for individuals and society generally without ever having to resort to their powers. The Commissioner, by virtue of his general direction and control of the force, is in a position to determine the policies that will be served by these immense resources. As has been seen, even the de jure independence of each individual garda in the exercise of the powers of his office is not beyond the de facto influence of the Commissioner. Furthermore, while the Commissioner may not be able to direct a garda in the exercise of his power he will always be in a position to exert a powerful influence over it. If, however, the Commissioner is also subject to the control of a higher authority, it must follow that that higher authority is in a position to influence, perhaps even dictate, the policies served by the police powers and resources of the Garda Siochana. A key question, therefore, is whether the Commissioner is constitutionally independent in the general direction and control of his force in a manner akin to that of a British chief constable.

It has already been seen that the allocation of police to the remit of the Department of Justice is not sufficient

in itself to give the Minister for Justice any operational control over the Garda Siochana. The only other likely place where such a statutory power of control might be found is in the legislation establishing the force. A striking feature of this legislation is the absence of any substantial provision aimed directly at defining the scope of political authority over the force. A similar vacuum in the comparable British legislation is reflected in the fact that the locus of control over British provincial police forces "involves the inter-relationship of three authorities - the Home Secretary, the local police authorities and the chief officers of police - in a complex relationship which ensures that except in respect of day to day operations, none of the three has absolute control."[27] This tri-partite arrangement developed through a mixture of convention, common law and statutory provisions. In Ireland, however, the fact that the legislature was starting with a clean slate to establish a single national police force provided not just the opportunity but also the need to define the locus and extent of political control in some detail. Given what has been said already about the Commissioner's authority over the force it might have been expected that the substance of the Government's control, or lack of it, over the Commissioner would have been specified. The legislature's primary response comes in the form of the stipulation that the Commissioner enjoys the "general direction and control" of the force subject to regulations made under or continued

by the Act.[28] Elsewhere in the Act, various Ministers are conferred with a number of general and specific regulatory powers. The primary provision, however, does not give a Minister, or any other political authority, a specific power to override the Commissioner's direction and control of the force. It does not share the Commissioner's operational control with any other authority. It is possible, however, that ministerial control over operational matters could be deduced from some of the regulatory powers.

(b) Regulatory Powers

(i) Specific

The regulatory powers contained in the 1925 Act reside exclusively in the political hands of government Ministers. There is no provision for any external, politically independent body, to make regulations on any matter for the force. The regulatory powers themselves fall into two groups. First, there is the general power, conferred on the Minister for Justice, to make regulations on a wide range of matters relating to the internal management of the force; about which more will be said later. Second, there are a number of specific regulatory powers which are spread over several sections, with each power being confined to the detailed subject matter of the section in which it is found. Again, all of these powers are related to the internal management of the force and, subject to a few exceptions, are exercisable by the Minister for Justice.

Section 12, for example, permits the Minister for Justice, with the sanction of the Minister for Finance, by Order[29] to regulate and appoint the rates of pay and allowances to the several ranks and grades within the force.[30] Section 13 permits the Minister for Justice, with the sanction of the Minister for Finance, by Order[31] to authorise the grant and payment of pensions, allowances and gratuities to members of the force, their widows, children and dependants. Such an Order may also regulate and appoint the rates and scales of these payments, the conditions under which they are payable, and may prescribe the penalties for any fraudulent conduct in relation to an application for any such pension, allowance or gratuity.[32] Section 16 permits the Minister for the Environment[33] to make orders for the purpose of giving effect to the contents of the section on the phasing out of the old Dublin Police rate and its replacement.[34] Finally, section 20 provides for the continuance of the Garda Siochana Reward Fund, established under section 18 of the Garda Siochana Act 1924, subject to the necessary modifications to cater for the amalgamated force. Section 18 of the 1924 Act stipulates that the Fund "shall be established in accordance with regulations to be made by the Minister for Finance," and administered in such a manner as the Minister for Justice, with the concurrence of the Minister for Finance, may from time to time prescribe. The section does not dictate the form in which the Minister should prescribe the manner in which the Fund should be

administered. Presumably, it would be done through regulations issued by the Minister pursuant to his general power to issue regulations on the internal management of the force.

These piecemeal regulatory powers scattered throughout the Act clearly do not give the government any significant authority to dictate the Commissioner's operational responsibilities. Their content is concerned exclusively with purely administrative matters. Certainly, the Minister could use his powers over pay etc. to boost or deflate morale within the force and in that way, have an effect on the overall efficiency of the force. That, however, falls a long way short of a power to determine force policy or actions either generally or in individual cases.

(ii) General

The Minister's general power to issue regulations on the internal management of the force is found in section 14. It reads:

> "The Minister may from time to time, subject to the approval of the Government, make regulations in relation to all or any of the matters following that is to say:
>
> (a) the admission, appointment, and enrolment of members of the amalgamated force;
>
> (b) the promotion, retirement, degradation, dismissal, and punishment of members of the amalgamated force;
>
> (c) the duties of the several ranks of the

amalgamated force;

(d) the maintenance, training, discipline, and efficiency of the amalgamated force;

(e) the formation of representative bodies of members of the amalgamated force;

(f) any other matter or thing relating to the internal management of the amalgamated force."

The political character of this regulatory power is emphasised by the fact that it can be exercised by the Minister only subject to the approval of the government. This implies that each regulation made by the Minister under this section will be vetted to ensure that it encompasses policy acceptable to the government. Having said that, it is doubtful if section 14 can act as a vehicle through which the Minister, or the government, can exercise control over the operational policies and practices of the force. Nevertheless, it is more significant in this respect than the other piecemeal powers considered above.

Paragraphs (a), (b) and (c) of section 14 do not appear different in kind from the other piecemeal regulatory powers. They are clearly concerned with pure administrative matters and do not envisage any direct influence over the Commissioner's control in operational matters. They could, however, be used by the Minister to exert an indirect influence over the policing policies and practices of the force; much more so than would be the case with the other piecemeal measures. This aspect is dealt

with at length in chapter 3 which covers the regulatory structures of the force.

Of much greater significance in this context are paragraphs (c), (d) and (f). In particular, that part of paragraph (d) which allows the Minster to make regulations in relation to the efficiency of the force and the whole of paragraph (f) which allows him to make regulations on any matter or thing relating to the internal management of the force, create the distinct possibility that the Minister can make regulations laying down operational policies for the force. This certainly would be the case if the "efficiency of the amalgamated" force could be interpreted in a very broad sense to embrace the operational policies of the force. Support for such a broad interpretation can be found in the common perception of an efficient police force as one which is successful in the discharge of its policing responsibilities. It would be reasonable to assume, therefore, that matters such as the priority given to detecting certain types of crime, the policy on public demonstrations, the type of patrol service offered in particular areas etc. would all be relevant to the efficiency of the force. If that is accepted the Minister should be able to issue regulations on such matters pursuant to paragraph (d). On the other hand, when the "efficiency of the amalgamated force" is read in conjunction with the other ingredients of paragraph (d), namely the maintenance, training and discipline of the

force, it seems that a narrower interpretation is intended. These other ingredients are concerned with structural or administrative aspects of the force as opposed to its law enforcement policies and practices. Basic principles of statutory interpretation suggest that the "efficiency" of the force should be interpreted in that light. In other words it relates to the provision of administrative structures and procedures which are essential if the force is to function in an efficient manner. That this is the more likely interpretation is confirmed by the fact that section 14 as a whole is dominated by an emphasis on the structural or administrative aspects of internal regulation.

A similar problem of interpretation is posed by paragraph (f). If it is interpreted very broadly it will give the Minister the power to frame regulations on the operational policies to be followed by the force. Some support for this approach can be found in section 8(1) which stipulates that the Commissioner's general direction and control of the amalgamated force is subject to regulations made under, or continued in force by, the Act. As explained earlier, this provision gives the Commissioner power to issue both general and specific instructions to members of the force on operational policing matters. The fact that the Commissioner's power is subject to regulations made under the Act suggests that the regulations could be used as a vehicle through which such

instructions could be issued to the force. The only regulatory power which could possibly carry this capacity is that conferred on the Minister by paragraph (f). It is submitted, however, that paragraph (f) must be interpreted against the background of section 14 as a whole. When it gives the Minister the power to make regulations on any matter or thing relating to the internal management of the force it is to be interpreted as sui generis with the specific examples given in paragraphs (a)-(e) inclusive. Since all concern internal structural or administrative matters it must be presumed that the general power conferred by paragraph (f) is limited to such matters. This is quite consistent with section 8(1) which can be interpreted as giving the Commissioner general control over all aspects of the force subject to the requirement that he must exercise this control in a manner consistent with ministerial regulations on structural or administrative matters. Again, however, it must be accepted that the regulatory powers contained in paragraphs (d) and (f) can be used by the Minister to exert an influence over the operational policies and practices of the force. This aspect is dealt with in chapter 3.

Paragraph (c) provides the Minister with the regulatory power which has the greatest potential to shape police policies and practices. The fact that there is no exclusive statutory statement of the duties of the force as a whole, or of individual members, means that the Minister

has the maximum freedom, by virtue of paragraph (c), to impose particular duties on any or all of the ranks. He could, for example, require a particular rank to take special responsibility for the policing of subversives or organised crime, for ensuring 24 hour daily protection for government Ministers, for the enforcement of the law on obscene publications, for supervising the treatment of suspects in police custody, or whatever. The fact that particular functions would be mentioned in regulations, combined with their assignment to specified ranks in the force, would have the effect of ensuring more Garda attention being paid to those functions than might otherwise have been the case.

Paragraph (c), therefore, is the regulatory power which comes closet to giving the Minister operational authority over the Garda Siochana. It is a power, however, which falls considerably short of a power to give binding operational instructions or directives. Regulations, by their very nature, lay down rules that must be followed generally when the circumstances prescribed in them arise. Furthermore, regulations issued under section 14 must be laid before parliament and are subject to annulment within 21 days.[35] Ministerial regulations issued under paragraph (c), therefore, lack the flexibility which would be associated with a power of direction and control. They can not be used, for example, to cater for individual cases, nor are they suitable to cope with

situations which are prone to rapid change. It is not surprising, therefore, that the Minister has yet to exercise this regulatory power. The inevitable result is that the duties of each rank, and the force as a whole, are fixed by the Commissioner pursuant to his power of general direction and control. These are expressed in the form of standing orders, most of which are disseminated internally through the Garda Siochana Code. It should not be assumed from this, however, that the Minister does not concern himself with the substance of these duties. On the contrary, he regularly makes requests to the Commissioner in this context and, for reasons that will be discussed later, he can expect that these requests will be granted.

Finally, it is worth noting the one directive power which is statutorily conferred on the Minister. It does not amount to a general power to direct the force in operational matters but it can have an effect in that sphere. The power in question is a power to direct the manner in which the force shall be distributed and stationed throughout the State.[36] This can have operational implications. For example, it enables the Minister to direct the Commissioner to increase or reduce the force concentration in particular areas or localities. This undoubtedly would have a significant impact on the nature of the police service experienced by the residents of an affected area or locality. Nevertheless, it patently falls very far short of a power to direct operational

policies and practices generally. Furthermore, in practice the Minister leaves it to the discretion of the Commissioner to decide how to deploy his men throughout the State. On every occasion that the strength of the Garda in particular stations or localities is raised in the Dail it elicits a response which commences with the standard phrase that "the deployment of the force is a matter for the Garda Authorities who have informed me that..." It does not follow that the Minister does not concern himself with how the force is deployed. On the contrary, he does make requests to the Commissioner concerning the deployment of the force in the full knowledge that these requests will be granted. The major example in recent times is the deployment of extra gardai along the border to the detriment of policing strength in some other parts of the country. This was in response to government commitments under the Anglo-Irish Agreement; but it was achieved without the Minister having to issue a statutory directive to the force.

In conclusion, therefore, it can be said that neither the Minister, nor any political authority, possess a specific statutory power to direct the force on general or individual operational matters. The closest that it comes is the power to issue regulations on the duties of the several ranks of the force, plus the power to direct how the force shall be distributed and stationed throughout the State. Even in theory these two powers pose very little

challenge to the hegemony of the Commissioner in the operational direction and control of the force. In practice they pose no direct challenge at all as the Minister has effectively ceded these two formal responsibilities to the Commissioner.

(c) Contrast with Other Jurisdictions

The absence of some form of statutory directive power over operational matters in the hands of a political authority appears unusual when compared to the equivalent arrangements in other common law jurisdictions. In the case of the Royal Canadian Mounted Police (RCMP), for example, section 5 of the RCMP Act, 1970 stipulates that the Commissioner "under the direction of the Minister, has the control and management of the force and all matters connected therewith."(emphasis added) In the case of the Ontario Provincial Police section 43(2) of the Police Act, 1980 stipulates that:

> "Subject to the direction of the Ontario Police Commission as approved by the Solicitor General, the Commissioner has the general control and administration of the Ontario Provincial Police Force and employees connected therewith."

The Surete du Quebec is placed as a whole "under the authority of the Attorney General" by section 39 of the Police Act 1977. According to Stenning,[37] no other police force in Canada is so patently under the complete legal control and authority of a government as the Newfoundland Constabulary. Section 13 of the Newfoundland Constabulary Act 1970 reads:

"It is the duty of the members of the force, subject to the orders of the chief of police, to

(a) perform all police duties of any kind whatsoever that may be assigned to the force by the Minister from time to time;

(b) act as wardens, inspectors, patrolmen, guides or in other like capacities if so appointed under any of the laws of Canada or of the province; and

(c) perform such other duties and functions as are, from time to time, prescribed by the Lieutenant-Governor in Council or the Minister."

Lest there is doubt about the extent of political control, section 5 provides that:

"The Minister has, subject to section 28, the general control and management of the force and of all matters connected therewith."

Section 28 provides further that the:

"Lieutenant-Governor in Council may make such regulations not inconsistent with this Act as he deems necessary or advisable for the more effective carrying out of the purposes of this Act according to its true spirit, intent and meaning and for dealing with any matters for which no express provision has been made or in respect of which only partial or imperfect provision has been made."

Quite clearly the normal practice in Canada is to subject the chief officer's power of direction and control over the force to the political direction of a higher authority, and to express that arrangement in statutory form.[38] However, it is not a purely Canadian phenomenon. A similar arrangement applies to the Australian Federal Police. The relevant subsections of section 13 of the Australian Federal Police Act, 1979 read as follows:

(1) "Subject to this Act, the Commissioner has the general administration of, and control of the

operation of, the Australian Federal Police.

(2) The Minister may, after obtaining and considering the advise of the Commissioner and of the Secretary-General, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.

(3) The Commissioner shall comply with all directions given under this section."

Policing arrangements in the U.S.A. also reflect a readiness to vest ultimate control in a political authority. In Pennsylvania, for example. the State police are obliged:

"(b) To assist the Governor in the administration and enforcement of the laws of the Commonwealth, in such manner, at such times, and in such places, as the Governor may from time to time request;

(c) With the approval of the Governor, to assist any administrative department, board or commission of the State Government, to enforce the laws applicable or appertaining to such department, board, or commission or any organisation thereof."[39]

Where a Borough Council has exercised its power to appoint one or more borough policemen,[40] it may designate one of them as its chief. It is then prescribed that:

"The Mayor of the Borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where, and the manner in which, the Chief of Police and the police force shall perform their duties, except that the Council shall fix and determine the total weekly hours of employment that shall apply to the policemen."[41]

Even if the Borough Council exercises its power to establish a police department consisting of a chief,

captain, lieutenant, sergeants or any other classification desired by the Council, it is prescribed that:

> "the Mayor shall continue to direct the manner in which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the Chief of Police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties."[42]

In the case of the Philadelphia City Police, there is some fudging about whether or not the force is subject to political direction. The chapter of the Philadelphia Home Rule Charter which deals with the police stipulates that:

> "The Department shall train, equip, maintain supervise and discipline the Philadelphia Police."(emphasis added).

Confusion can arise from the fact that the designation "Police Department" is used to denote the whole force plus its professional and administrative heads. The Commissioner, for example, is a civilian administrator and is as much a member of the Department as any member of the force. In Irish terms the equivalent would be appointing a senior civil servant to be the Garda Commissioner without actually changing his designation as a senior civil servant. In his latter capacity he would be amenable to the political direction of the Minister or, in the case of Philadelphia, the Mayor. This integration of the Philadelphia police force into the administrative and political apparatus of city government renders it much more subject to political direction and control than is obvious from the bare words of the Home Rule Charter.

(d) Historical Precedents

Given the practice elsewhere, it must be assumed that the absence of a specific provision subordinating the Garda Commissioner to the direction of the Minister, the government or any other body, suggests that neither the Minister, the government nor any other body can exercise such control over the Commissioner. Unfortunately contemporary and historical precedents in both Britain and Ireland suggest that the presence of such specific statutory provision does not always succeed in establishing political control over the police, while their absence does not always signify independence. The closest equivalents to the current Irish provisions are to be found in Britain today and, historically, in both Britain and Ireland. Some guidance on the current status of the Garda Commissioner can be had from looking at how these provisions are, and have been interpreted. British historical and contemporary precedents were considered in the preceding chapter. Irish precedents will be considered now.

(i) Outside Dublin

The statutory provisions governing the Garda Siochana's immediate predecessors, the RIC, were remarkably similar in this context to those governing the Garda Siochana. The Inspector-General of the RIC was "charged and invested with the general Direction and Superintendence of the Force" by law.[43] While his power to make "Rules, orders and regulations for the general government" of the

force was subject to the "Approbation of the Lord Lieutenant",[44] he was nowhere statutorily subordinated to the direction and control of the Lord Lieutenant in operational matters generally. The only exception to this was the provision with respect to the distribution of the force[45] which has its counterpart in the legislation governing the Garda Siochana. These measures, and the related issue of the separation of powers between the Lord Lieutenant and the Inspector-General, were never the subject of judicial scrutiny. In practice, however, it was always assumed that the force was subject to the close political direction of central government. Palmer even goes so far as to say that the 1836 Act put the constabulary de jure under the control of central government; the government having enjoyed de facto control at least since 1828.[46] This should not be interpreted as a claim that there was clear statutory authority for the government to issue binding instructions on operational matters to the Inspector-General; because no such measure was provided. What Palmer is referring to is the fact that the power of appointment to the force was vested in central government alone. Under the arrangements for the RIC's predecessors this power was divided by law between central government and local magistrates; but, in practice, it had become vested in the former alone. The 1836 Act, therefore, had formalised the practice in law.

The predecessors of the RIC can be described loosely

as the baronial constabulary. They were provided for in the Irish Constabulary Act, 1822. Unlike the 1836 Act this measure provided for a curious mixture of roles for central government and the local magistrates. The Lord Lieutenant had the power to appoint a chief constable to superintend the force in each of the 250 baronies[47] and an inspector to superintend the police in each one of the four provinces.[48] The local magistrates had the power to appoint up to sixteen constables and subconstables in each of the baronies, but they could be discharged only by the Lord Lieutenant.[49] If the local magistrates failed to appoint constables and subconstables, the Lord Lieutenant could do so.[50] The rules and regulations for each province were to be drawn up by the inspectors respectively and were subject to the approval of the local magistrates.[51] Although the chief constables had to submit written reports on the state of the police every three months to the Lord Lieutenant,[52] they had to obey the local magistrates or the stipendiary magistrate where such existed.[53] While stipendiary magistrates could be appointed only on the written request of seven county magistrates[54] they owed their allegiance to the central administration. The magistrates, in turn, were responsible in a loose way to the provincial inspectors insofar as their superintendence of the police was concerned. Indeed, the final administrative control over the baronial police rested with the inspectors.[55]

Despite the fact that the 1822 legislation allocated direct operational control to the chief constables, magistrates and the provincial inspectors, it was standard practice for the government to issue directives on operational matters to the force. Palmer explains[56] that the story of the everyday duties of the constabulary was one of a tug-of-war between local magistrates and Dublin Castle. The men caught in the middle were the constables; especially the chief constables. Time and again, local magistrates commanded a police officer to do one thing while directions from the Castle, or his provincial inspector, instructed him to refrain, or to do something else. The nub of the problem was that the magistrates wanted to use the constables for the service and enforcement of civil processes and the other purposes for which they had traditionally depended on constables prior to the establishment of the provincial police forces. Dublin Castle, on the other hand, felt that the magistrates should appoint individual constables for this purpose and that the constabulary should be used only against crime and violence.[57] For example, in an effort to stamp out the use of the constabulary for other purposes, Chief Secretary Littleton ordered in 1833 that all applications for police aid should be forwarded to him and henceforth such requests would be decided by the Lord Lieutenant.[58] Since there was no specific statutory measures authorising the government to take such action it can only be assumed that its authority was perceived to flow from the fact that the

provincial inspectors, the chief constables and, in time, the constables were its appointees, as opposed to those of the local magistrates.

The perception of central control over the police clearly would have been enhanced by the 1836 Act which not only provided for all members of the force to be appointed by the Lord Lieutenant alone, but also vested the "Direction and Superintendence of the Whole Force" in the hands of a single Inspector-General who was appointed by the Lord Lieutenant and based in Dublin Castle. The only functions left to local magistrates were: a power to request the Lord Lieutenant to appoint more constables to a particular county of a city, county of a town or division of a county than the maximum statutorily provided for that locality;[59] and the right to receive and examine, at the special Road Sessions, the paymasters accounts of all constabulary payments and disbursements for the county.[60] The result was a police force which was seen to be under the strict control of central government.[61] This control was diluted, but certainly not displaced, by the transfer of power over all appointments, promotions and punishments in the force to the Inspector General in 1838.[62] Palmer notes that Drummond continued to issue the same policy directions to the force that had been a feature of its predecessor. In addition he directed them to get tough on Orange marches and faction fighting at fairs.[63]

(ii) Dublin

The other Irish police force which survived the nineteenth century, and even the initial establishment of the Garda Siochana itself, was the Dublin Police. Since it was the police force for the capital city, and survived until 1925, it is reasonable to assume that its structures and relationship to political authority were significant in the planning for the Garda Siochana. Indeed, Dublin enjoys the distinction of being the first city in the British Isles to be policed by an organised police force of the kind that was to become standard. The Dublin Police Act, 1786 provided for the appointment of three magistrates to be Commissioners of the new force.[64] They, in turn, subject to the approval of the Lord Lieutenant, could employ ten ministerial officers of the peace and one chief peace officer in each of four divisions into which the city was to be divided, and one principal peace officer for the whole city.[65] The power to make rules and orders for regulating these officers and the duties to be performed by them was conferred on the Commissioners,[66] while all the powers, duties and privileges of a constable were conferred directly on each of the officers.[67] Of particular significance is the fact that the ministerial peace officers were statutorily obliged to obey the lawful directions of their chief officers, while both were subject to the lawful directions of the principal peace officer, and all three were subject to the lawful directions of the Commissioners in the due execution of the laws.[68] The

chain of authority, conspicuously, did not carry on to the Lord Lieutenant. Nevertheless, it was assumed, primarily because of the Lord Lieutenant's power to appoint the Commissioners, that the force was under the control of central government to the exclusion of the traditional local vested interests. Indeed, it was this perception that generated the heated opposition to the introduction of the new measures;[69] opposition which grew over the next ten years until it succeeded in forcing a fundamental amendment in 1795.[70]

A key feature of the changes was the major concession to local control. The Dublin police district was divided into two divisions with a divisional justice at the head of the police in each division, and a superintendant magistrate over the whole district. All three were nominated by the Lord Mayor and aldermen and were elected by the common council with the input of the Lord Lieutenant reduced to a power of approval.[71] The superintendant magistrate was given the power to appoint 25 petty constables and, subject to the approval of the Lord Lieutenant, a chief constable for each of the two divisions and a head constable for the district as a whole.[72] In addition to this force the parishes retained a power to appoint local night watches and constables.[73] The effect, according to Boyle, was to establish the new police as "a model of democracy, with the influence of government reduced to a shadow."[74] However, this concession to

local control was shortlived. An Act of 1799 restored central government control in even stronger terms than that prescribed by the 1786 Act.

The 1799 Act divided the police district up into four divisions under a single police magistrate appointed by the Lord Lieutenant.[75] Below the magistrate was one head constable and four chief constables; all appointed by the Lord Lieutenant.[76] The Lord Lieutenant also appointed up to 48 petty constables to each of the four divisions,[77] while the magistrate employed up to 30 watch constables[78] and the head constable employed up to 500 watchmen.[79] These measures clearly reflected the government's determination to take a firm grip over the Dublin police. The year 1808[80], however, saw a timid reversion to local involvement in the context of a major extension of the Dublin Police jurisdiction from 12-200 square miles.[81] The Dublin District was divided up into six divisions with the police in each presided over by three divisional justices, making a total of eighteen in all.[82] Twelve of these, including the chief, was appointed by the central government[83] and the other six were elected by the Corporation.[84] Any or all of the eighteen could be removed by central government.[85] In each division there was a chief constable, three office constables and four petty constables, with a further 28 petty constables in the head division centred around the Castle.[86] The chief justice, who was based at the Castle, along with his other

two divisional justices appointed and employed the entire force of watch constables and watchmen, in addition to a maximum of one hundred patrolling constables and a maximum of one hundred horse patrolling constables.[87] Finally, in 1836 control over the Dublin Police was concentrated once again in the hands of central government by the transfer of all the remaining powers of the Corporation to the Lord Lieutenant.[88] The structures of the force were amended to bring them more into line with the LMP. The Lord Lieutenant was empowered[89] to appoint two justices of the peace[90] who were responsible to the Chief Secretary. They were to recruit a sufficient number of "fit and able men" and make rules and regulations for the police.[91]

From 1786, therefore, apart from the brief interlude between 1795 and 1799, central government control over the Dublin police could be traced back to the Lord Lieutenant's power of appointment over the senior officers or the superintending magistrates. Although the reality of this central political control was never questioned, the fact remains that it was never specifically provided for in clear terms in any of the many statutory provisions affecting the force. As with RIC, it was simply assumed that the power of appointment and dismissal carried with it the necessary authority to direct and control.

It is quite possible, therefore, that when the framers

of the Garda Siochana legislation followed the basic statutory formula which had been used traditionally in Ireland to define the chief police officer's role and relationship with government, they believed they were retaining ultimate control in the hands of the government. In other words, the Commissioner would have merely the immediate power of direction and control over the force but, in the last resort, he would be subordinate to the wishes of the government by virtue of the fact that he was an appointee of the government. While there may be firm historical grounds for such a belief, its basis in law is far from certain. The Commissioner holds an office which is purely a statutory creation. The statute which created it also gave it the power of direction and control over the force. Nowhere does the statute, or any other legislation, suggest that the exercise of this power can be curtailed or directed by any political authority. If the legislature had intended the Commissioner to be subject to higher authority in the exercise of this primary power of his office it would surely have made provision to that effect in the clearest terms; as has been done in some other common law jurisdictions. The mere fact that the power of appointment to, and removal from, the Commissioner's office is statutorily vested in the government is hardly sufficient in this regard. As will be seen later, it may make it less likely that the Commissioner would ever disregard government wishes in any operational matter, but that is wholly different from saying that the Commissioner

is legally subordinate to the government in his direction and control of the force.

(e) Case-Law

Although the Blackburn[92] decision has yet to be judicially considered in Ireland, there is no doubt that it would be viewed by the courts here as being of very persuasive authority. There are several reasons for this. First, there is the general tendency for Irish Courts to follow decisions of English courts in the interpretation of the common law.[93] This tendency would be particularly strong in a subject matter as basic to a civilised society as policing. Second, the Blackburn decision concerned the LMP Commissioner directly. The significance of this for the Garda Siochana is that the LMP is the one force in Britain which has all the attributes of a national force; the only exception being that its jurisdiction is confined to the London Metropolitan area. Indeed, its establishing legislation goes much further in the current context than its Irish counterpart by stipulating that the London Metropolitan Commissioner shall act under the authority of the Home Secretary. Third, and closely associated with the second, is the fact that the British legislation expresses the subordination of the Commissioner to ministerial authority much more clearly than its Irish counterpart. In the light of these features the fact that the English Court of Appeal was still able to uphold the doctrine of operational independence for the Metropolitan Commissioner

should make it all the more difficult for an Irish Court to find otherwise in the case of the Garda Commissioner. Fourth, a particular feature of the Blackburn case is that the Metropolitan Commissioner does not occupy the office of constable[94] which was at the root of the authorities cited by Denning in support of his independence thesis. This did not deter Denning, however, as he simply asserted that the Commissioner could be equated with any other constable in the land. Presumably, what he had in mind was that they were all peace officers at common law. As explained earlier, the garda is also a peace officer at common law, and since the Garda Commissioner is also a garda Denning's thesis would appear to be directly relevant to him.

There are, of course, grounds upon which an Irish Court could refuse to follow the Blackburn case; apart from the fact that it is not binding. There is the possibility that an Irish Court would conclude that it was wrongly decided for the reasons advocated earlier. That, however, is unlikely given that it was an English decision, based on English and Commonwealth precedents, and addressed to the legal status of an English police force. If an Irish court did not wish to follow Blackburn it would probably be content to distinguish it. There are at least two grounds upon which it could do this. First, the Irish Court could find that, in contrast to British policing, there has been a tradition of close central government control of policing

in Ireland since the introduction of organised police forces. The fact that the legislation establishing the Garda Siochana does not address the issue directly could be interpreted as a legislative intention to continue that tradition. Second, the Garda Siochana, unlike their British counterparts, also constitute the secret service for the State. It is inherent in the nature of a State secret service that it should be under the immediate control of the government of the day. It can be argued, therefore, that the notion of the Commissioner's independence from ministerial control in operational matters is incompatible with the Garda Siochana's role as the State secret service.

Neither of these two grounds of distinction are conclusive. Against the first it can be argued that when the founders of the new State designed the Garda Siochana they clearly took a conscious decision to establish a new police force for a new Irish State. An integral part of this enterprise was not just the disbandment of the police forces which preceded it, but also the repeal of the statutory bases for those forces. The Garda Siochana, therefore, was constructed on a new, purpose-built legislative framework. If it was intended to continue the tradition of executive control over operational matters, that would have been provided for specifically in the legislation. Since it was not, it must be presumed that this omission was deliberate. As against the second, it

must be said that there is no statutory authority designating the Garda Siochana as the State secret service. Its deployment in this fashion is facilitated, but not required, by the fact that the duties of the force are not prescribed by statute. The fact that they are deployed for this purpose is due solely to the Commissioner's acquiescence to government wishes. It would be a non-sequitur to argue that his de facto acquiescence in this matter means that he is under a legal obligation to acquiesce. There is no clear statutory authority compelling him to do so.

Case law on police independence in other common law countries is sparse and, unfortunately, serves to confuse more than enlighten. In Re Copeland and Adamson,[95] for example, the High court of Ontario found that the Police Board of Commissioners can give directions to its chief police officer on general law enforcement matters, despite quoting extensively from Blackburn. Of particular interest to the Irish situation is the decision of the Quebec Court of Appeal in Bisaillon v. Keable.[96] It declared that the English doctrine of police independence could not apply in Quebec because the status of the police in Quebec was fundamentally different from that of an English county. The key points of difference were that: the Quebec police, unlike the English, was a national force; the English lacked a prosecution service like that of Quebec; and there was no Minister for Justice in England with the powers and

authority of that in Quebec. Unfortunately, the decision did not explain how these factors necessarily required that the police could not be independent in operational matters from political authority. A further complicating factor was that the legislation relating to the Quebec police specifically states that the force as a whole is under the authority of the Attorney-General. Despite the fact that the Quebec force is a national force the Bisaillon v. Keable case cannot be relied on as very pertinent to the Garda Siochana.

On balance, therefore, it is difficult to foresee an Irish Court diverging too far form the Blackburn doctrine of independence. The position might have been otherwise had the legislature enacted a specific provision subordinating the operational control of the Commissioner to the directions of the Minister for Justice or some other external authority. In the absence of such provision, it is submitted that even if an Irish court did not specifically found itself on Blackburn it would fashion a similar doctrine of operational independence for the Garda Commissioner. The result would be that the Commissioner would not be legally bound to comply with operational instructions in general matters or individual cases from the Minister for Justice. It does not follow, however, that the Minister, or the government, would lack the capacity to influence the Commissioner in operational matters; even to the extent of effectively dictating his

decisions. The several powers and responsibilities vested in the Minister and the government concerning various aspects of the Garda Siochana are such that they can be used individually and collectively to exert a real influence on Garda policies and operations. Exactly how this can happen is the subject of the next chapter.

1. Commissioner's Operational Independence.

(a) The Conventional Position

The absence of a firm legal foundation for the Garda Commissioner's independence in operational matters is countered by a convention to the same effect. The essence of this convention is that neither the government as a whole, nor the Minister for Justice, will interfere with the Commissioner's operational control of the force. The most clearcut statement on the subject was offered in the course of a Seanad debate on the spate of violent attacks against the elderly in 1985. In the course of the debate many speakers called on the Minister to take firm control of the force to protect the elderly and track down those responsible for the violent attacks. In response the Minister deemed it necessary to clarify the division of responsibility between himself and the Commissioner in the following terms:

> "While I accept that I am responsible to the Oireachtas and to the government for the force and while, as I have already said, I am happy to answer for that role, I do not run the force on a day-to-day basis or indeed at all. This is the task of the Commissioner and his senior officers. My role is to provide the Garda Siochana with the resources they require to do their job, that is manpower, equipment and a sound legal basis for operation."[1]

The clear implication is that the Minister's input is confined to providing the administrative and legal framework plus the material resources necessary for an efficient police service. It is for the Commissioner,

however, to decide on what strategies and methods to apply within the parameters of that framework and those resources.[2]

A comprehensive examination of the Dail Debates between 1985-1987 (incl.) reveals strong ministerial support for the Commissioner's autonomy in operational matters. On only one occasion was the Minister asked to enforce the law in a specific situation, namely to keep the rear entrance to a named school free from unlawfully parked cars.[3] Needless to say, he replied that this was a matter for the Garda Authorities. Much more common, however, are questions and requests for action on Garda policies and commitment to law enforcement on particular subject matters such as: the provision of better protection for local traders in a named area of Dublin,[4] the immigration and drug detection functions at Rosslare port,[5] measures to prevent a recurrence of the previous years crime and vandalism at the Slane Concert in 1985;[6] the enforcement of the Animals Act, 1985,[7] special steps to cope with violence against women,[8] the enforcement of the gaming and lotteries law on slot machines,[9] measures to combat the drug problem,[10] measures to combat the joy-riding problem,[11] enforcement measures against illegal moneylending,[12] combatting armed robberies[13] and the prevention of illegal trading in a named part of Dublin.[14] In all these matters, too, the Minister took the view that they were the concern solely of the Garda

Authorities. Because they involved issues of how Garda resources should be applied in the enforcement of the law, as opposed to what resources should be made available to the Garda, the Minister felt that he had no function. Such operational matters were solely within the mandate of the Commissioner.

A similar attitude can be discerned from ministerial contributions to relevant debates during this three year period. For example, in a debate on a private members motion on crime and lawlessness the Minister set out what he described as a comprehensive programme to combat the problem.[15] An integral part of this programme was to establish the Garda as the most efficient and effective force possible. It is significant, however, that those parts of the Minister's programme designed to achieve this objective were confined to a general framework of legal and material resources. They were confined to the provision of extra manpower, higher entry standards, enhanced training, reformed promotions procedures, a first class national communication network, computerisation and greater legal powers. There was never any suggestion that the programme would or could extend even as far as general policies or priorities that the force should adopt to combat the problem. Such matters, in common with policies on the enforcement of particular laws, were included as operational matters within the prerogative of the Commissioner. This distinction between the provision of

legal and material resources on the one hand and general operational policies and priorities on the other is also evident in the annual estimates' debates[16] and various other debates on the crime problem.[17] The same distinction is reflected in ministerial answers to Dail questions. For example, questions about the provision of more beat patrols in an area,[18] the development of a community policing policy, [19] the expansion of the neighbourhood watch scheme [20] and the procedure for recording crimes [21] were all regarded by the Minister as internal operational matters within the discretion of the Commissioner. The same approach was adopted to the setting up of special task forces to cope with individual Garda operations or to spearhead the Garda response to an ongoing criminal or security threat.[22] Even the question of what vehicles to purchase was regarded by the Minister as an internal operational matter for the Commissioner despite the fact that the necessary finance is a matter solely for the government and the Dail. In answering a Dail question on whether the Garda would be provided with more powerful cars to combat joyriders, the minister explained that:

> "... in the Garda vote there is a block grant for Garda transport. It is at the discretion of the Garda Authorities what type of cars they buy, the range of cars and the power of cars they buy. If they want to get more powerful cars that is a matter for the Garda Authorities."[23]

The high point of this ministerial hands-off approach to operational police matters must be the official position that Garda deployment is purely a matter for the Garda Commissioner. In the 1985-7 period the Minister was asked

in the region of 130 Dail questions concerning the deployment of gardai. For the most part these questions asked the Minister to intervene in matters such as the allocation of gardai to individual stations, particular geographical areas or to general or specific functions. The Minister's typical response was that:

> "the detailed deployment of Garda manpower is a matter for the Garda Authorities who have informed me that ..."[24]

Alternatively, where the question relates to the allocation of manpower to specific functions, the response is more likely to be that:

> "the allocation of members of the Garda Siochana to particular duties is a matter for the Garda Authorities at the appropriate level having regard to local circumstances, available Garda resources and demands on Garda services."[25]

This approach is consistent with the view that the provision of resources is the Minister's responsibility while their application is a matter for the Commissioner. Manpower is as much a resource in this context as transport or communications equipment. There is no reason in principle why control over the deployment or application of one should reside in one place for one and in another place for the other. They are both essential and integral components for the provision of an efficient police service.

The significance of the official position on who has responsibility for Garda deployment lies in the fact that the Minister carries a specific statutory responsibility

for the distribution and stationing of the force throughout the State. Section 6(1) of the Garda Siochana Act, 1924 (as amended by section 9 of the Police Forces Amalgamation Act, 1925) stipulates that:

> "The Garda Siochana shall be distributed and stationed throughout [the State] in such manner as the Minister shall from time to time direct."

When this provision appeared first in the Garda Siochana (Temporary Provisions) Act, 1923 it was qualified by the requirement that the Minister had to act through regulations. This suggested a fairly rigid arrangement whereby the Minister would fix the general geographical distribution from time to time, while leaving it to the Commissioner to apply flexibility locally in response to operational exigencies. The dropping in 1924 of the requirement to act through regulations conferred on the Minister the flexibility that otherwise was confined to the Commissioner. The legislative intention would appear to have been that the Minister, and not the Commissioner, should bear the statutory responsibility for the distribution and stationing of the force throughout the State. The only remaining difficulty is defining what is meant by "distributed and stationed." Interpreted literally it clearly incorporates the question of how many members should be allocated to each individual station and to particular geographical areas at any one time; even if it does not extend to the allocation of manpower to particular duties. Ministerial practice however, has confined it to the question of how many stations there

should be in any particular part of the State, and what status should be attached to each. As explained above, the Minister asserts that it is the responsibility of the Commissioner to determine allocation of manpower to particular stations and to particular areas of the country. Given the terms of section 6(1) this must rank as clear evidence of a ministerial determination that the Commissioner's remit shall extend over all aspects of operational matters up to, although not including, the provision of resources for the force.

(b) Qualifying the Convention

From what has been said so far it might be concluded that there is no government involvement in operational aspects of policing. Such a conclusion, however, would impute to the Convention a rigidity and clarity that it does not deserve. The reality is that the government does, and must, concern itself with operational aspects of policing. The very fact that it must provide the force with the necessary legal, administrative and material resources to discharge its policing function implies that the government must have views, however broad, on the contents of operational policies and priorities. These views will be reflected in the sort of resources that it makes available and in those that it withholds. The government must also be concerned with how the resources are applied. Ultimately, it will have to answer to the Dail, and the electorate, for the manner in which the

country is policed. Protestations to the effect that the force has been endowed with more resources than is necessary to provide an efficient police service will be to no avail if large parts of the country are experiencing an exponential rise in burglaries, vandalism and petty crime because, for example, Garda management has diverted too many resources away from beat patrol to road traffic control or the surveillance of subversive suspects. In such a situation it is to the government, and not the Garda management, that the Dail and the electorate will look for their pound of flesh. It would be unreal, therefore, to imagine that the Convention means that the government will never encroach on the Commissioner's autonomy.

In the three year period under review there have been many ministerial statements, both in the Dail and in the media, which blur the conventional division between operational control and the provision of legal, material and administrative resources. At the very least these statements convey the appearance that the Minister makes known to the Commissioner his views on the need to devote more resources, or to adopt new strategies, to deal with general types of criminal activity such as: joyriding, burglary, vandalism and subversion. On exceptional occasions it would appear that the Minister effectively dictates what the operational priorities or strategies should be.

The most frequent hints of ministerial involvement in operational policy have arisen in the context of the Minister's answers to questions on operational aspects of policing. This might concern such ordinary everyday matters as why traders in a named area of Dublin have not received the police service they desire,[26] or more sensational incidents such as a kidnap or a major armed robbery. In either event the fact that the Minister is prepared to answer for these matters on behalf of the Garda Authorities, coupled with the detailed contents of his answers, suggests that he can command reports on all aspects of Garda operations. Indeed, it is apparent that when the need arises he can have a preliminary report on an incident on his desk the day the incident happens.[27] However, just because the Minister can command access to such information it does not follow that he gets involved in the operational matters to which the information relates. Nevertheless, it does happen on occasions that when answering to the Dail on a particular incident or policing problem the Minister intimates that he has further information which he has decided not to reveal. Typical reasons given in such instances are that it would have an adverse effect on Garda plans to combat a spate of armed robberies[28] or a possible outbreak of crime and vandalism[29] or that it was not the practice of the House to reveal the information. The clear implication is that the Minister's role in operational matters is not confined to acting as an information conduit from the Garda

Authorities to the Dail. On the contrary, it would appear that he discusses some operational incidents or matters in much greater detail with the Commissioner or other appropriate figures.[30] The immediate objective of such discussions would be to find out what is going wrong, or what went wrong, and whether further resources or administrative changes were necessary to cope or to prevent a recurrence. That hardly amounts to the Minister issuing formal operational instructions to the Commissioner; although that may well be the effect in practice. Clearly, the Convention of operational autonomy loses much of its clarity and force at this point.

Public announcements proclaiming extra or new resources for the Garda Siochana are regular occasions on which the demarcation between the respective roles of the Minister and the Commissioner is blurred. In the course of a debate on a private members motion on the crime problem in 1985, for example, the Minister gave a list of the extra resources provided by the government to enable the Garda get on top of the situation. Referring to these extra resources he said:

> "During the term of office of this government, the Garda have been encouraged and supported in developing new strategies to deal with crime. Emphasis has been placed on community policing and in getting the Garda and the community into a co-operative and supportive relationship to jointly tackle crime. I am personally convinced of the importance of developing a preventive approach to crime and it is because of that conviction that I have been very keen to have neighbourhood watch schemes adopted as widely as possible in the community." [31]

Clearly, the Minister and the government do not confine themselves to the provision of resources. Quite understandably, they aim to have a say in how those resources are used. A further example occured in 1988 [32] with a ministerial announcement of another major crime fighting package. This time the Garda was given resources including: (1) the appointment of 250 civilian clerical staff to allow re-deployment of "desk-gardai"; (2) the extension of the retirement age to 60 in the case of 250 gardai in the ranks of garda, sergeant and inspector who were otherwise due to retire at 57 before 1991; (3) the acceleration of the planned recruitment of 1000 members over three years; and (4) an extra allocation of £1/2 million for the period leading up to Christmas. The purpose was to ensure greater visibility through a major emphasis on more gardai on the beat. However, the announcement did not make clear whether it was the government or the Commissioner who had decided that the nature of the crime situation required this policy. The impression given was that the initiative emanated from both working together as a team.

The convention is much more absolute in individual operations such as: the investigation of a crime, the arrest or prosecution of an individual, the policing of a public protest march etc. An attempt by the Minister or the government to give operational instructions to the Commissioner on such matters would be viewed with alarm. It

could be interpreted as an attempt to use the Garda Siochana for party political purposes. Such a development would drive a coach and horses through the Convention of operational autonomy and might even be ultra vires the power of government. It does not follow that the government never gets involved in specific operational matters. The three year period under review provides at least four situations in which it would appear that the government was involved in decision-making concerning specific operations. None of them, it must be said, contains even the hint of politically improper interference. However, they do illustrate the flexibility of the Convention on operational autonomy.

The first example is not confined to the three year period under review. It concerns the requirement that the Garda must provide an armed escort for all major movements of cash by the banks.[33] What is particularly significant about this example is that the government directed, as opposed to requested, the Commissioner to provide the service. The intention was that the Commissioner should have no discretion at all in the matter. The second example arose in the aftermath of the fatal shooting of a Mr. Aidan McAnespie by a British soldier at a border checkpoint in 1988. The effect of the shooting on nationalist opinion in Northern Ireland was such that the government felt it had to be seen to be capable of responding. Accordingly, the Taoiseach issued the following

statement:

> "In view of the very deep and unequivocal public concern the Government directed (emphasis added) the Garda Commissioner to institute an inquiry immediately into the fatal shooting of Mr. McAnespie at Aughnacloy and the circumstances surrounding his death."[34]

The statement also made it clear that the enquiry was to be conducted by Deputy Commissioner (as he then was) Crowley who was instructed by the government to "take statements and obtain information from all persons willing and able to assist."[35] Furthermore, his report was to be submitted to the government who would then decide what to do. This episode portrays the government as effectively usurping the role of chief executive of the force.

The third example portrays the Minister for Justice assuming the role of chief executive of the force. It arose out of the Garda investigation into the IRA kidnapping of a Mr. O'Grady, a dentist and son-in-law of a wealthy doctor and entrepreneur. As the investigation stumbled from one embarrassing bungle to another the opposition in the Dail forced a debate by adjournment of the Dail under standing order 30. The catalyst for this debate was newspaper reports that the government and the Garda may have connived in an attempt to pay ransom money to secure O'Grady's release. In the course of the debate the government, and particularly the Minister for Justice, faced scathing criticism for their handling of the situation. The most significant contribution came from Michael Noonan, a former Minister for Justice, who was

appalled at the Minister's attempts to distance himself publicly from the Garda handling of the situation. He explained that:

> "When an event of this magnitude takes place with all the policy implications, the Minister in effect becomes the chief executive for the weeks that it continues. He is briefed daily and nightly on several occasions. He is asked for decisions and if he cannot decide himself he goes to the security committee of the cabinet or ultimately to the cabinet itself."[36]

Coming from a former Minister for Justice these comments must be accepted as authoritative.

The last example is provided by the Garda nationwide search for arms which commenced in December 1987. The whole episode originated in the capture, by the French navy, of a huge consignment of arms aboard a boat called the Eksund. It was believed that these arms were destined for the IRA. As the result of a follow up intelligence operation the Garda concluded that the Eksund was only one of several shipments of which all, apart from it alone, had been delivered successfully. When this information was presented to the government it responded by requiring the Garda to conduct a nationwide search for the arms. The Minister explained that:

> "[I]n those circumstances there is a most serious obligation on the government to make every effort to establish whether those arms were, in fact, landed, and to find them, if indeed they are here."[37]

Since this nationwide search was an even bigger operation than the search for O'Grady, and entailed very similar policy implications, it is likely that the Minister's input

was akin to that of a chief executive. Indeed, the tone of his statement is consistent with this view.

(c) Conclusion

These four examples reflect the fact that the Commissioner's operational autonomy will be encroached upon by the government or the Minister for Justice from time to time as political need dictates. This may not accord neatly with the legal or constitutional theory governing the respective roles of the Commissioner on the one hand and the government and the Minister for Justice on the other; but it must be an inevitable fact of life in a jurisdiction with a national police force. Since it is the government of the day ultimately that will be called to account politically for the police of the State it is hardly surprising that it should take a keen interest in the operational policies and priorities of the national force. In the case of this State a further pressure militating in this direction is the violent and politically unstable situation prevailing in Northern Ireland. Not only must the Irish government concern itself with the knock-on effect of that situation in this State but, pursuant to the Anglo-Irish Agreement, it is under an obligation to do what it can to protect the interests of the nationalist minority in Northern Ireland and promote peace and security on the island as a whole. Given the fact that the State does not have an anti-subversive force or secret service distinct from the Garda Siochana or the regular Army, it must follow

that the government will lean heavily on the Garda in the discharge of its security responsibilities arising out of the Anglo-Irish Agreement and the situation in Northern Ireland. Indeed, it is worth remarking that the four examples of government involvement in operational matters all arose directly or indirectly from the situation in Northern Ireland.

2. Machinery of Government Control

(a) Introduction

The suggestion that the government does exert an influence on the operational policies and strategies of the Commissioner would be strengthened considerably if there was an obvious mechanism through which this influence could be exerted. The fact that the relevant legislation does not confer a power of direction and control on the government or the Minister for Justice does not mean that a mechanism does not exist. Indeed, it was argued earlier that the Minister's power to make regulations affecting the administration and internal management of the force could be used indirectly to influence the style of policing in this State. The allocation of police to the remit of the department of Justice would also facilitate ministerial influence in this regard. There are, however, two other factors which allow the government to have a much more substantial impact on the policies and practices of the Garda Siochana. These factors are: the government's control over the finances of the force, and the government's power

to appoint and remove the Commissioner. They will be considered now in that order.

(b) Finance

(i) Introduction

Finance is a critical factor which enables the government to exert control over the Garda Commissioner, and therefore the whole force. The annual budget for the Garda Siochana is currently about £400m. Since the Garda has no significant revenue capacity of its own it follows that it must depend on the government for its financing. It is up to the government, with the acquiescence of the Dail, to determine the overall amount of the Garda budget each year. That, in itself, creates ample scope for government involvement in the functioning of the force. It is compounded, however, by the fact that the Commissioner's control over how the annual budget is spent is constantly overshadowed by that of the department of justice. Together these two factors ensure that the role, policies, operational activities and practices of the force are always amenable to government influence. Indeed, it may not be an exaggeration to say that they are used to reduce the Commissioner's formal statutory position of independence in the operational control of his force to that of a mere administrator implementing the operational policies set at departmental and political levels. To understand how this happens an outline of the financial procedure is necessary.

(ii) Outline of Financial Procedures

The financial procedure begins with the Garda Siochana drawing up estimates of their expenditure for the following year. Each Assistant and Deputy Commissioner would submit an estimate for the particular services which come within his responsibility. These all go, in the first instance, to the Commissioner, who finalises an overall estimate and submits it to the Accounting Officer in the department of Justice. For the most part the estimate consists of routine expenditure in the form of salaries, wages, overtime, the maintenance and running of equipment, the purchase of new equipment and sundry items. There will be a separate breakdown for the general police service provided in all Districts. Although the substance of the estimate for each District will be broadly similar there will be a few differences on account of certain specialist equipment or services being available in some Districts and not in others. Furthermore, the estimate will also contain a detailed breakdown of expenditure on general or special programmes. For example, if a community relations programme was running in certain areas the estimate would contain costings for the programme in each area affected. These costings would give figures for salaries, overtime, video equipment, transport etc.. The estimate will also reflect the existence of special units within the force, such as the sub-aqua unit, the Garda Siochana band, the road traffic corps etc.. Separate breakdowns will be provided for these.

The Commissioner's finalised estimate goes, in the first instance, to the Accounting Officer in the department of Justice. He examines it and sends it on to the Minister with his comments. He can be expected to point out and give his opinion on proposals for the financing of new programmes, the purchase of new equipment and any significant disparities from the previous year's estimate. If the Minister is happy with the estimate he will send it to the Minister for Finance for his approval and ultimately on to the government. After securing government approval it will be presented to the Dail. The estimate that is introduced in the Dail, however, is drawn up in accordance with the strictures of the U.K. Treasury Manual, "Government Accounting" and, as such, it is not as detailed as that examined by the Accounting Officer and the Minister for Justice. The document presented to the Dail is broken down into a number of sub-headings. In 1985, for example, the Garda Vote contained the following sub-headings: (1) Salaries, Wages and Allowances; (2) Travelling and Incidental Expenses; (3) Office Machinery and Other Office Supplies; (4) Postal and Telecommunications Services; (4a) Clothing and Accessories; (5) Station Services; (6) Transport; (7) Radio and Other Equipment; (8) Superannuation; (8a) Witnesses Expenses; (9) Appropriations in Aid. Each of these sub-headings are broken down again. Some give further detailed information. The sub-heading for Office Machinery and Other Office Supplies, for example, specifies the purchase, rental and maintenance of:

(a) Computer and Data Preparation Equipment and Related Items: (b) Photocopying Equipment and Requisite Materials: (c) Office Machinery. Others, however, provide no further details at all. Clothing and Accessories, for example, are allocated £1,680,000 but the sub-heading provides no further details on what that is for, even though it apparently includes firearms, ammunition and other weapons. Similarly the sub-heading on Salaries, Wages and Allowances is not broken down any further despite the fact that it eats up the lions share of the budget. Since the financing of general and special programmes and specialist units would straddle a number of these sub-headings, they do not appear as separate items in the formal estimate presented to the Dail.

The Garda estimate is debated in the Dail in conjunction with the estimates for the Prison Service, the Attorney-General's office and the general services of the department of Justice. At the conclusion of the debate separate votes are taken on each. This usually occurs around June or early July in the year to which the expenditure relates. Lawful authority for the financing of the Garda Siochana, and other public services, from the beginning of each year until the vote for that year is taken, is provided by the Central Fund (Permanent Provisions) Act, 1965. It authorizes the Minister for Finance to sanction the issuing of funds in a financial year for services for which funds were appointed in the

preceding year's Appropriation Act. This authorisation is subject to the requirements that the Minister must ask the Dail to grant funds for the service in question in that financial year and he must consider that each issue and each application is necessary. Statutory effect is given to the Garda Vote, and all other Votes, by the annual Appropriation Act. It appropriates to the particular services the sums voted by the Dail in the interval since the previous year's Act. The annual Appropriation Act together with the Central Fund (Permanent Provisions) Act, 1965, therefore, provide the necessary statutory authority to spend the funds voted in the Garda estimate on the Garda services specified in that estimate. However, further formal procedures must be gone through before the funds can be drawn down. These give tight control to the department of Finance. Section 2(4) of the Ministers and Secretaries Act, 1924 provides that the expenses of each Department established under the Act, to such amount as may be sanctioned by the Minister for Finance, shall be paid out of moneys provided by the Oireachtas. Section 1 of the Exchequer and Audit Departments Act, 1921 gives this teeth by stipulating that expenditure not having department of Finance sanction may not be properly chargeable against a Vote. While Finance sanction can be given in either specific or general terms it can also be made subject to conditions where it involves the transfer of funds from one subhead to another or the opening of a new subhead.[38] The normal procedure[39] before any money may be issued

from the Exchequer is for the Minister for Finance to address a written requisition to the Comptroller and Auditor General requiring the latter to issue a credit to the Exchequer Account for a stated sum. On receiving the requisition for credit the Comptroller and Auditor General, in his capacity as Comptroller General of the Exchequer, if satisfied as to its correctness sends a communication to the Central Bank stating that he grants the credit in question. Moneys may not be issued from the Exchequer unless such credit has been given. The Minister for Finance will usually seek credit about two months ahead of requirements. This helps ensure that the necessary cash is available to meet expenditures as they arise.

The expenditure on the Garda service, and all other public services, in the course of each financial year must be accounted for to Dail Eireann. The Accounting Officer for the Garda Vote must prepare the annual Garda accounts. When completed for any single year these will set out the sums voted in the estimate for the respective items, together with the amounts actually expended on those items in the course of that year. In the event of a significant discrepancy between the amount estimated and the amount expended for any one item he will append a brief explanation. He will also include brief notes on losses or special payments. These accounts are sent to the Comptroller and Auditor General for auditing. He audits the accounts for accuracy and regularity and for

identifying and reporting to the Dail on instances where it appears to him that there has been loss, waste or uneconomic expenditure. He has no function in regard to policy but he may examine its implementation in the course of investigating apparent instances of loss, waste or uneconomic expenditure.[40] The audited accounts, together with his report on them are sent to the Public Accounts Committee (PAC) for examination. This may involve the Accounting Officer being called to explain matters arising out of the accounts or the report. Finally, if the PAC is unhappy about some aspect of expenditure it may submit a report to the Dail.

(c) Scope for Government Influence

(i) The Estimate

The complex financial procedures outlined above provide ample scope for government influence in the functioning of the Garda Siochana. Both the estimate procedure and the accounting procedure are significant in this respect. In the case of the estimate the opportunity for influence is unavoidable. This can be seen most clearly in a situation where proposals have emanated from within the force for an innovative programme. If, for example, the Garda wished to initiate a community relations programme which encouraged the formation of local community councils to liaise with the Garda on all aspects of policing in their areas the question of finance would arise. Manpower would be required to work at encouraging

the formation and proper functioning of these councils on an ongoing basis. Unless manpower could be diverted from other tasks, more members or extra overtime would be required to service this programme, in which case provision would have to be made in the Garda estimate. The first occasion for a political decision on this proposed programme would arise when the estimate reached the desk of the Minister for Justice. If the policy behind the programme was at odds with his views on policing, or those of the senior officials in the department, it would hardly get beyond this preliminary stage. It would simply be struck out of the estimate. In practice, such situations are unlikely to arise as the Commissioner will normally be cognisant of the Minister's and the department's views on the proposed programme beforehand. Unless he felt that there was some sympathy for it he would not waste his time arguing for its inclusion in the estimate. Even if the Minister was not opposed on policy grounds to the new programme, there is no guarantee that its inclusion in the estimate would survive his scrutiny. If, as is often the case, he was under pressure to avoid extra expenditure, or even to make cutbacks, in the Garda budget new proposals which involved extra expenditure would be the first casualties.

A wholly different situation arises where the Minister, or the government, wants the Commissioner to adopt a particular policy or proposal. If the Commissioner

resists on the ground that it could not be accommodated within his existing resources the government can force his hand by intimating that the resources would be made available by a supplementary estimate if necessary. A recent example is offered by Minister Burke's announcement of a major crime fighting package costing £20m.[41] This announcement would have been the culmination of discussions between the department and senior Garda officers on how the Garda's response to crime could be improved. It would also involve lobbying within the cabinet by the Minister for the necessary funds to be made available. It may be that the Commissioner's view was that sufficient attention and resources were being devoted to crime fighting, and that if extra funding was available it should be spent on other Garda functions. If, however, he failed to use these resources for the implementation of the government's proposals on crime control, he would be seen either to be negligent in the management of the force or out of step with government policy. Either way he would be under pressure to ensure that the government's strategy is implemented.

The government's financial power can also be used to dictate the direction of individual Garda operations. A classic example occurred in the context of the Garda fight against major crime syndicates. In the eighties the government became increasingly embarrassed at the alleged drug-trafficking and criminal activities of a family which

had captured the attention of the national media. The Taoiseach called a meeting of himself, the Ministers for Justice and Finance, the Commissioner and a few senior ranking Garda officers to discuss what could be done about the situation. The Taoiseach made it known that he wanted the individuals in question subjected to the closest surveillance. On being told that that would require expenditure well in excess of anything the Garda budget could afford the Taoiseach responded that the necessary finance would be made available. While such political direction in operational matters affecting identifiable individuals may not be a regular occurrence, there are frequent examples of Garda operations being encouraged by ministerial promises of unlimited resources.[42] In the aftermath of particularly serious crimes which provoked public outrage, the Minister for Justice would normally give a commitment that no expense would be spared in the hunt for the perpetrators.

The government's control over the budget can also be used in a negative fashion to influence operational matters. This will arise where the government wants the Commissioner to embark upon a particular programme or operation which requires extra expenditure. The government's wishes will be conveyed in the usual format of a request which it expects to be met. Instead of making provision for the extra expenditure in the estimates, a supplementary estimate or through some other device, the

government might leave the Commissioner to meet its request from his existing resources. Since he can hardly afford not to comply with the request, he will be forced to transfer funds from existing programmes and services in order to service the new programme. This is tantamount to the government setting operational priorities for the Commissioner. A classic example can be found in the government's request to the Commissioner to transfer extra manpower to the border areas consequent to the signing of the Anglo-Irish Agreement. This request was motivated not only by a desire to combat the threat of loyalist attacks from Northern Ireland but also to satisfy the government's ongoing security obligations arising from its commitments under the Agreement. Estimates vary as to the numbers involved, but it may be in the region of 1000 men taken from selected districts in various parts of the country.[43] In order to retain the normal level of police services in the districts affected the Commissioner had to resort to excessive use of overtime. The inevitable result was that in the first four months of 1986 two thirds of the overtime allocation for the whole year was used up. Instead of making the necessary finance available the Minister advised the Commissioner to carry out a review of expenditure with a view to keeping within his overtime allocation for the year. The Minister was able to report subsequently that:

> "...the Garda Authorities [had] carried out a review of expenditure and as a result they have effected some changes in such a way as to maintain effective policing in all areas at all

times."[44]

What constitutes "effective" policing in all areas at all times can be a very subjective matter. While allegations that the investigation of serious crimes such as murder came to a halt as a result of the review seem exaggerated,[45] there can be no doubt that it resulted in a cutback in some police services. Judging from the general nature and volume of complaints in the Dail it would seem that the servicing of the beat patrol and juvenile liaison officer programmes was adversely affected in some areas.[46] That is an apt illustration of how government demands on the force coupled with financial stringency can persuade the Commissioner to fix operational priorities to suit the government.

(ii) Expenditure

The Commissioner's freedom to incur expenditure on the Garda is limited from the outset by the terms of the Garda vote. As explained earlier this will be broken up into subheads with specific sums allocated to each subhead. Unless the specific consent of the Minister for Finance is forthcoming money allocated to one subhead cannot be spent on items which fall within the ambit of another subhead. That is so even if there is a corresponding saving and overrun in the two subheads. The cardinal principle is that funds can only be applied to the extent and for the purposes authorised by the Dail. Within each subhead, however, there is scope to move funds around from one item

to another in response to changing priorities. Since the subheads are, for the most part, quite general this ensures a considerable degree of financial freedom. Whoever enjoys control over the expenditure of the force, therefore, is in a position to exert an influence on operational priorities. The degree of influence would be greatest where funds are scarce and demands on the force are escalating. Indeed, in such a situation it could be tantamount to a power to determine the conduct of specific operations. One might expect, therefore, that this power over expenditure would constitute an integral part of the Commissioner's statutory responsibility for the general direction and control of the force. The Dail follows British precedent by adopting the special title of "Accounting Officer" to designate the individual who carries the statutory responsibility for ensuring propriety and regularity in the expenditures of the public body or bodies to which he is attached. The role and identity of the Accounting Officer for the Garda Siochana, therefore, has a critical bearing on the Commissioner's operational independence.

(iii) Accounting Officer

The genesis of this office can be traced back to section 22 of the Exchequer and Audit Departments Act, 1866 which obliged the Treasury, as it was at that time, to appoint an Accounting Officer for every vote.

From the outset it was inherent in the concept of an Accounting Officer that he should be responsible to his

Minister, at least in financial matters, for all the work and organisation of the government department or public body to which he is attached. This responsibility can be broken down as follows:[47] he must:

> "(a) Sign the appropriation, trading and other accounts assigned to him, and in doing so accept personal responsibility for their proper presentation as prescribed in legislation or by the Treasury:
>
> (b) ensure that proper financial procedures are followed... and their accounting records are maintained in a form suited to the requirements of management as well as in the form prescribed for vote accounting purposes;
>
> (c) ensure that public funds for which he is responsible as accounting officer are properly and well managed and safeguarded, with independent and effective checks of cash balances in the hands of any official; similar care, including checks as appropriate, must be taken of stores, equipment or property of any kind held by his department; and
>
> (d) ensure that, in the consideration of policy proposals relating to the expenditure or income for which he is accounting officer, all relevant financial considerations are taken into account, and where necessary brought to the attention of Ministers."

The Accounting Officer's personal responsibility for the proper presentation of the accounts is of critical importance. This imposes on him the obligation to ensure that the funds for which he is responsible are applied only to the extent and for the purposes authorised by the Dail. For the most part this means that any payments made must come within the ambit and amount of the vote, and that Dail approval has been sought and given. In the case of payments which are not covered by prior Dail approval he must ensure that approval is sought and given at the

earliest opportunity. This includes the responsibility to ensure that the sanction of the Minister for Finance is forthcoming for expenditure incurred in any subhead of a vote which is in excess of the amount specified for that subhead in the estimates.[48] In cases involving losses or special payments, he must ensure that the Dail's attention is drawn to the matter by suitable notation of the appropriation account.[49]

In all of these matters the Accounting Officer is acting for his Minister. However, it may happen on occasions that the Minister's wishes conflict with the statutory responsibilities of the Accounting Officer. This would ensue, for example, where the Minister is contemplating a course of action involving expenditure which, in the opinion of the Accounting Officer, would infringe the requirements of propriety or regularity. In such an event the Accounting Officer should set out in writing his objections to the proposed expenditure and the reasons for his objection. If the Minister decides nonetheless to proceed, the Accounting Officer should seek a written instruction to make the payment. Having received such an instruction the Accounting Officer must comply with it, but should then inform the Minister for Finance of what has occurred and should also communicate the papers to the Comptroller and Auditor General. Provided that this procedure has been followed the Public Accounts Committee can be expected to recognise that the Accounting Officer

bears no personal responsibility for the expenditure.[50] This procedure reveals that the Accounting Officer is not answerable solely to his Minister, he is also accountable to the Dail.

It is patently clear that the Accounting Officer's financial responsibilities strike at the very heart and permeate every branch of the department or public body to which he is assigned. His responsibilities are so closely interwoven with the administrative management of his department or body that it would be impossible to maintain a strict separation between them. Since the 1920's it has been accepted that finance is an inseparable element in all policy questions in public administration. Given that efficient management and financial responsibility are so closely interrelated it follows that the financial and administrative responsibility for a single department or body should be concentrated in one person.[51] In the case of a government department administrative responsibility has rested with the permanent head, otherwise known as the Secretary. It has been normal, therefore, for him to be appointed Accounting Officer for his department. In the case of a public body which has its own vote the normal practice is for its chief executive to be appointed Accounting Officer. The chief executive of agencies which are financed from one or more vote subheads will normally be appointed agency Accounting Officer by the relevant departmental Accounting Officer. The latter, however, will

remain in general charge of the department and, in particular, of its organisation, management and staffing, and department-wide procedures in financial and other matters. Within that framework only will the former function as Accounting Officer for his agency. However, in matters affecting their responsibilities as Accounting Officer their judgement should be overridden only by, or with the specific agreement of, the Minister.[52] In the case of grant-aided bodies the senior full-time official carries a similar responsibility to that of a departmental Accounting Officer insofar as expenditure out of the grant in aid is concerned. If the grant in aid is large the senior full time official may be formally designated as Accounting Officer.[53]

Since the Garda Siochana has its own separate vote it must follow that it has an Accounting Officer. The Police Forces Amalgamation Act, 1925 assumes the existence of such an officer but gives no clue as to his identity. The most it says in this regard is that he is:

> "the public officer to whom the duty of preparing the appropriation account in relation to the amalgamated force is for the time being assigned by the Minister."[54]

Given the nature of the Accounting Officer's responsibilities it might seem that the obvious candidate in the case of the Garda Siochana is the Commissioner. Not only is he the head of the force with statutory responsibility for its general direction and control, but the force itself has its own separate vote. Furthermore,

his capacity to discharge fully his statutory responsibility for the general direction and control of the force is heavily dependent on his having the authority of Accounting Officer. As Accounting Officer for the Garda vote he would be able, on his own authority, to move funds around within particular subheads in order to respond to operational situations in a manner which he deems necessary in the exercise of his professional judgement. As events unfold in the course of the financial year, for example, he might consider it expedient to transfer funds earmarked for the community relations programme to help finance a major surveillance operation. So long as the transfer did not inevitably involve transfers from one subhead to another, he could do this on his own authority. Even where he felt that inter- subhead transfers were necessary he would be able to approach the Minister for Finance directly for sanction. Such financial flexibility is a sine qua non of the Commissioner's operational independence in the management of the force.

In practice, however, the Minister for Finance has always appointed the Secretary in the department of Justice as Accounting Officer for the Garda vote. By splitting financial responsibility from managerial responsibility in this manner the Minister is not only flying in the face of established practice in public administration but he is also severely curtailing the capacity of the Commissioner to discharge his statutory responsibility in the general

.direction and control of the force. It also has the effect of subordinating the Commissioner's statutory independence in the operational control of the force to the authority of the department of Justice. The former is left to function in an environment where he knows that every decision he takes incurring expenditure will be subject to the scrutiny and, perhaps, second guessing of the department. If, for example, he wants to buy specially reinforced vehicles to combat joy-riding he will know that this might be queried by the Accounting Officer on the ground that his estimate provided only for the purchase of conventional vehicles. Similarly, if he was considering expenditure on equipment, not specially provided for in his estimates, to capitalise on an upsurge in interest in the community relations programme, one of the factors he will have to take into account is the attitude of the Accounting Officer. Even in relatively mundane matters such as an exceptional purchase of rainproof clothing to mount a large scale search of bogland in mid-Winter for dangerous suspects the Commissioner must look over his shoulder to ensure that the co-operation of the Accounting Officer is forthcoming.

The high point of departmental interference in the Commissioner's managerial autonomy was reached in the late fifties and early sixties when the Secretary/Accounting Officer was Peter Berry. He enjoyed a notable reputation for scrutinising every item of expenditure and disallowing any that did not strictly conform with the estimate. The

story is told of him that on one occasion he vetoed the Commissioner's decision to transfer to the detective branch four members more than had been provided for in the estimate. The only financial implication would have been the payment of four more plain clothes allowances than had been budgeted. This instance more than any other illustrates how critical the role of Accounting Officer can be to the Commissioner's operational freedom and the consequences of denying him that status.

Admittedly the practice since Berry's time has been to interfere as little as possible with the Commissioner's decisions which have financial consequences. That, however, does not detract from the Commissioner's financial subordination to the department. Even though he might not anticipate opposition to expenditures which do not comply exactly with his estimate he will have to play safe each time by seeking out the department's support in advance. Furthermore, where his plans require transferring funds from one subhead to facilitate an overrun under another he will have to depend on the Accounting Officer securing the sanction of the Minister for Finance. The priorities of the professional in the field, however, may not always accord with the policies in the department and so the Accounting Officer might simply disallow the proposal without any recourse to the Minister. Even if the Accounting Officer does take the matter to the Minister the arrangement can result in delay, inflexibility, uncertainty

and even bungling when responding to major operational situations. More generally, it can result in the Commissioner seeing his situation as merely that of a senior administrator who must function within the ambit of policies formulated and imposed higher up in the administration. Ultimately it must detract from his confidence and enthusiasm to formulate and implement innovative initiatives in policing which are not assured of support from the departmental civil servants. This would seem to be at odds with his statutory designation as head of the Garda Siochana with responsibility for the general direction and control of the force.

(iv) Conclusion

Clearly government control over the finances of the Garda Siochana is a key factor in the government's ability to influence, and sometimes dictate, the operational policies and practices of the force. It must not be assumed, however, that the government is relying on its de facto power of control over the Commissioner and the force on every occasion that it intrudes on operational matters. Indeed, it must be said that government participation in operational matters does not always result from an initiative on the part of government. It is just as likely to arise from the Commissioner seeking guidance on how he should respond to an operational situation. If the situation requires a decision on the allocation of significant material resources or a decision with

significant political, security or civil liberties implications the Commissioner will normally clear it first with the Minister for Justice or the security committee of the cabinet. The O'Grady kidnapping or the nationwide search for IRA arms would be examples of such situations; but so also might some more innocuous matters such as the desirability of a new approach to community policing. The extent to which a Commissioner will refer matters up the line for guidance will be affected considerably by the personality of each individual Commissioner. The fact that it happens at all is a reflection of a Commissioner's unwillingness to shoulder ultimate responsibility for the more difficult operational decisions involved. By securing government approval or direction in advance he can avoid personal responsibility or blame if the decisions taken subsequently prove unpopular or misguided. His caution in such matters, however, puts the government in the position of having to take key decisions in some operational matters. This helps to reinforce the perception that the government does participate in the direction and control of the force despite the absence of a statutory power in that regard and despite the currency of the Convention on operational independence.

(d) Power to Appoint and Remove the Commissioner

(i) General

The appointment and removal of the Commissioner is provided for in section 6(2) of the Police Forces

Amalgamation Act, 1925. It stipulates that the Commissioner shall be appointed, and may be removed at any time, by the government.[55] The key feature is that both the powers of appointment and removal are vested exclusively in the government. This automatically puts the government in a position to effect an influence on the policies of the Commissioner. Inevitably, it will appoint an individual whose general views on policing accord most closely with its own. In the early decades of the force there were few obstacles in the path of the government pursuing this approach. Indeed, from 1938 to 1965 the practice was to appoint a civil servant to the office.[56] However, as the force matured and produced competent and experienced candidates from within its own ranks this practice became increasingly difficult to justify. Governments found themselves under intense pressure to fill the highest office in the force from within the ranks. While this has constrained the government's freedom of choice it is unlikely to result in the appointment of a Commissioner who is not in tune with the policing priorities of the government of the day. There are a number of factors which enable the government to make a safe choice.

First, the choice is confined in practice to a small number of very senior officers who have worked their way up the force over many years. Accordingly, the views and records of each of these officers on most aspects of

policing will be well known to the government and its advisors. Second, because these officers occupy the most senior positions in a national force they will inevitably find themselves in regular contact, both socially and professionally, with individual members of the government. Such interaction enables the government personnel to become acquainted with the professional and personal characteristics of each. Not only will they learn about each officer's professional views on policing, but they will also assess how sympathetic each is to the broader political policies favoured by the government. Third, the government is not constrained in its freedom of choice by having to adopt a formal statutory procedure. It was seen earlier that the government also makes appointments to the ranks above inspector. In these appointments, however, it must follow a statutory procedure in which its freedom of choice is constrained by factors over which it has no control. No set procedure applies to the appointment of a Commissioner. The government is free to make its choice withhout regard to any independent input. Fourth, if the government subsequently finds that it has appointed a Commissioner whose policing policies, priorities and practices diverge from its own it can simply remove him and try again.

The power of removal is probably even more potent than the power of appointment in the broad context of government control over the Commissioner. Even if a Commissioner is

minded to refuse a government request concerning an operational matter the threat of removal should be sufficient to persuade him to comply. Just how persuasive it can be will depend first of all on what limitations, if any, there are on the power. The statutory wording suggests that it is absolute; that the Government can remove the Commissioner at any time it feels the need to do so. There is no suggestion of the Commissioner being entitled to a disciplinary hearing or of his threatened removal being the subject of independent arbitration. That, of course, is what one might expect in the case of the head of a national police force which has primary responsibility not only for the civil policing of the State, but also for the protection of the State and the government of the day against internal and external subversion. More often than not the government's desire to remove the Commissioner will be fuelled by disagreements over policing or security policies as opposed to disciplinary transgressions. Since both policing and security strike at the heart of the government's political responsibilities it might seem reasonable to accord the government an absolute power of appointment to, and removal from, the office of Commissioner. The Supreme Court has held, however, that the power of removal is subject to judicial review.

(ii) The Garvey Decision

In Garvey -v- Ireland[57] Commissioner Garvey sought

a declaration that his removal from office by the government, pursuant to section 6(2), was in breach of natural justice and, therefore, unlawful. The facts were that he had been removed from office by the government without notice, without any reasons being given and without having been afforded the opportunity of making representations as to why he should not be removed. The government claimed that by virtue of section 6(2) the Commissioner held his office at the pleasure of the government and that it was fully entitled to remove him in the manner it did. McWilliams J., in the High Court, ruled that the Commissioner was entitled to notice of the government's intention to remove him and was entitled to be given reasons for that removal and the opportunity to make representations. On appeal the Supreme Court, by a four to one majority, upheld McWilliams' decision on these points. The majority judges, however, were by no means unanimous in their reasoning. O'Higgins C.J. found that the Commissioner's office was not an office held at pleasure and, as such, the rules of natural justice applied to his removal. This meant that the government had to act fairly by giving reasons for the removal and affording the Commissioner the opportunity to be heard. Nevertheless, he was careful to emphasise that so long as the government followed fair procedures its power to remove the Commissioner was virtually unreviewable:

> "It seems to me that the government in this regard has the widest possible discretion as to the reasons or grounds upon which it may decide to act. The only qualification must be that the

> reason or ground cannot be one which would be prohibited by the Constitution. Subject to this, the government has the right and the responsibility to decide for what reasons the power to remove the Commissioner of the Garda Siochana should be exercised."[58]

Parke J. agreed with the judgement of the Chief Justice. Henchy J. found that the constitutional right to fair procedures applied even to an office whose incumbent could be removed "at any time". As such, the government was under an obligation to give the Commissioner a reason for his removal and an opportunity to respond. The reason, however, could be general, unless it consisted of specific misconduct in which case the Commissioner must be afforded the opportunity of rebutting the allegations. Like O'Higgins C.J. he, too, emphasised that apart from the procedural restrictions the government enjoyed a sweeping discretion to remove the Commissioner:

> "It must be admitted, however, that the absence from the statute of any express restriction of the government's power to remove a Commissioner from office, at any time, must be held to connote a discretion so wide that it is limited only by what the law as it must now be interpreted in the light of the Constitution deems indispensable; and it must be deemed to be a tacit assumption of the law that it will not require the discretion to be exercised in a manner that will be inimical to the common good."[59]

Griffin J. found that the office was held at pleasure. Nevertheless, in the current state of the law he held that this did not dispense with the need to follow fair procedures when removing an incumbent from it. He also stressed that, subject to this duty to follow fair procedures, the government's discretion to remove the Commissioner was the widest possible:

> "In view of the importance of the Garda Siochana in ensuring the security of the State, and because under section 8 subsection 1 of the Act of 1925, the general direction and control of the force is vested in the Commissioner, it should be stated that it is essential that the government should have the widest possible power to remove a Commissioner from office for reasons that to them seem appropriate....It is for the government alone to decide whether a Commissioner should continue in office and, therefore, the Courts should not interfere, without extremely compelling reasons, with the exercise by the government of their discretion in this behalf."[60]

The dissentient judge, Kenny J., found that the government was under no duty at all to give notice to the Commissioner, nor to give him a reason for his dismissal, nor to afford him the opportunity to make representations. He reached this conclusion on a construction of section 6(2) coupled with five dated Irish decisions on the removal of officeholders which had not been cited to the Court.[61]

The majority judgements in the Supreme Court provide clear authority for the proposition that the government's statutory power to remove the Commissioner from office is subject to judicial review. Having said that, however, it is equally clear that this need not act as an effective curb on the government's freedom in this matter. So long as it gives the Commissioner a valid reason for his removal and affords him the opportunity to make representations the government's decision to remove him will be unreviewable. Furthermore, it would appear that the government need give only a general reason[62] unless the removal is for specific misconduct. If the reason given is not

unconstitutional the government's decision cannot be impugned. Inevitably this leaves the Commissioner's security of tenure very much at the mercy of the government. He must be constantly aware that his failure to comply with the government's wishes in a number of minor matters or, indeed, on a major issue, may result in his removal from office with all that that entails in the way of loss of pension entitlements and loss of face. It is important, however, not to give the impresson that the Commissioner's freedom of decision-making is totally emasculated by the government's power to remove him from office. The other side of the coin is that the government will always be reluctant to exercise this power. Given the very sensitive nature of the Commissioner's office it is inevitable that the sacking of its incumbent would generate intense political scrutiny and publicity. Before exercising the power a government would have to weigh in the balance the political embarrassment and the destabilising effect that the sacking would generate. While this will not afford the Commissioner absolute protection from dismissal, it will at least enable him to assert some degree of independence from government.

(e) Impact on Government Control

(i) Government Requests

Governments are not slow to exercise their leverage over the Commissioner. Their lack of a legal power to issue binding instructions or directives to the Commissioner is

almost fully compensated by their practice of making requests to the Commissioner. The government, like any citizen, can make requests to the Commissioner for police assistance in a particular matter, or to deploy his members in a particular manner, or to adopt certain policies, or to act in one way as opposed to another in an individual case, or simply for information. Unlike the citizen, however, the government, through its power to remove the Commissioner from office, has a very swift and effective means of ensuring compliance with its requests. The impact of this can be seen in the Commissioner's prompt response to requests or queries on operational matters put to him by the government or the Minister for Justice. For example, when formal questions are asked of the Minister for Justice in the Dail, relating to police matters the Minister passes these on to the Commissioner for a response. Almost invariably the Commissioner co-operates by providing not only an answer to the immediate query, but also sufficient background information to enable the Minister to cope with any supplementary questions that may be put. In the three years from 1985-87 the Minister was asked about 230 questions concerning operational matters covering very diverse subjects from the efficiency of the drug squad, to Garda co-operation with the RUC, to the details of individual investigations. The Minister provided answers to all these questions apart from a small number which he declined on the grounds of security, public policy or established practice. It was quite clear from his answers

that he could depend on the full co-operation of the Commissioner in providing him with full information to all questions whether they related to individual investigations or general policy matters. This was also apparent from the Minister's contributions to debates on various aspects of policing during the same period. Whether it was an adjournment debate on joy-riding or armed robberies, a private member's motion on crime and lawlessness, a debate on national security or an annual estimates' debate, it was clear that he relied heavily on a detailed briefing from the Garda Commissioner. In incidents such as the "Evelyn Glenholmes"[63] affair, for example, his contribution was based almost exclusively on the Garda report on the matter, while in the "O'Grady kidnap" affair he prefaced his initial contribution to the Dail with an assurance that he would be getting a complete report on the matter from the Commissioner.

A significant feature of the Minister's ability to depend on the Commissioner's compliance with his requests for information and reports is that there is absolutely no legal obligation on the Commissioner to comply. The Commissioner is under no greater legal obligation to facilitate the Minister in this matter than he is in respect of any community group or citizen who sought the same assistance. Since he is the holder of a statutory office outside the civil service of the government he is not subject to the legal obligation of the civil servant to

obey the directions of his Minister. Even if he had to account to the government for the manner in which Garda funds under his control have been spent, this could hardly embody an obligation to report on the contents of his operational policies or the handling of individual cases as these are matters which are statutorily vested in him and in each member of the force. The Commissioner also differs in this regard from the Board of a typical state-sponsored body. Where such a Board has been established by statute and conferred with specific statutory powers and duties it is almost invariably subject to a statutory duty to supply the Minister with whatever information he seeks from time to time about its operations.[64] A notable omission from the legislation establishing the Garda Siochana and the office of Commissioner is a provision imposing a similar obligation. Indeed, the Commissioner is not even under a statutory obligation to submit an annual report on the activities and development of the force. In the light of this lack of legal obligation the Commissioner's ready compliance with the voluminous ministerial requests for information must be explained by the vulnerability of his position vis-a-vis the government. His refusal to co-operate fully with ministerial requests for the detailed information required to answer the tedious minutiae of written Dail questions or to contribute meaningfully to a Dail debate on crime would court his removal by the government. The power of appointment to and removal from the Commissioner's office clearly compensate for the

absence of a legal power to require the provision of information on any matter within the domain of the Garda.

(ii) Commissioner Loyalty

A revealing feature of the Commissioner's compliance with routine ministerial requests for information is the extent to which they reflect the Commissioner's identification with the government. Nowhere is this more apparent than in ministerial answers to Dail questions which suggest that the Garda are not possessed of sufficient resources in terms of manpower, vehicles or equipment to provide an efficient police service with respect to a particular type of criminal activity or in a particular part of the State or generally. Since it is the government and not the Commissioner that determines the gross financial and manpower resources allocated to the Garda one would expect that the Commissioner would attribute lack of Garda success in particular matters to a shortage of such resources. Indeed, there can be little doubt that in the annual preparation of the Garda estimate he argues strongly in private for more manpower and financial resources to be made available. However, when the Minister asks his opinion on the adequacy of Garda resources for the purpose of responding publicly to a Dail question it would seen that the Commissioner invariably gives the opinion that the Minister wants.

In the years 1985-87, inclusive, there were about 60 Dail questions which directly or impliedly suggested that Garda manpower resources were inadequate in specified parts of the State. Almost invariably the Minister was able to answer that he was "informed by the Garda Authorities" that Garda manpower was adequate having regard to the policing needs of the area in question.[65] A similar government response prevailed during this period in the several Dail and Seanad debates which highlighted public concern over the apparent inability of the Garda to cope with serious problems of drug trafficking, joy-riding, attacks on the elderly, armed robbery, and general crime and vandalism.[66] The Commissioner could have taken advantage of these opportunities by going public about insufficient manpower and resources to cope with all the demands being made on the force. Instead, he adopted a policy of absolute loyalty to the Minister and the government by publicly advising the Minister that resources were adequate. Even when the burden on the Garda was increased, with no commensurate increase in resources, by the need to fulfil the government's security obligations under the Anglo-Irish Agreement the Commissioner refused to disappoint the Minister by responding that resources were inadequate. In contrast, many community groupings, public representatives, Garda representative bodies and even some District and Divisional Garda officers were complaining publicly that the force was not adequately resourced to provide the public service that was expected of it. The

Commissioner, however, continued to toe the ministerial line. The irony of this situation was that by supporting the ministerial claims that resources were adequate he was implying that shortcomings in the Garda service were ultimately attributable to him. The fact that he maintained this approach during a period when serious public concern over Garda performance was being expressed is testimony of the strength of his loyalty to the Minister. Indeed, it conveys how closely the Commissioner of the day identifies with the government. In that respect he can be contrasted with other independent, public officeholders such as the Ombudsman or the chairmen of the Garda Siochana Complaints Board and the Legal Aid Board respectively. When the fulfilment of their statutory or public obligations were jeopardised by government financial stringency they did not shrink from going public on the matter even though it caused acute political embarrassment to the government. The Commissioner, by contrast, behaves much more like the Secretary of a government department who sees it as his duty to give unswerving loyalty to the government of the day. Such behaviour on the part of the Commissioner, however, has nothing to do with any legal obligation on his part. It can be attributed to the fact that the office of Commissioner is so politically sensitive that its holder would find his position untenable if he did not feel able to oblige the government of the day in such matters. Ultimately the government may feel that the poltical embarrassment caused by a Commissioner who could not

present a public face in support of its policies would outweigh the embarrassment associated with the removal of that Commissioner from office.

(f) Conclusion

The contents of chapters 5 and 6 taken together pose a major challenge for the design of coherent and effective accountability structures for the force. Chapter5, in particular, reveals that the force cannot be viewed simply as a government department, a branch of a government department or even as a traditional state-sponsored body in a quasi-autonomous relationship with a government department. Instead the force must be understood partly as a body of officeholders each vested with a wide range of powers to exercise independently on their own initiative; and partly as a highly organised, trained and disciplined body vested with immense powers and resources and deployed under the direction and control of an independent officeholder. When a member exercises his powers in any individual case he is accountable first and foremost to the law. It follows that the general law of the land functions as one of the primary sources of accountability for the police. When the force acts as a collective body, however, the focus of accountability is moved. For example, when individual members are engaged in policing duties consequent on directions or policies issued on the authority of the Commissioner they will not necessarily be exercising their common law or statutory powers. It is

unlikely, therefore, that accountability to the law would have much relevance for their acts or omissions or for the directions or policies of the Commissioner.These are matters which are within the lawful discretion of each member or the Commissioner, as the case may be.

It does not follow that there is no accountability for the exercise of police discretion. In special,circumstances there will, of course, be the possibility of a judicial review. For the most part, however, the focus of accountability will swing to the democratic process. Since the members of the force and the Commissioner are public officeholders appointed and resourced by the State for the purpose of delivering a police service to the State it follows that they must be accountable to the public, through the normal democratic process, for the manner in which they deliver that police service. Give our structures of police and government that means that the force will answer to the democratically elected representatives of the people through the Minister for Justice and the government. In chapter 5, however, it was established that the peculiar status of the Garda Siochana was such that the individual members of the force and the Commissioner enjoyed a certain degree of autonomy from outside interference in operational police matters. The members were answerable only to the law when exercising the powers of their office, while the Commissioner was answerable only to the law when exercising his power of direction and control in operational matters.

Clearlt, this situation undermines the potential of the democratic process to deliver effective police accountability and, at the same time, it imposes an immense burden on the law to deliver the goods.

To complicate matters further chapter 6 reveals that the de facto relationship between the government and the police does not always comply with the de iure model. The government clearly exerts a much greayer operational input into the policies and practices of the force than is envisaged by the strict constitutional theory. This raises the question whether the accountability structures have been designed, and are operating, in a manner which can accommodate both the constitutional theory and the practical reality. Chapters 7 and 10 pursues this question for the legal and the democratic processes respectively, and finds both wanting. Chapters 8, 9 and 11 examines how the shortcomings might be tackled most profitably with a view to enhancing police accountability to the public.

Ch.6 GOVERNMENT CONTROL OF GARDA OPERATIONS

1. Seanad Debates 1985: 107, 1152.
2. Dail Debates 378: 1752-62.
3. Ibid. 369: 2557-8.
4. Ibid. 357: 1432-3.
5. Ibid. 357: 1433.
6. Ibid. 357: 2594-5.
7. Ibid. 361: 2533.
8. Ibid. 361: 3107-8.
9. Ibid. 362: 305-9.
10. Ibid. 362: 337-40.
11. Ibid. 362: 1678.
12. Ibid. 363: 875-886.
13. Ibid. 365: 1269-73.
14. Ibid. 369: 1236-7.
15. Ibid. 357: 116-234.
16. Ibid. 359: 591 et. seq.; 368; 373: 1788 et. seq.
17. Ibid. 362: 2578 et seq.; 366: 739 et. seq.; 368: 1827 et. seq.
18. Ibid. 369: 593-4.
19. Ibid. 369: 2771-2.
20. Ibid. 374: 2048.
21. Ibid. 373: 2985.
22. Ibid. 356: 2006.
23. Ibid. 358: 2537-47, see also 357: 2595-6.
24. Ibid. 355: 1577.
25. Ibid. 359: 104-106.
26. Ibid. 357: 1432-3.

27. Ibid. 355: 965.

28. Ibid. 365: 1269-73.

29. Ibid. 357: 2594-5.

30. An unusual example was reported recently in the Irish Times (31.8.91) to the effect that the Minister for Justice had called a meeting in his office with a Chief Superintendent from the Dun Laoghaire district. During the meeting the Minister let it be known to the Chief Superintendent that he was not happy with the crime situation in Dun Laoghaire, and that he wished to see a distinct improvement. The Chief Superintendent's Association subsequently lodged a complaint with the Minister to the effect that the Minister's concern should have been communicated directly at Commissioner level only; as was the normal practice.

31. Ibid. 362: 2589.

32. Ibid. 393: 2047-56.

33. Ibid. 359: 89-93.

34. Ibid. 378: 1220-62.

35. Ibid.

36. Ibid. 373: 228.

37. Ibid. 376: 1473-80.

38. An Outline of Irish Financial Procedure (Dublin: Government Publications) at paras, 3(c) and 6(c).

39. Ibid. para. 4(b).

40. Ibid. 4(c).

41. Dail Debates 393: 2047-56.

42. See, for example, Dail Debates at: 378: 1760-2; 375: 247.

43. Dail Debates 365: 276-86.

44. Ibid. 368: 1648-52.

45. See the debate on the estimates in vol. 368 and the debate on Garda overtime in the same volume.

46. See, for example, Dail Debates 368: 1843-44.

47. Government Accounting 11/1989 at 6.1.5.5.

48. Ibid. 6.1.5.8.

49. Ibid. 6.1.5.7.

50. Ibid. 6.1.5.10.

51. Ibid. 6.1.2.

52. Ibid. 6.1.5.19.

53. Ibid. 6.1.5.21-22.

54. S.21(4).

55. While the subsection is not unequivocal on the point, the legislative intention would appear to be that the government is actually under a duty to appoint a Commissioner when the office becomes vacant from time to time. The power of removal, however, is expressed in terms which suggest that it may be exercised peremptorily and unconditionally.

56. C. Brady Guardians of the Peace (Dublin: Gill and Macmillan, 1974) at pp. 226 and 240.

57. [1981] IR 77.

58. Ibid. at p. 97.

59. Ibid. at p. 102.

60. Ibid at p. 109.

61. Darley v. The Queen (1846) 12 CL & F 520; R (Fitzmaurice) v. Neligan (1884) 14 LR IR 149; R (Riall) v. Bayly [1898] 2 IR 335; R (Jacob) v. Blaney [1901] 2 IR 93; R (McMurrow) v. Fitzpatrick [1918] 2 IR 103.

62. Examples cited include: ill-health; to improve the efficiency of the force; because the Commissioner has lost the confidence of the government; it would be in the interests of the force for a younger man to be appointed; in the prevailing circumstances the Commissioner was unsuitable for office; the incapacity of the Commissioner.

63. The Evelyn Glenholmes case arose out of the unsuccessful attempt to secure an extradition order against a woman of the same name in Dublin District Court. After complaining that she could not leave the court by the main door because gardai were blocking the entrance she was given permission to leave by the District Justices door. As she and her supporters made their way through crowded streets gardai attempted to keep them under surveillance. One officer, who claimed subsequently that he believed his life was in danger or at least that he was going to be disarmed, fired shots over the heads of the people in the street.

64. Examples of other State sponsored bodies which are under a statutory duty to supply information include: Amalgamated Railway Companies, Railways Act, 1924 s.

69; Prison Visiting Committee, Prison (Visiting Committees) Act, 1925 s.3(1)(d); Electricity Supply Board, Electricity (Supply) Act, 1927 s.32(2); Industrial Credit Co., Industrial Credit Act, 1933 s.11(3); Pigs Marketing Board, Pigs and Bacon Act, 1935 s. 137(3); Aer Lingus, Air Navigation and Transport Act, 1936 s.81(5); Racing Board, Racing Board and Racecourses Act, 1945 s. 19(4); CIE, Transport Act, 1950 s.16; Fogra Failte, Tourist Traffic Act, 1952 1st sched. para. 14; An Foras Tionscal, Undeveloped Areas Act, 1952 1st sched. para. 12; Great Northern Railways Board, Great Northern Railways Act, 1953 s. 19(3); Bord na gCon, Greyhound Industry Act, 1958 s. 19(5); An Bord Bainne, Dairy Produce Marketing Act, 1961 s. 47; Bord na gCapall, Horse Industry Act, 1970 s. 19(2); National Agricultural Advisory Board, Education and Research Authority Act, 1977 s.21; Director of Consumer Affairs and Fair Trading, Consumer Information Act, 1978 s. 19(2)(b); Central and Regional Fisheries Boards, Fisheries Act, 1980 s. 19(3); An Post, Postal and Telecommunications Services Act, 1983 s. 33; National Social Services Board, National Social Services Board Act, 1984 s. 12(2); Industrial Development Authority, Industrial Development Act, 1986 1st sched. para 8; Independent Radio and Television Commission, Radio and Television Act, 1988 1st sched. para. 17(3); Official Censor of Films, Video Recordings Act, 1989 s. 29(2);

Central Bank, Central Bank Act, 1989 s. 20(2).

65. Some examples from 1986 alone can be found in the Dail Debates at: 363: 501-2, 364: 384-5, 639-40, 2193-4, 365: 598-9, 1255, 1282-3, 366: 2130-1, 2138-40, 2146, 2147-9, 367: 1856-7, 368: 1646-8, 1758, 369: 593-4, 833, 2801, 2810-11; 370: 1208.

66. See, for example, Dail Debates at: 366: 752-765; 368: 1823-36, 2118-27; 357: 183-190. See also, Seanad Debates at 107: 1119-54.

primarily statute law, has enabled the public administration to play a decisive role in many diverse aspects of the social and economic lives of each person both as an individual and as a member of a clearly defined group or class or as a member of society as a whole.[13] At the same time law, primarily common law, has sought to deliver its traditional role in protecting the individual against the wrongful exercise of power and authority by the administration.[14] Not surprisingly, however, the fundamental shift in the nature of the statutory power and resources at the disposal of the administration throughout this century has had an adverse impact on the capacity of the rule of law to deliver on the task mapped out for it by Dicey. This will be reflected specifically in the context of police in the following analysis of the capacity of the law to render the Garda Siochana, and individual members of the force, accountable to individual members of the public and the public as a whole.

T O R T

1. The Action in Tort

The law of torts provides a remedy in damages and, indeed, the possibility of an injunction for the citizen who has been the victim of the unlawful act or omission of another.[15] To succeed the plaintiff will have to establish that he has suffered, is suffering, or is about to suffer, harm as a result of the tortious act of the defendant. In Ireland, trespass to the person or

property,[16] assault and battery,[17] negligence[18] and defamation[19] are the main torts recognised at common law,[20] while the body of statutory torts is growing steadily.[21] In addition, the courts are manifesting a willingness to accept breach of the constitutional rights of the individual as tortious thereby developing a body of constitutional torts.[22]

A remedy in tort is secured through a standard civil action. The exact details of the procedure will differ slightly depending on which court has jurisdiction in the matter. Broadly speaking, if the successful plaintiff is awarded damages not exceeding £5,000 the appropriate forum is the District Court.[23] In the case of damages exceeding £5,000, but not exceeding £30,000, the appropriate forum is the Circuit Court.[24] For damages in excess of £30,000 and/or where an injunction is being sought, the appropriate forum is the High Court.[25] Common to all three Courts, however, is the standard accusatorial and adverserial procedure. This entails that an individual who feels he has been wronged by another is not only free to commence an action in tort against that other, but also that he must carry the full expense and effort involved in assembling and presenting his case. He cannot rely on the State, or any agency of the State, to do it for him. While there are procedures such as discovery and interrogatories,[26] which enable one side to use the authority of the Court to compel the other to produce

relevant documents or admit relevant facts, the primary burden of assembling his claim or defence rests with the individual litigant. The judge's role is confined to ensuring that proper procedures are followed and that the law is applied.

Up until recently in actions for damages in the High Court the judge was assisted by a jury which decided all questions of fact, including the outcome of each case.[27] Now, however, juries have been abolished in most High Court actions for damages,[28] thereby making the judge the arbiter of both law and fact; which is the position that prevails in both the Circuit and District Courts. A significant feature of this function is the assessment of damages to be awarded to a successful litigant. For the most part this is a mere matter of compensation; that is, making an award of damages which will restore the plaintiff, insofar as that is possible, to the position he was in immediately prior to his injury.[29] However, it is open to the judge to make a punitive award of damages.[30] This is possible only in very limited circumstances; primarily where the defendant deliberately inflicted the wrong with a view to making a profit which would be larger than a compensatory award against him. At the other end of the scale, it is also open to the judge to award token damages to the plaintiff.[31] This is most likely to happen where the plaintiff's decision to pursue the claim was vexatious. An award of token damages is acutely

significant in the context of the order for costs. The order for costs has always been a matter for the judge who normally awards costs to the successful party. He has a discretion, however, to award costs to the unsuccessful defendant, or to make no order for costs in which case each party must bear his own.[32] When either of the last two situations is combined with an award of token damages it can have a penal effect on the successful plaintiff. Now that the assessment of damages and the order for costs are both in the hands of the judge they can be used much more effectively to deprive a successful plaintiff of the fruits of his victory and even to leave him at a loss for having embarked on the action in the first place.

2. Police Accountability Potential

The action in tort constitutes a fundamental pillar in the framework of police accountability structures.[33] In conjunction with the criminal action it can play a critical role in subjecting the police to the rule of law on the same terms as ordinary citizens. Individuals who claim that they have been punched or kicked or otherwise physically injured by the police, unlawfully arrested or detained, subjected to excessive force in the course of a lawful arrest or the victim of an unlawful entry, search or seizure can look to the law of tort for a remedy. Indeed, in many situations the victim will be able to seek a remedy through tort and the criminal process in respect of the same incident. Generally speaking, however, the former has

the capacity to offer a remedy in a much wider range of police illegality than the latter. This can be explained partly by the requirement of mens rea for most criminal offences against the person.[34] If, for example, a garda shoots dead a suspect in circumstances where he believes honestly, but mistakenly, that a suspect is armed and posing a real and immediate threat to the life of others the garda will not have the mens rea for criminal homicide.[35] If his mistake was negligent, however, he may be sued successfully in tort. The standard of proof is another factor which tends to favour the tort as opposed to the criminal option. In the example above it would be necessary to establish beyond a reasonable doubt that the garda's mistake was grossly negligent bordering on recklessness before criminal liability would attach.[36] Civil liability would attach merely if it could be established on a balance of probabilities[37] that his mistake was negligent.

The initial contribution that the tort action can make to police accountability is emphasised by other aspects of the criminal process. As explained earler, the criminal action is not designed primarily to serve the private interests of the individual victim of police illegality. On the contrary, its major concern is to satisfy the general public interest in ensuring that all citizens, including members of the Garda Siochana, abide by the dictates of the criminal law. Decisions taken in the

course of a criminal case, therefore, are determined by the requirements of the public interest. To the extent that they may also meet the private interests of the victim in any individual case it is more a matter of accident than design. The tort action, on the other hand, is characterised by its concern for the private interests of the individual. It offers the victim of police misconduct the opportunity to call the police to account to him personally for their conduct and to secure a remedy which is related to his personal circumstances. This contrast between the two actions is highlighted in their respective procedures. In the criminal process, for example, a citizen's complaint against the police is almost invariably controlled by the police themselves; with the citizen being relegated to the role of a mere witness to be interviewed. Even the decision whether or not to prosecute is usually taken by the police while, in serious cases, it is taken by an independent State agency which has a close working relationship with the police. In the civil process, however, the decision to initiate an investigation into a grievance, the conduct of that investigation, the decision to institute proceedings and the conduct of the proceedings are all within the discretion of the victim; subject, of course, to the law and court procedure. Furthermore, in a successful civil action the remedy awarded will be personal to the victim and will reflect the harm inflicted on him by the unlawful conduct. In a successful criminal action, on the other hand, the penalty imposed will be for the benefit

of the State and may reflect a range of concerns, only one of which is the degree of harm inflicted on the victim.[38]

The tort action is clearly of critical importance to the citizen who wishes to call the police to account to him personally for how they have treated him. Since it is open to any individual to pursue a tort action for this purpose, it follows that it must have the capacity to make a major contribution towards a democratic society's collective need for effective police accountability. Caleb Foote, writing almost forty years ago, explained it thus:

> "By placing the initiative for enforcement in the hands of injured persons who are offered a selfish motive for prosecuting the actions, it is possible to by-pass the insoluble problem of how to make a police force police itself."[39]

Before this can become a reality, however, individual victims of police illegality would have to be convinced: (1) that they have a remedy in tort; (2) that they will be able to enforce that remedy; and (3) that it will be worth the effort. Referring to the U.S.A. of the 1950's Foote lamented that various factors were inhibiting the tort action from achieving anything near its full potential for police accountability.[40] Unquestionably, there has been a marked improvement since Foote's time not only in the U.S.A. but also in Britain and Ireland. In Britain current statistics suggest that in appropriate cases complainants are opting for, and having more success with, the civil action.[41] In Ireland, too, it is apparent that civil actions against the Garda are much more frequent than they

were even ten years ago. Whether this is due primarily to greater public awareness of the availability of the tort remedy, greater public willingness to resort to it, or merely a higher level of police misconduct is impossible to say. What can be said, however, is that the tort action in Ireland suffers from a number of defects which will prevent it from reaching its full potential to serve both the citizen's and the State's police accountability requirements. Until these defects, which will be considered now, are remedied the availability of the tort action will give merely the appearance of police accountability to the law, but not the substance.

3. Scope of the Tort Remedy

(a) Generally

The tort action can provide a remedy for police misconduct which comes within any one of the traditional tort headings. This should be sufficient to cover the most typical cases such as: unlawful arrest, assault and unlawful killing. A broader range of situations would be covered by Garda action which amounts to a breach of the constitutional obligations owed to the citizen by the State. In the Byrne case Walsh J. made it clear that:

> "Several provisions of the Constitution of the Irish Free State imposed obligations upon the State and conferred rights on the citizens as against the State and a breach of these, or a failure to honour them, on the part of the State would clearly have been a wrong or a breach of obligation: it is of no consequence that the wrong or breach might not be within the recognised field of wrongs in the law of tort."[42](emphasis added)

Even allowing for the possibility that the garda is not acting as an agent of the State when functionning in his common law capacity this passage surely enhances the citizen's remedy for police misconduct. For example, if a garda, purporting to act under statutory authority, unlawfully seizes property belonging to the plaintiff, the plaintiff should be able to sue under Byrne for the return of the property and/or damages. It is also worth pointing out that even if a garda is acting in a common law capacity when infringing the constitutional rights of a citizen, the citizen will still have a cause of action against him personally. It is no longer necessary to bring the action under one of the traditional tort headings.

Despite the very wide scope of the tort action, and its close relations, there are a variety of situations in which the police can treat individuals oppressively without exposing themselves to civil liability. For example, if they honestly suspect an individual of engaging in serious crime it would appear that they can subject him to a level of surveillance which involves openly following him everywhere he goes in public.[43] Equally, it would appear that they can deploy a disproportionate amount of resources to policing him personally to the extent that every minor violation he commits in the course of a day is detected and prosecuted. Such an individual, although clearly the victim of oppressive police practices, would have no cause of action in tort or under Byrne unless he could show that

he was being victimised for reasons that were unconstitutional. The tort action also fails to cope with more minor sources of irritation such as a garda flaunting his authority or taking advantage of his position to behave in a condescending manner to members of the public, or unnecessarily putting members of the public to inconvenience.

(b) Negligent Exercise of Discretion

Dicey's formulation of the rule of law suggests that an individual who has suffered from the tortious acts or omissions of a public authority will be able to secure redress at law on the same grounds and through the same procedure that would be applicable if the tortfeasor was a private person. As a general proposition that holds true for the police as much as any other public authority. Each individual member of the force is a public officer vested with a wide range of discretionary powers and duties. If an individual officer exercises these powers or discharges these duties in a tortious manner he will be exposed to an action in tort at the suit of an injured plaintiff. In recent years, however, the suitability of the private law action as a means to call public authorities to account has been called into question. This is particularly evident when the genus of the action is the manner in which the body has exercised or failed to exercise a statutory power or the manner in which it has failed to discharge a statutory duty.[44] The fact is that many of the powers

conferred on public authorities are intended to be exercised in order to secure certain policy objectives which are deemed to be in the interests of the public as a whole. Inevitably, there will be winners and losers in this process. That in itself does not give the losers a cause of action so long as the powers are used in the manner, and for the purpose, intended by parliament. The difficulty, however, arises where such powers are used negligently to the detriment of an individual. Should the individual succeed in a private law action for damages based on the tort of negligence in such circumstances? Acceding to such a claim runs the risk that the public authority will respond by exercising the power in an over cautious manner thereby frustrating much of the benefit that parliament had intended by conferring the power in the first place. Refusing the claim implies that a public authority may not always be subject to the law in the same manner as any private citizen. Recent case law developments in both Britain and Ireland have tacitly accepted that public authorities and private citizens may not always be equal in the eyes of the law.

The issue has been litigated in the context of the negligent exercise of a discretionary public power. In Britain Lord Wilberforce, delivering the principal judgement in the landmark decision of the House of Lords in Anns v Merton London Borough Council[45], applied a two stage test for determining liability. First, the

relationship between the public body and the aggrieved party would have to satisfy the standard "neighbour" principle. If such a relationship existed then it would be necessary to consider whether there are any factors which might negative or limit the scope of the duty. One such factor would be that the body in question is a public body whose powers and duties were definable in terms of public as opposed to private law. Such bodies are often vested with broad discretionary powers intended to be exercised for the benefit of society as a whole or indeterminate classes of persons. In deciding whether or not such a body would owe a duty of care to specific individuals when exercising such powers a distinction would have to be drawn between policy decisions and operational decisions (i.e. decisions taken in the execution of a policy which had already been taken). The more operational a decision the easier it would be to find the existence of a duty of care. Conversely, the more policy oriented a decision the more difficult it would be to find a duty of care. Clearly the distinction between the two is one of degree. Indeed, Lord Wilberforce explained that even a primarily operational decision taken in circumstances which do give rise to a duty of care may involve an element of policy or discretion. When it does an aggrieved party would have to show not only that the duty of care was broken but also that the discretion was exercised unreasonably. Unfortunately this perplexed area of law has been thrown into further confusion by the fact that Lord Wilberforce's

approach has not enjoyed universal support in the English courts.[46] Lord Keith, in particular, has been to the forefront in advocating an alternative approach.[47] This is based on the familiar notion of foreseeability of harm plus the existence of a relationship between the parties which is sufficiently close and direct to give rise to a duty of care.[48] Although this test clearly differs in its formulation from that prescribed in Anns it does not detract from the fact that it will be more difficult in practice to assert a duty of care against a body exercising discretionary power for public purposes than it would be to assert a similar duty against someone acting in a private capacity. The difficulty arises from the fact that such bodies will usually be exercising their discretionary powers for the benefit of the public as a whole. Accordingly, in order for the victim of a negligent exercise of discretionary power to succeed in an action for damages he will have to establish that there was a sufficiently close and direct relationship between him and the body. The mere fact that he was a member of the public who might be affected by the exercise of the discretionary power would not be sufficient.

Unfortunately, the state of the relevant law in Ireland is just as perplexed as its counterpart in Britain. The High Court and Supreme Court judgements in Ward v Mc Master[49] provide the most comprehensive discussion of the relevant issues to be found in the Irish cases. In the High

Court Costello J. reviewed the relevant English and Irish authorities and concluded that liability could arise where a relationship of proximity between the parties was such that in the reasonable contemplation of the public authority carelessness on its part might cause loss. However, in deciding whether such a relationship existed all the circumstances of the case would have to be considered including: the content of the statutory provisions, the purpose for which they were conferred and whether or not the plaintiff was in the class of persons which the statute was designed to assist. Finally, the court would have to decide whether it was just and reasonable that a duty of care should exist in the circumstances. In the Supreme Court Mc Carthy J. referred with approval to the two stage test advocated by Lord Wilberforce in Anns. However, he also expressed a preference for a test based on proximity, foreseeability and the absence of any compelling exemption based on public policy. In reaching a conclusion on the facts he appeared to proceed on the basis that the plaintiffs came within a defined category of persons who were intended to benefit from the public authority's exercise of the power in question. The plaintiff's action in seeking the benefit of the power established a sufficient degree of proximity between the parties to create a private duty of care. Irrespective of which of these approaches represent the correct test for the liability of public authorities for the exercise of their statutory powers, the fact remains

that there will always be scope for such an authority to act negligently in the exercise of its powers to the detriment of individuals in circumstances which do not give rise to a duty of care.

A useful example in this context is the Supreme Court decision delivered again by Mc Carthy J. in Sunderland v Louth County Council[50] less than one year after Ward v Mc Master. In this case the plaintiffs failed in their action for damages based on the council's alleged negligent exercise of its statutory powers under the planning code. Mc Carthy J. distinguished the public powers under the planning code from those under the housing legislation. The former were part of a regulatory code designed to facilitate proper planning and development for the benefit of the public as a whole. The housing legislation, by contrast, was designed to confer social benefits on those who could not provide for themselves. Accordingly, it was much more difficult for an individual to establish a relationship of sufficient proximity to give rise to a duty of care on the part of the public authority when acting under the planning code than it would be when acting under the housing legislation.

An application of these principles in the specific context of police is offered by Hill v Chief Constable of West Yorkshire.[51] In that case the English House of Lords had to decide whether an action in tort for damages would

lie against the chief constable for West Yorkshire for the failure of his force to apprehend the "Yorkshire Ripper". The "Ripper" had committed 13 murders and 8 attempted murders of young or fairly young women. The mother of the last victim argued that the Ripper's modus operandi and the characteristics of his victims were such that it was reasonably foreseeable that if he was not apprehended individuals such as his last victim would be at risk of death or serious personal injury. Lord Keith delivering the principal judgement in the House of Lords explained that the reasonable foreseeability of likely harm was not sufficient in itself to give rise to a duty of care. It was also necessary to establish proximity of relationship between the victim of crime and the police. Since the police duty to suppress crime was owed to the public at large proximity could only be established if there were special characteristics or ingredients present which would mark out the victim as being specially at risk over and above the general class of people who might be affected.[52]

The Hill case also raised another factor which has most relevance for the liability of public bodies in negligence; namely public policy. Although the issue was not necessary for a decision in the case Lord Keith explained that liability can be curtailed in the interests of public policy. If, for example, operational police decisions taken in the course of a criminal investigation could be re-

opened and reviewed for their competence in an action for damages, it could lead to an undesirable defensiveness in police investigations and excessive police time and resources being applied to the ex post facto defence of decisions taken in the heat of the investigation. It would not be in the public interest for scarce police time and resources to be diverted in this fashion. Accordingly, public policy would be against exposing the police to liability for injury suffered by individual members of the public as a result of the negligent failure of the police to apprehend an offender.

The U.S. Approach

The restrictive approach of the House of Lords is echoed in American jurisprudence. U.S. courts have demonstrated a similar reluctance to extend the tort action in negligence in this context.[53] They base their approach on the familiar notion that a law enforcement officer's duty to protect citizens is a general duty owed to the public as a whole.[54] Accordingly, it is very difficult to establish that the police owed a duty to protect an identifiable individual, or group of individuals, from harm caused by a third party. Those cases in which it has been established successfully are confined to situations where the plaintiff has been injured as a result of abetting the police,[55] and where the police have given express promises of protection to the individuals in question.[56] In both situations the courts

adhered to the principle that the police decision on how or whether to act in any particular case is a matter for the discretion of the police and cannot be the subject of an action in negligence. In the former cases the courts explained their decisions on the premise that the police had already exercised their discretion by accepting the individuals assistance. This affirmative action gave rise to a police duty to afford reasonable protection to the individual in question. In the latter cases the courts also concluded that the police had exercised their discretion; this time by promising protection to specific individuals. The police failure to deliver on this promise, therefore, did not involve the exercise of a discretion. It could, however, constitute the failure to perform a ministerial act, or the negligent performance of such an act. By contrast, the courts have refused to find a duty of care relationship where the police have neither jeopardised the plaintiff through their affirmative acts, nor promised him protection.[57] This refusal has held even in cases where the police were aware of a danger to a specific individual.[58] It would appear, therefore, that the tort action in damages has not proved an effective remedy for a citizen who has suffered injury as a result of police inaction.[59]

The significance of these cases in the context of police accountability lies in the fact that perceived police inaction with respect to criminal activity in

certain districts or the investigation and prosectuion of certain offences generally is a regular target for public criticism. The fact that police resources are limited means that discretion must be exercised in the allocation of these resources to particular offences and to particular districts. Inevitably, individuals and interest groups will feel and complain from time to time that insufficient attention, or too much attention, is paid to their situation. So far, however, the tort action has not been used successfully to seek redress for such greivances in either Britain or Ireland; even where the failure to provide sufficient resources may have been negligent.

4. A Financially Sound Defendant

(a) The Problem

A plaintiff who succeeds in a tort action for damages against an impecunious defendant may find that he has won the battle but lost the war. Not only will he not succeed in recovering compensation for the harm done but, in all liklihood, he will find that he is financially worse off than he would have been if he had not bothered to sue at all. This will be the case if the defendant's assets are not sufficient to cover the plaintiff's costs. Not surprisingly, therefore, one of the key factors an injured party will take into account before resorting to his remedy in tort is the availabilty of a financially sound defendant. This has particular relevance for a citizen who has suffered harm from police illegality in circumstances

which give him a cause of action against the police. In the vast majority of these cases the tortfeasor will be a low-ranking member of the force for the very practical reason that the more senior officers function mostly in a supervisory role which removes them from the sort of contact with the public that is conducive to tort actions. It is the low-ranking members, however, who are most likely to be impecunious defendants. If the tort action is to fulfil its police accountability potential, therefore, plaintiffs will have to find a financially sound defendant who will be vicariously liable for the tortious actions of rank and file police officers.

(b) Vicarious Liability

Vicarious liability will arise where a contractual relationship exists in a master-servant context.[60] Traditionally, the hallmark of such a contract was the master's right to control not only what the servant did but also how he did it. In the words of Bramwell B. in R v. Walker:

> "...it seems to me that the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."[61]

Where this aspect of control was equivocal the courts would look at a small number of other factors to determine whether or not a contract of service was present. These other factors were stated by Lord Thankerton in Short v. J. and W. Henderson Ltd. to be:

> "(a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; ....and (d) the master's right of suspension and dismissal."[62]

The application of this traditional test to the Garda Siochana is complicated by the fact that each member of the force exercises his powers and performs his duties by virtue of his status as the holder of a public office. The special problem posed by public officeholders was adverted to as far back as 1864 in Tobin v. R where Erle C.J. said:

> "When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."[63]

In the case of the constable, the problem was confronted head-on in Fisher v. Oldham Corporation.[64] In that case the plaintiff had been unlawfully detained by members of the Oldham police force. He sued the Oldham Corporation, as employers of the individual police officers involved, for unlawful imprisonment. The action failed because McCardie J. found that in effecting the arrest and detention of the plaintiff the constables were fulfilling their duties as public servants and officers of the Crown and, accordingly, the Corporation was not vicariously liable in law for their actions. A major factor which influenced McCardie J. in this conclusion was his finding that a constable, by virtue of his office, exercised original authority and in that endeavour he was regarded, at common law, as a servant or officer of the Crown.[65] Added to this was the fact that various statutory provisions empowered the Home Secretary, as central police

authority, to make regulations on the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the constables, and to hear appeals from disciplinary decisions by the local police authorities. Finally, McCardie J. assumed that if the Corporation was vicariously liable for the torts committed by its police constables in their law enforcement function, it must follow that the Corporation could "demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders."[66] In the view of McCardie J. this "would indeed be a serious matter."[67]

Although the Fisher case relies heavily on the notion that a constable is acting as a public servant or officer of the Crown when exercising law enforcement powers it does not follow that vicarious liability could be invoked against the Crown. Indeed, the Judicial Committee of the Privy Council has already ruled in Attorney-General for New South Wales v. Perpetual Trustee Co.[68] that the contractual relationship of master and servant does not exist between the Crown and a constable for the purposes of the action per quod servitium amisit. In the course of his judgement Viscount Simmonds explained that just because a constable may be referred to in certain contexts as a servant of the Crown it does not follow that "the ordinary law of master and servant determines the relations of the parties."[69] In particular, he found that there was 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."[70] He also found that the constable fell within the latter category on account of the fact that "he is a ministerial officer exercising statutory rights independently of contract,"[71] and that "[h]is authority is original, not delegated, and is exercised at his own discretion by virtue of his office."[72] Accordingly, the action per quod servitium amisit could not lie with respect to the constable as it rested upon the domestic relationship of master and servant. Although the New South Wales case was concerned only with the action per quod servitium amisit it is clear that its analysis of the relationship between a constable and the Crown is equally applicable to the issue of vicarious liability. Indeed, Viscount Simmonds specifically recognised this when quoting with approval from Enever v. The King,[73] Fisher v. Oldham Corporation[74] and Stanbury v. Exeter Corporation[75] all of which are directly or indirectly concerned with vicarious liability for the torts of a constable. It follows that if vicarious liability depends solely on the existence of a master-servant relationship neither a local police authority nor the Crown can be vicariously liable at common law for the torts committed by a constable in Britain in the exercise of his law enforcement powers.

(c) Vicarious Liability in Ireland before Byrne

In Ireland, the issue is less complicated by virtue of

the fact that the Garda Siochana is a national police force. If a garda is party to a master-servant relationship for the purposes of vicarious liability the only other practical party is the State. Since, as explained earlier, the garda occupies a similar status as the constable at common law it should follow that the reasoning of the New South Wales case is as much applicable to the garda unless, of course, the issue has been the subject of legislation in Ireland, which it has not. There is, however, relevant Irish case-law on the subject. In Carolan v. Minister for Defence,[76] for example, the issue was whether the Minister for Defence could be held vicariously liable for injuries inflicted on the plaintiff as the result of a soldier's negligence when driving an army lorry. It was held in the High Court on the authority of Lane v. Cotton[77] and Whitfield v. Le Despencer[78] that the relationship of master and servant does not exist between the head of a government department and his subordinate officials as both are fellow servants of the public. Since the High Court found that the Minister for Defence was head of a government department and that the members of the armed forces were his fellow servants of the public it followed that he could not be vicariously liable for their tortious acts. That members of the Garda Siochana can be equated with members of the armed forces in this sense was confirmed by Maguire P. in the subsequent case of Attorney-General and Minister for Justice v. Dublin United Tramways Ltd.[79] Unfortunately, he also assumed

that because a garda was bound to render services to the public it must follow that a master-servant relationship existed. He concluded, therefore, that the action per quod servitium amisit would lie for the benefit of the State in respect of members of the Garda Siochana.[80] This part of the decision was not followed by the Supreme Court in Attorney-General v. Ryan's Care Hire Ltd.[81] where the availability of the action per quod servitium amisit was in issue in respect of a member of the armed forces. Adopting the analysis of the action in Commonwealth v. Quince[82] the New South Wales case and IRC v. Hornibrook[83] Kingsmill-Moore J. agreed that it was confined to the domestic relationship of master and servant and, as such, had no application to the holder of a public office and the State he serves. He concluded, therefore, that "public servants, be they in the armed forces, the police or the civil service, do not fall within the class of servants in respect of whom the action...lies."[84] While this does not constitute direct authority it is at least persuasive for the proposition that the State is not vicariously liable on the basis of a master-servant relationship for the tortious acts of a garda.

It is, of course, possible that the State could be held vicariously liable for the tortious acts of a garda under some other principle. For many years now the courts have been prepared to find vicarious liability even in the absence of a master-servant relationship based on control

in the old Bramwellian sense. According to Atiyah the Bramwellian control test has been generally re-interpreted so as to create vicarious liability in relationships where previously it would not have applied.[85] The courts look now not so much for a power to direct how the work shall be done, but for a power to control the incidental features of the employment such as the "when" and the "where" of the work.[86] Even this looser concept of control is by no means regarded as the decisive factor. In most cases it is treated merely as one of the many factors that must be taken into account; while in exceptional cases it is even possible to find vicarious liability in the absence of control.[87] Given these developments it is more likely that if the issue arose today the English courts would find a police authority vicariously liable for the tortious acts of its constables.[88] The possibility of the issue arising, however, is remote given that chief constables have been made vicariously liable by statute for the torts of constables under their direction and control.[89] Since the chief constables will present financially sound defendants there will be no practical need for plaintiffs to seek to attach vicarious liability on police authorities.[90]

(d) Vicarious Liability in Ireland after Byrne

In Ireland there have also been significant developments in vicarious liability which have a bearing on the liability of the State for the torts of gardai. The

seminal authority is Byrne v. Ireland.[91] In that case the plaintiff fell and was injured when walking on a footpath which had been left in a dangerous state of repair by employees in the department of Posts and Telegraphs. She sued the State on the premise that it was vicariously liable for the negligence of its servants or agents. She lost in the High court on the ground that since Ireland was a sovereign State it could not be sued in its own Courts. This decision was overturned on appeal to the Supreme Court which held that the State was a juristic person which was vicariously liable for the tortious acts of its servants committed in the course of their employment; and that the courts had jurisdiction to entertain an action in damages brought by a private plaintiff in respect of such a tort. On the question of sovereignty, which had proved so decisive in the High Court, Walsh J. explained that it was the people and not the State that was the sovereign authority. The declaration of the State's sovereignty in Art.5 Bunreacht na hEireann simply meant that the State was not subject to any power of government apart from that designated by the people in the Constitution. That much is clear from the fact that the Constitution imposed various duties on the State in terms which conferred correlative rights on citizens. Since the Constitution must have deemed those rights to be enforceable against the State any notion of State immunity from suit must be incompatible with the terms of the Constitution itself. It followed that "where the right is one guaranteed by the State, it is

against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed."[92]

The question of vicarious liability arises because the State can act only through its respective organs: the legislature, the executive and the judiciary. It follows that the onus of protecting the constitutional rights of the citizen which are guaranteed by the State falls on the shoulders of these three organs. The State, however "remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution."[93] This liability will attach where a citizen suffers damage as a result of his constitutional rights being infringed by the action or inaction of a public servant in the course of his employment. Walsh J., himself, acknowledged that it extends beyond the confines of the recognised causes of action in tort to include any wrong which arises from a failure to honour an obligation imposed upon the State by the Constitution.[94] Later in his judgement he seems to extend the liability even further when he says that "the State is liable for damage done by such persons in carrying out the affairs of the State so long as that person is acting within the scope of his employment."[95] This suggests that vicarious liability will attach to anything done by public servants in the course of their employment so long as it causes damage to another. In other words, it

is not necessary that the harm should result from an intentional act amounting to a breach of some specific constitutional obligation owed to the citizen by the State. Budd J. adopted a similar approach. He would hold the State vicariously liable for the torts of its employees on exactly the same basis as any other employer.[96] However, in the case of the State it is worth emphasising that liability could not be avoided in any particular case by establishing that some organ of the State was equipped with adequate powers or charged with the appropriate duty to carry out the obligation undertaken by the State. If this organ failed to perform the obligation, or performed it in a wrongful manner, the State would remain vicariously liable for any damage which resulted.[97]

It is significant that neither Walsh nor Budd attempted to explain the attachment of vicarious liability on the basis of what control the State could exercise over its servants or agents. In fact, the concept of control did not enter into their analysis at all. They would be prepared to attach vicarious liability simply because the servants or agents were carrying on the affairs of the State, or were functioning on behalf of the State.[98] It was irrelevant, therefore, whether the servant or agent in question enjoyed independence from executive control in the discharge of his obligations or whether he was subject to the control of an organ of State in how he should discharge them.

(e) Applying Byrne to Gardai

The application of the Byrne approach to gardai depends first of all on whether gardai can be classed as servants or agents of the State. Walsh J. had no difficulty in finding that the officials and employees in the department of Posts and Telegraphs were "persons employed by or under the State."[99] Following the Carolan case he found that a Minister and persons employed by his department were fellow servants or employees of the State. He distinguished the Ryans Car Hire case as being confined to the issue of whether the State employee in question was "a servant of the menial status in respect of the loss of whose services the State could seek to avail of the action per quod servitium amisit."[100] More significantly, he explained that "all such persons employed in the various departments of the government and the other departments of the government and the other departments of State, whether they be in the civil service or not, are in the service of the State"[101] for the purposes of vicarious liability. Budd J. arrived at substantially the same conclusion through a different route. He recognised the distinction drawn by O'Dalaigh J. in O'Loughlin v. Minister for Social Welfare[102] between civil servants of the government and civil servants of the State. The former denoted those who worked within a government department, while the latter covered all those public servants employed in a range of other national public bodies or authorities, including the Garda Siochana. Budd J. in common with Walsh J. concluded

that both categories qualified as servants or agents of the State for the purpose of vicarious liability.

Just because gardai can be classed as public servants it does not follow under Byrne that the State will always be vicariously liable for torts committed in the course of their duties. It must be established first that a garda is discharging, on behalf of the State, constitutional obligations that were imposed upon the State. The most relevant obligation would appear to be that contained in Art. 40.3 Bunreacht na hEireann. It obliges the State to vindicate and protect from unjust attack the life, person, good name and property rights of every citizen. Presumably, the State action in establishing, maintaining, empowering and equipping the Garda Siochana can be interpreted as an attempt to discharge this obligation. Accordingly, when a garda is exercising a statutory power, performing a statutory duty, or acting pursuant to ministerial regulations or the general directions of the Commissioner he can be said to be acting on behalf of the State for the purposes of vicarious liability. It does not follow, however, that everything he does in his official capacity can be interpreted in this manner. As explained earlier, when the State established the Garda Siochana as a force of police it did not create a corporate body whose existence, powers, duties and functions were defined exclusively by statute. On the contrary, it adopted the British model of a police force being nothing more than a

collection of individual peace officers banded together under a centralised chain of command and regulation. State control over the functions of the force come in the form of specific statutory powers and duties which are attached to the office of garda from time to time, and in the form of the Commissioner exercising his statutory power of general direction and control over the force. The inevitable consequence is that the very essence of the office of garda, including some of its most fundamental powers and duties, derive not from statute or the State but directly from the common law. When exercising his common law power of arrest, for example, the garda is exercising an original authority which vests directly in him at common law by virtue of the office he holds. He is not acting, nor exercising authority, on behalf of the State. Even if he exercises this power to effect an arrest when on duty, using the material and financial resources of the State, it would appear that he is not acting on behalf of the State[103] any more than an ordinary citizen is acting on behalf of the State when effecting a citizen's arrest. In such matters the garda, like the private citizen, is acting directly on behalf of the people. It would appear, therefore, that there are at least large areas of the Garda function for which vicarious liability cannot attach on the State at common law.

Unfortunately, there has been no judicial analysis in Ireland on the application of the Byrne decision to the

torts of a garda.[104] Opinions in other common law jurisdictions, however, favour the view that the State is not liable at common law for the torts of a police officer committed in his capacity as a peace officer. While these opinions have been given against legal and constitutional backgrounds which are different in some respects from those which apply in Ireland, the reasoning applied does have special relevance. In Canada and U.S.A., for example, there is a long line of judicial authority which exempts municipalities and provincial and State governments from vicarious liability for the torts of their police officers.[105] The common thread running throughout these cases is the notion that a peace officer is not the agent or servant of the body that appoints him, but is a public officer whose duties are owed to the public at large. This is neatly summed up by Haddad J.A. in the Supreme Court of Alberta, Appellate Division, in Patterson v. Tenove.[106] Founding himself specifically on McCleave v. City of Moncton[107] and Pon Yin v. City of Edmonton[108] he said:

> "...the general principle settled by long standing authority that the duties of a policeman are that of a public officer acting for the benefit of the general public and he is not, therefore, at common law the agent or servant of a municipal corporation through whose auspices he is appointed. For that reason, it is not liable for his tortious acts."[109]

The identification of the peace officer with the public has also proved fatal to attempts to attach vicarious liability to the Crown in right of Canada for the torts of common law peace officers. In the leading authority of Schulze v. The Queen[110] Walsh J. in the Federal Court, Trial Division,

supported his decision with the following extracts from previous authorities which are particularly relevant to the garda:

> "If a peace officer is only exercising his rights for the benefit of the public, rights which he holds by virtue of the common law or the criminal code, no-one is responsible for his acts and conduct, no more the city of Trois-Rivieres who named him as police chief, than the criminal court or the government which constituted him as a constable."[111]

And:

> "...the members of the provinical police are public officers. When they execute writs issued by a competent court their functions are ministerial. They have, aside from that, functions which result from the judicial order, where they are called upon to exercise a certain discretion. Thus, it is left to their judgement to decide whether in certain circumstances there is justification or not for making an arrest. They are not employees of the State in the strict sense of the word. Their duty is not to the State itself, but to the public."[112]

The second extract suggests that vicarious liability cannot be imposed even where the peace officer is exercising a statutory power. So long as his tortious act is committed in the course of exercising a discretion vested in him by law it matters not whether that law is statutory or common law. Further support for this view can be found in the influential judgement of Griffith C.J. handed down in the Australian High Court in Enever v. The King where he said:

> "Now, the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself...A constable, therefore, when acting as a peace officer, is not exercising a delegated authority,

> but an original authority, and the general law of agency has no application."[113]

In this passage he is clearly basing the absence of vicarious liability on the constable's common law capacity as a peace officer. He is saying that so long as the constable is discharging functions originally attached to the common law peace officer only he can be responsible for his actions; irrespective of whether he is exercising the common law or statutory powers attached to his office. The difficulty with this approach, in the light of Byrne, is its equation of the common law and statutory powers. It ignores the fact that when the constable is exercising a statutory power he is exercising authority delegated to him by the State. The fact that these powers are used to discharge duties which already attach to him at common law cannot obscure the State's input. By conferring him with these powers, or by entrusting him with additional peace-keeping duties, the State is adopting him as a vehicle through which to discharge some of its own obligations. In Ireland, therefore, it is possible that the State would be liable, under the Byrne principle, for the torts committed by a garda when exercising statutory powers or discharging statutory duties even when he does so in his capacity as a peace officer. It is even more likely that the State will remain vicariously liable for the torts of a garda committed in the course of his official functions where those functions do not involve the exercise of either his statutory or common law powers or duties. Nevertheless,

the trend of the authorities from other common law jurisdictions lends support to the view expressed here that the Irish State is not vicariously liable at common law, even under the Byrne principle, for the torts of gardai committed in the course of exercising the common law powers or discharging the common law duties of the office of garda.

(f) The Practice

Contrary to the view being presented here the regular practice is for the Irish State to accept that it is vicariously liable for the torts of gardai committed in the course of their duty.[114] So far, no attempt has been made to distinguish a garda exercising common law powers or duties from other situations. From the accountability perspective this has the benefit of providing the citizen with a financially sound defendant in those cases where he has been the victim of the tortious action of a garda. The financial satisfaction that plaintiffs can obtain in practice in individual cases, however, should not be mistaken for a sound accountability mechanism at work. There is always the danger that the State's vicarious liability will be challenged successfully on the grounds mooted here. Even if that challenge is confined solely to torts committed in the exercise of common law powers or duties, that will be sufficient to render the tort remedy unattractive in many situations where individuals have been the victims of gross misconduct. Furthermore, even if the

courts did uphold the validity of the current practice in Ireland its accountability potential will be confined to satisfying the needs of individuals on a case by case basis. Its capacity to function as a catalyst for improved police practices for the benefit of all will be retarded by the law and practice governing the identity of the defendant and the source of the funds needed to meet awards.

Generally speaking, the burden of defending, or accepting liability for, the alleged torts of an employee is a powerful incentive for the employer to exercise supervision and control over his employees. In the case of a garda, however, the defendant will be the State or the Attorney-General in his "representative capacity as the law officer of the State."[115] Neither are in a position to exercise a close supervisory control over all public servants. In the case of gardai such control can be exercised only by the Commissioner. Since the Commissioner cannot be sued or held liable for the tortious acts of a garda it follows that the tort action cannot achieve its full potential as an agent for the improvement of Garda practices. Indeed, its potential in this matter is further diluted by the fact that awards made are paid out of funds for which the Commissioner has no responsibility. Provision is made for them in the Garda estimate which is the responsibility of the Accounting Officer. A useful contrast can be made with the position in Britain. There

a chief constable is statutorily liable for the torts committed by his constables in the course of their duty. Awards made against him are met by his police authority. This approach secures the best of both worlds. It provides a financially sound defendant for the plaintiff while, at the same time, it ensures that the chief officer will take a direct interest in finding out how the tortious act came about and how it might be prevented in future.

5. Character of the Plaintiff

Just because an individual has suffered damage as the result of the tortious act of a garda, it does not follow that he will find an adequate remedy in tort. His chances of success will be determined not just by the content of the legal rules, principles and procedures involved, but also by his character; or what an American judge once referred to as the "moral aspects of the case."[116] This is a general reference to such extra legal factors as the character of the plaintiff, what he was doing at the time he became the victim of police misconduct and what object the police were trying to achieve when they overstepped the bounds of legality. Such factors will have no role in the criminal process. For example, an unlawful arrest, detention or search and seizure will not be subsequently validated in the criminal process if it transpires that the victim was guilty of a criminal offence at the time it was affected.[117] In a tort action, however, the fact that a victim had been committing a criminal offence at the time

may have an adverse effect on the level of damages awarded and may even be fatal to his chances of success.

This aspect of the tort action is the subject of Caleb Foote's article, "Tort Remedies for Police Violations of Individual Rights."[118] He asserts that :

> "Probably the greatest police abuse is harassment of persons who are vaguely suspect due to prior criminal conduct, low economic status or membership in a racial minority group. But the same factors which make such persons bait for an illegal arrest or search also effectively bar them from prosecuting a tort action."[119]

Chief among these factors is the plaintiff's prior reputation. Foote explains that, in a tort case, the prior reputation of a plaintiff, who was not convicted of the crime for which he was arrested, can be shown to: (a) impeach his credibility as a witness; (b) mitigate damages by showing that his reputation was such that it would not have been damaged by an arrest or by showing that his prior record of arrest or imprisonment negated the inference that he suffered mental anguish; and (c) to mitigate damages by showing probable cause for the arrest, thereby negating the inference that the defendant acted wantonly or maliciously.[120] Clearly, if the plaintiff has a criminal record or is associated with such suspect classes as: subversives, drug-users, prostitutes, drop-outs etc his reputation may be a fatal handicap in a tort action against the police. Since these are the sort of people who are most likely to be on the receiving end of police illegality it must follow that the tort remedy is weakest where it is

needed most. Drawing on Hall,[121] Foote presents the point more colourfully:

> "For most potential tort plaintiffs the "moral aspects of the case" are not very favourable. Very few of them are persons who are respectable in the sense that they have some measure of status and financial security in society and have acquired the kind of reputation which will be "damaged" by illegal police activity. Most police action operates at lower levels of society and the great majority of persons who are subjected to illegal searches and who are therefore potential tort plaintiffs come from the lowest economic levels, or minority groups, or are criminals or suspected of criminality. For such people "the rules..are little more than mere pretensions." It is not surprising that attorneys are reluctant to take their cases because of the small chances of a recovery "sufficent to justify the action" and fear of police retribution may also be a substantial factor in deterring such plaintiffs from bringing suit. The "moral aspects" of the cases of these potential plaintiffs ruin their chances of success in court. They lack the minimum elements of respectability which must be present to form a base upon which the fiction of reparation can operate."[122]

Although Foote was writing forty years ago, the general thrust of his thesis is applicable in Ireland today. The most significant point of difference would be the absence of a jury in these civil actions. A judge is not as likely to be influenced as much as a jury by the matters adverted to by Foote. However, these matters must at least influence a judge's findings of fact in cases where the facts are in dispute. To this extent the plaintiff with a poor reputation will always face a daunting task in winning a tort action against a garda for matters such as unlawful arrest, assault and unlawful search and seizure. Even if he does succeed a judge is not likely to award him an amount in damages which would

persuade him to sue again the next time he was the victim of similar misconduct.

6. Costs

A question which every prospective plaintiff must consider is cost. The issues involved will vary from case to case depending not just on the personal financial resources of the individual plaintiff but also on the subject matter and strength of his case. Unfortunately for the individual seeking a remedy in tort for alleged garda misconduct the interplay of those factors often conspire to render his objective financially impossible. If the plaintiff is in the position to finance the cost of the action comfortably from his own resources he will be able to make a free choice on whether or not to proceed. His resources, however, would have to be deep enough to cover not just his own costs but also those of the defence if he loses. In a serious case these could easily amount to a five figure sum. Not surprisingly, the incidence of such individuals being the victims of alleged police misconduct is so low as to be almost insignificant in this context. For the large majority of prospective plaintiffs the question of costs may prove an insuperable obstacle. This is particularly apparent in the case of a plaintiff whose financial resources are too deep to qualify for free legal aid but not deep enough to risk an action in tort against the police. For such an individual the risk of jeopardising the future financial security of his home and

family may prove too high a price to pay for the luxury of using an action in tort to call the garda to account for alleged harm done.

Things look better for the impecunious plaintiff who is, after all, in the category most at risk from police illegality. Appearances, however, can be deceptive. Theoretically, he has the security of free legal aid at his disposal. To qualify, however, a prospective plaintiff must satisfy, inter alia, a stringent means test, have reasonable grounds for taking the action and be reasonably likely to be successful in the proceedings.[123] Furthermore, qualification is no guarantee that free legal aid and advice will be readily available.[124] The prospective plaintiff will find that it is available only through designated State law centres which are scattered throughout the country. Outside the major urban areas these function on a part-time basis only and are so grossly underfunded that many have been closed to new business at regular intervals since 1982.[125] Even when they are open they are confined in practice to cases where life or personal safety is at risk; mostly family law cases.[126] Even if a prospective plaintiff did find a centre which was within commuting distance and was open, it is doubtful that the staff would have either the time or the resources to take on his action against the Garda.

To some extent the problem of costs is relieved by the

growing practice of solicitors taking on cases on a no win - no fee basis. This will lower, although not fully remove, the financial obstacle in the path of the impecunious plaintiff and the plaintiff who cannot risk his family's financial security. Obviously, solicitors will pursue such cases only where they feel there is at least a strong chance of success. In the case of tort actions against the police, however, this can have the effect of weeding out a large number of those cases which have most significance for police accountability. It will exclude virtually all cases where the "moral aspects" are not right. Also doubtful are those cases of assault, trespass, or unlawful arrest in which the evidence consists wholly of the plaintiff's word against that of the police. Given the nature of police activities and role, it is almost inevitable that most allegations against the police will fall into one or other of these two categories. It follows that the prospects of the average plaintiff persuading a solicitor to take on his case against a garda on a no win - no fee basis are not great. Costs, therefore, remain a significant handicap for the police accountability potential of the tort action.

7. Conclusion

So long as the Diceyan concept of government being subject to the law on the same terms as the citizen prevails in Ireland, the action in tort must remain as a primary mechanism of police accountability. For the

individual citizen who has been the victim of police misconduct, however, that will mean having to seek a remedy through a body of law and procedure which has been developed to cater for civil wrongs generally. So far this chapter has attempted to show that the peculiar status and role of the police will present the citizen plaintiff with problems that are not adequately addressed by principles, rules and procedures designed to cope primarily with disputes between private parties. The nature and extent of these problems are such that the plaintiff may wish to search out other alternatives. One option which may present itself is the
criminal process.

THE CRIMINAL PROCESS

1. Introduction

The police are subject to criminal law and procedure on exactly the same basis as the private citizen. If a garda is suspected of having committed a criminal offence the law and procedure governing the investigation of that suspicion is not affected by the fact that he is a garda. Similarly, the law and procedure governing his prosecution and trial, if it comes to that, are generally unaffected by his status. This aspect of the police being subject to the rule of law on essentially the same basis as the private citizen is often presented as proof that the police are

fully accountable for their actions.[127] Certainly the criminal law and procedure do serve an important accountability function. They enable the private citizen to use against the garda the very same legal process that the garda will use against him in the event of either one of them having committed a criminal offence. This reciprocity helps to combat the development of a communal feeling that there is one law for the police and another for the rest of the community. It is important, however, not to overemphasise the police accountability potential of the criminal process. Not all garda wrongdoings, for example, will be criminal. Furthermore, there are factors of both law and circumstance which weakens the capacity of the criminal process to combat the criminal actions of a garda committed in the course of his duty. These factors will be considered now.

2. Police Powers

Probably the most basic factor in this context is the legal capacity of a garda to do things in the course of his duty which would be criminal if done by a private citizen. Police powers have expanded at such a rate in the course of this century that the traditional British concept of the police officer being none other than a citizen in uniform[128] cannot be accepted as accurate today.[129] For example, the forceful exercise of a garda's powers of arrest under section 30 of the Offences Against the State Act, 1939,[130] the Road Traffic Code[131], the Casual

Trading legislation[132] and the Wildlife Protection legislation[133] would amount to assault and battery in most situations if executed by a private citizen. Similarly, the garda's powers to detain arrested suspects in certain circumstances[134] would probably involve the commission of a criminal offence if a private citizen attempted to exercise them in identical circumstances.

A critical feature of police powers is that most of them are based on arrest which, in turn, can be exercised merely on a reasonable suspicion. It follows that even if a garda arrested the wrong person the arrest would still be perfectly lawful so long as the garda honestly suspected that person of having committed the relevant offence, had a reasonable suspicion, followed correct procedure and used no more force than was reasonably necessary.[135] Even if it transpired that the arrest was unlawful because the garda's suspicion was not reasonable or he failed to follow correct procedure, the arrest would not necessarily involve the commission of a criminal offence. The prosecution would have to establish that force was used and that the garda had mens rea with respect to the unlawfulness of that force.[136] In other words, the prosecution would have to establish beyond a reasonable doubt that the garda either knew or was recklessly ignorant of the fact that the person arrested was the wrong person or, alternatively, that the garda was either wilful or reckless in his failure to follow correct procedure or in his use of unreasonable

force. It is not surprising, therefore, that the use of force in an unlawful arrest rarely gives rise to a criminal prosecution. Where prosecutions are taken they normally involve the use of lethal force by a police officer attempting to apprehend a suspect whom he believes wrongly to be armed. Even in these cases the prosecution finds it exceptionally difficult to counter the police officer's defence that he acted under a mistaken belief that his life, or the lives of others, were in danger.[137]

It is obvious, therefore, that the law on police powers allows the garda to act in many circumstances in the course of his duty where it would be criminal for a private citizen to do likewise.[138] This has implications for police accountability. Where an individual has been wrongly subjected to physical force by a garda in the exercise of his police powers, that individual will find that the criminal process does not always provide a remedy. This will be the case even if the individual himself would have been liable to criminal sanction if he had treated the garda or another citizen in the manner that the garda had treated him. The fact that the criminal process cannot provide a remedy on such a reciprocal basis is an inherent feature of its limited accountability potential. It would be understandable, therefore, if the average citizen viewed the criminal law as something which the garda enforces against him rather than as something which is equally applicable to both him and the garda. The general picture

of the Garda Siochana being specially established, organised, maintained, equipped and empowered to enforce the criminal law will reinforce this mistaken perspective. The inevitable result, however, is the undermining of the limited police accountability potential that the criminal process may have.

3. The Investigation

In theory, the law and procedure governing the investigation, prosecution and trial of a garda for an offence allegedly committed in the course of his duty are no different from those applicable to a private citizen. While the theory holds good in practice for the trial, the same cannot be said for the investigation and prosecution. This is evident from the outset of the investigation stage.

Where someone is suspected of having committed a criminal offence it is theoretically open to anyone to investigate that suspicion with a view to preferring charges.[139] In practice, the vast majority of criminal investigations in Ireland are handled by the Garda Siochana. Because the force is officially organised, financed, resourced and equipped with special powers and duties to investigate suspected offences, the general practice is for complaints of criminal activity to be referred to it for investigation. Inevitably, it is identified in the public mind as having a special responsibility for the investigation of offences. This

gives rise to no difficulty so long as the offences are committed by private citizens. In this scenario the force appears as an agency fighting an evil which exists only outside of the agency itself. When, however, an offence is committed by a garda it raises the prospect of the force having to fight an evil within itself. In other words, it raises the age old problem of who will police the police? The problem is most acute when a citizen complains that a garda has committed a criminal offence in the course of investigating a criminal offence allegedly committed by a citizen. Will the force apply the same resources, effort, and commitment to the investigation of the crimial allegation against the garda as it will to the allegation against the citizen? To do so could be interpreted as diverting resources away from the primary function of the force and applying them to a purpose which will have the effect of making the primary purpose more difficult to fulfil. While such action might be expected in cases involving gross abuse of authority resulting in death, serious bodily harm or the perversion of justice, the same might not be expected in minor or borderline cases. Indeed, the fact that the force enjoys a discretion over the allocation of resources to criminal investigation means that it is in a position to downgrade investigations into its own members in order to concentrate on investigations against professional criminals.[140]

The official Garda position would reject out of hand

any notion that the force uses its discretion to treat criminal allegations against a member more leniently. Indeed, the Commissioner can point to the elaborate citizen complaints machinery and the resources that are devoted to the investigation of not just criminal accusations but also disciplinary complaints against members of the force. It is doubtful, however, that this will convince individual complainants or the public at large. The general picture is still one of the Garda Siochana being seen to investigate complaints against themselves in circumstances where a high rate of success would actually render their primary task more difficult. Furthermore, the sceptics can point to a very low success rate as evidence that the force is not really serious about prosecuting its members for criminal offences committed in furtherance of their policing objectives.[141] Although there are alternative explanations for these low rates it is at least credible that part of the explanation is lack of commitment within the force. Even if the leadership is committed to the enforcement of high standards in the rank and file, investigating officers may not be infected with a simiar zeal in individual cases. They will find it difficult to treat a fellow member as a suspect criminal;[142] particularly when the alleged offence was committed for the purpose of maintaining public order or making a suspect amenable to the court. This difficulty will be enhanced by the awareness that they are all members of the one force, engaged in a common fight against hostile

criminal elements on the outside.[143] To prosecute a fellow member in such circumstances would be to sacrifice him to those same elements. It would not be surprising, therefore, if an investigating officer approached his task with less vigour in these cases than he would if the suspect was a private citizen.

For the same reasons it would be very difficult to secure the cooperation of gardai as witnesses against one of their own in an internal criminal investigation. The common identity felt among members of the same police force, even when they do not know each other personally, can often be stronger than their desire as individuals to see that one of their number is publicly prosecuted for a crime committed in the course of his law enforcement efforts.[144] For example, investigating officers have, on occasions, met with a "wall of silence" when interviewing police officers on what they had seen and heard during an incident or operation which has given rise to serious criminal allegations against fellow police officers.[145] This "wall of silence" has occasionally meant that an internal investigation has failed to unearth the full facts about what happened and who was involved.

Another factor which would tend to stunt the rigour of internal police criminal investigations is the procedure that must be followed. This can be illustrated by comparing the procedure applicable to a private citizen who

is suspected of having committed a serious arrestable offence with that applicable to a garda who is suspected of having committed a similar offence in the course of his law enforcement duties. The former normally[146] will be arrested by uniformed gardai at his home, place of work or in a public place. Inevitably the arrest will appear to the suspect as a hostile act as it forcibly restricts his freedom and takes him away from his own safe and familiar surroundings. Furthermore, that act is perpetrated by uniformed individuals with whom, at best, he has nothing in common and, at worst, he perceives as an enemy. He is then removed to a police station where he finds that his freedom, privacy, personal belongings, health, well-being and immediate future is in the hands of the same individuals. Furthermore, these individuals may regard him as a criminal in need of correction. By the time the interrogation starts he will be afflicted by a very strong desire to get away from his threatening surroundings and back to more familiar surroundings where he will feel comfortable and safe. One way of achieving this is to give full cooperation to his interrogators. The Garda object of securing a confession, or further information, out of the suspect must be assisted significantly by the sheer reality of arrest and detention in a police station. Indeed, statistics suggest that of those who confess to a criminal offence during interrogation in a police station, a very large majority do so in the first few hours.[147]

By contrast, the questioning of the suspect garda is not likely to be preceded by his arrest. When he has been the subject of a criminal complaint, the usual practice is for him to be notified of that fact, cautioned and interviewed in that order. At the termination of the interview he will often be free to resume his duties; subject only to the possibility of his being suspended or called in for further interviews subsequently. The interview is most likely to take place during the garda's working hours and at the police station to which he is attached. The whole procedure, therefore, is more akin to an employer interviewing an employee about some incident which took place at work. In contrast to the citizen suspect the garda's will to refuse cooperation will not be undermined by the deprivation of his freedom or privacy by hostile officials or by a hostile environment. Indeed, the suspect garda's resolve might well be boosted by the fact that he shares a common bond with his interrogators and is fully familiar with and comfortable in his surroundings. In all likelihood he will know exactly what techniques the interrogators will use to secure his cooperation. He will also have the practical and moral support of his representative body. When these factors are taken into account it would seem reasonable to conclude that the standard Garda criminal investigation is more geared to producing results in the case of citizen suspects than it is where the suspect is a garda acting in the course of his duty.

4. Decision to Prosecute

The next step in the criminal process is the decision to prosecute. Once again it would appear that garda suspects are likely to fare better than their citizen counterparts. Theoretically, it is open to anyone to initiate a prosecution against someone suspected of a summary offence. In practice the vast majority of such prosecutions are brought by the members of the Garda Siochana in the context of their general law enforcement function. Accordingly, when a private citizen witnesses, or is the victim of, a criminal offence he will normally report it to the Garda Siochana for a decision on whether or not a prosecution is warranted. If the offence is of a minor nature the decision to prosecute will be at the discretion of any member of the force. In practice it is normally left to the discretion of the Commissioner or members specially designated by him. Alternatively, the case may be referred to the DPP, in which event the discretion to prosecute will reside with him. Where the offence is not minor, or is otherwise to be tried on indictment, the discretion to prosecute will reside only with the DPP or the Attorney-General.[148]

Where the suspect is a garda the procedure is slightly different. If the garda investigation reveals that a criminal offence may have been committed, the report must be submitted to the DPP irrespective of whether the offence in question is of a minor or non-minor nature.[149] It

follows that the discretion to prosecute a garda for an offence committed in the course of his law enforcement duties resides not with the Garda Siochana but with the DPP. Since the DPP is established statutorily as an independent officeholder[150] the prosecution stage is protected against some of the conflicts of interest that are evident at the investigation stage. It should not be concluded, however, that this is sufficient to ensure equal treatment for garda and citizen suspects alike. Other factors conspire to render a positive decision to prosecute less likely in the case of a garda compared to that of a citizen.

From the outset the DPP's independence is compromised by the fact that his decision in each case is based solely on the Garda investigation report. If it can be accepted that a Garda report is likely to be biased, albeit unintentionally, in favour of a garda suspect, it should follow that there will be a lower incidence of DPP prosecutions against gardai relative to that against civilian suspects. The special relationship between the DPP and the Garda Siochana must be a further contributor to this lower incidence. Both are independent State agencies with special responsibilities in the fight against crime; and both interact with each other in that context. The DPP, in particular, is dependent on gardai to do the necessary footwork to enable him to decide whether or not prosecutions are warranted in individual cases. The

constant working liaison between his office and the force ensures that the former is more aware than most of the pressures and pitfalls which are everyday hazards of Garda work. Accordingly, he is likely to be more sympathetic to a garda who committed an offence in the course of his law enforcement function than he would be towards a private citizen who committed a similar offence for personal gain or malice. This sympathy could easily translate into a decision not to prosecute the garda in individual cases. A factor which would encourage such decisions is the availability of the internal police disciplinary process to cope with aberrant professional misconduct. The DPP could be persuaded that many cases of Garda criminality could be dealt with more conveniently and satisfactorily by the internal procedure rather than through the expense and publicity of a criminal trial. This would be especially true of minor criminal offences. Further support for this view can be found in the apparent reluctance of juries to convict police officers for offences committed in the course of their law enforcement efforts.[151] From the DPP's perspective, therefore, it might make more sense to plump directly for the disciplinary option. In the case of citizen suspects, however, the disciplinary option is not available. Accordingly, the DPP might feel more compelled to prosecute in order that justice should be done.

National security interests may also play a part in persuading the DPP not to prosecute gardai in individual

cases where prosecution might otherwise have been warranted. The classic example of this in recent times was the decision of the DPP for Northern Ireland not to prosecute several RUC officers for offences arising out of a series of fatal shootings of terrorist suspects.[152] The Attorney-General explained in Parliament that the decision not to prosecute officers involved was taken in the public interest and, in particular, the interests of national security.[153] He accepted that there was sufficient evidence to warrant prosecution for perverting, attempting or conspiring to pervert the course of justice, or for obstructing a constable in the execution of his duty. Unfortunately he did not explain what the particular public and national security interest issues were. It may have been that prosecution would have revealed political involvement in the shootings, or the identity of RUC informants. Alternatively, it may simply have been that prosecutions and subsequent convictions would have damaged the reputation and morale of the RUC to such an extent that its capacity to combat terrorism would be seriously inhibited. So far, there has been no comparable case in this jurisdiction. Nevertheless, there is no reason why there could not be one or more in the future. Just like the RUC, the Garda Siochana is deployed in the frontline against organised, armed subversives. Furthermore, it also carries the extra responsibility of serving as the State security service. It is not at all improbable that some of its members could find themselves accused of committing

serious criminal offences in the course of an anti-terrorist or State security operation. In that event the DPP might also have to weigh the public interest in justice being done and being seen to be done in individual cases against the public interest in protecting the reputation and stability of the State. The dilemma facing the DPP in such a scenario is another illustration of how the prosecution stage can be more sympathetic to suspect gardai than it might appear at first sight.

5. Trial

When a case leaves the prosecution stage and enters the judicial arena the scope for distinguishing between a garda and a citizen accused is minimised. Indeed, the Garda's primary hope for more favourable treatment at this stage rests with the jury. As suggested earlier, it would appear that juries are reluctant to convict police officers for offences committed in the course of their law enforcement efforts. Apart from that, however, there is nothing in the law, practice or procedure governing criminal trials which would afford the garda accused more favourable treatment than his citizen counterpart.

6. Conclusion

In conclusion it can be said that the criminal process is limited in what it can achieve in terms of police accountability. It must be accepted, of course, that the criminal process was never designed with the aim of police

accountability in mind. The most that it seeks to achieve is the accountability of both private citizens and individual members for the force to the basic standards set for them in common by the criminal law. What has been suggested here, however, is that in practice members of the force can find themselves treated more leniently by the criminal process in comparison with their fellow citizens. While this disparity expresses itself at different points in the process they can all be traced back to the fact that the Garda Siochana performs a very central and vital role in making that process work. The result is that individual victims of police misconduct, and the public generally, may perceive the criminal process as being an unsatisfactory mechanism for calling the police to account.

THE EXCLUSIONARY RULE

1. A Potential Police Accountability Mechanism

The exclusionary rule has often been presented as an effective antidote to some of the weaknesses in the police accountability potential of the civil and criminal processes.[154] The basic concept underlying the rule is that evidence obtained unlawfully, unfairly, or in breach of the relevant procedures governing criminal investigations should be inadmissible at the subsequent criminal trial. It is argued that the rule can be deployed as an effective deterrent against the police bending the relevant law or procedure. If the police knew that their

malpractice would jeopardise the fruits of their successful investigation they might be more concerned to comply strictly with the relevant rules and procedures. Indeed, it is arguable that the exclusionary rule could provide a much greater incentive in this respect than either the civil or criminal processes. Under the latter the aggrieved citizen must discharge a heavy burden of proof and overcome other hidden obstacles in order to succeed against the police. The enormity of his task will be increased if his grievance arose out of a police investigation into his own alleged criminal activities. Under the exclusionary rule, however, he need only establish a reasonable doubt that he was the victim of police malpractice in order to succeed. In such a case he may be entitled to an acquittal even though there is a strong probability that the evidence excluded is reliable. The police, therefore, might have more reason to fear the exclusionary rule than they have to fear the civil or criminal processes.

The exclusionary rule can also play a useful role in promoting police compliance with the procedural rules governing criminal investigations. These procedural rules have an important role to play in protecting the rights of the suspect and generally securing the balance between the suspect and the State. Nevertheless, failure to comply with the suspect's procedural entitlements will not always give rise to a cause of action in tort, or the prosecution

of the police personnel responsible. The failure to caution a suspect, for example, is neither a tort nor a crime. Excluding a suspect's confession at his subsequent trial, however, can be a powerful incentive for the police to ensure that the caution is given in the correct form at the appropriate time. The exclusionary rule can lend real teeth to the procedural rules governing a criminal investigation.

The USA has spearheaded the recognition of the exclusionary rule as a necessary police accountability device. In Weeks v. US[155], the Supreme Court ruled that evidence obtained in breach of a citizen's 4th Amendment right to privacy must be excluded in a federal prosecution. This conclusion was greatly influenced by the Court's view that there were no alternative means by which the citizen's 4th Amendment rights could be secured in this context. Since the Court was vested with the responsibility of supporting the Constitution it had to intervene through the exclusionary rule. The clear implication was that the Court regarded the exclusionary rule as an effective device through which it could and should police the police. In Mapp v. Ohio[156] the Supreme Court extended this exclusionary rule to State prosecutions.[157] Again a critical factor which influenced its decision was the Court's perception that no other adequate means existed to ensure police compliance with the 4th Amendment:

> "Since the Fourth Amendment's right of privacy has been declared enforceable

> against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be a form of words, 'valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without the rule the freedom from State invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit the Court's high regard as a freedom' implicit in the concept of ordered liberty."[158]

A similar influence was at work in the development of the "Miranda" exclusionary rule. The Supreme Court in Miranda v. Arizona[159] concluded that the 5th Amendment right against self-incrimination extended to the interrogation of a citizen in police custody. It also concluded, however, that legitimate police interrogation practices, coupled with the fact of the suspect's incarceration, were sufficient in themselves to put the suspect's 5th Amendment rights at risk. The Court even went so far as to draw up a code of procedural protections for the suspect in police custody. This code was designed to secure his constitutional right against self-incrimination. Police failure to comply with it rendered a confession inadmissible at the subsequent trial; even if the failure did not reflect on the veracity or reliability of the confession. Quite clearly the emphasis was put on using the exclusionary rule as a means of supervising

police interrogation practices.

Miranda proved controversial from the outset. Indeed, the past 25 years since it was handed down have witnessed an immense volume of writing analysing, criticising and supporting it.[160] Broadly speaking, the supporters have welcomed it as a vital mechanism for securing police deference to the constitutional rights of the suspect in police custody,[161] while the critics have regarded it as an unnecessary, extra burden which the police will have to bear in their fight against crime.[162] This division is also recognisable in judicial interpretation of Miranda. In some cases its scope, and hence its potential for controlling police investigation practices, has been strengthened.[163] On the whole, however, the trend has been in the opposite direction.[164] In particular, two recent Supreme Court pronouncements on the subject have severely curtailed the scope of the exclusionary rule based on Miranda[165]. This approach unquestionably has been motivated by a concern to maintain or restore a certain balance between the police and the suspect in criminal procedure. Nonetheless, it can be argued that it has been facilitated by a growing belief that Miranda is not necessarily the only, nor even an effective, means of controlling police interrogation practices.[166]

2. The Judicial Perspective in Ireland

(a) The Rule on Confessions

On this side of the Atlantic the judges have displayed a marked reluctance to apply an exclusionary rule for the purpose of supervising or disciplining the police. In Ireland an exclusionary rule applies automatically to involuntary confessions, conscious and deliberate breaches of the accused's constitutional rights and, in other situations, at the discretion of the trial judge. The rule against the admissibility of involuntary confessions can be traced at least as far back as the late eighteenth century.[167] Its modern formulation can be stated precisely to the effect that a confession shall not be admissible unless it is a voluntary statement:

> in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.[168]

More recently it has been extended to include oppression.[169] Unfortunately, it is much more difficult to identify the rationale behind the rule. Insofar as confessions obtained in police custody are concerned the case-law reflects a range of options including: the inherent untrustworthiness of such evidence[170], public policy,[171] the privilege against self incrimination[172], the need to ensure a fair trial[173], and the need to deter improper police practices.[174] It must be said, however, that the last suggestion represents very much a miniority view; the majority strongly preferring the rationale of protecting the right against self-incrimination or the right to a fair trial.

In practice, the voluntariness test has been applied judicially in a manner which has convinced some critics that its object is to discipline the police.[175] Even where confessions were patently reliable judges have excluded them on the ground of involuntariness simply because the police behaviour inadvertently encouraged the suspect to confess in circumstances where he would otherwise have remained silent. In Attorney-General v. Cleary[176], for example, the Irish Court of Criminal Appeal excluded a woman's confession to the killing of her child. She made the confession in response to a police sergeant's comment that the cause of death would be established by a medical examination which was to be carried out on the child. The Court concluded that the woman confessed only out of fear that her guilt would be uncovered and, therefore, it was not given freely.

Despite appearances the judiciary rarely, if ever, attempts to explain such decisions on the basis of the need to supervise police practice or the need to ensure that the police do not get away with some minor indiscretion. In fact, these decisions are usually the result of the judges interpreting and applying previous decisions on particular facts as rules of law.[177] Even when the British House of Lords embarked upon a major analysis of this exclusionary rule it did not conclude that the application of the rule depended on any impropriety on the part of the police or the presence of a subjective intent to induce a

confession.[178] This approach has prevailed despite the extension of the voluntariness test to include confessions taken in circumstances amounting to oppression. Although the very concept of oppression in this context implies police ill-treatment of the suspect, the courts have been careful not to make the two synonymous. They have based their interpretation of oppression on the broader issue of whether or not the circumstances were such that they overpowered the free will of the suspect.[179] There is no suggestion that a confession could be excluded solely on the ground that the police questionning or behaviour was somehow unfair or improper. Indeed, they have recognised that the suspect could be the victim of oppression through no fault of the police.[180]

(b) Infringement of Constitutional Rights

The exclusionary rule based on the conscious and deliberate infringement of the suspect's constitutional rights can also give the appearance of being motivated by a desire to encourage higher standards from the police. Exclusion under this heading can result even if the evidence in question takes the form of a voluntary and reliable confession.[181] For example, if the police arrest a suspect in circumstances where they have no legal power to arrest, or where they detain a lawfully arrested suspect for a period beyond that which is legally permissible, a confession obtained from the suspect during that unlawful detention will be inadmissible by virtue of

the infringement of his constitutional rights. It will make no difference that the confession was wholly voluntary. This statement of the rule suggests a desire to exclude evidence solely in order to discipline the police. If that was the case, however, one would expect the exclusionary rule to operate by automatically excluding evidence obtained by Garda methods which infringe the constitutional rights of the suspect. The reality is otherwise.

In People (Attorney-General) v. O'Brien[182], where this particular exclusionary rule was first formulated, the Supreme Court was unanimous that it could apply only where the breach was conscious and deliberate. The effect of that is neatly illustrated by the facts of O'Brien itself. In that case the gardai involved had found incriminating evidence in the accused's dwelling pursuant to a search under warrant. However, the search amounted to a technical infringement of the accused's constitutional right to the inviolability of his dwelling because the warrant read 118 Cashel Road instead of the correct address which was 118 Captain's Road. The Supreme Court, nevertheless, upheld the admissibility of the evidence found during the search on the ground that the breach of the accused's constitutional right was neither conscious nor deliberate.

The exact scope of this "conscious and deliberate" element has given rise to some disagreement. Some members

of the Supreme Court have interpreted it as being concerned only with Garda actions or omissions. In other words it would not be necessary to show that the gardai involved had consciously and deliberately infringed the constitutional rights of the accused; it would be sufficient if they were conscious and deliberate with respect to their acts or omissions which gave rise to the infringement. This interpretation would give a broad scope to the exclusionary rule and thereby exclude evidence for no other reason than that a garda had erred. Others have preferred a narrower interpretation which requires culpability on the part of the gardai. They take the view that the exclusionary rule applies only when the garda knew, or was in a position to know, that his acts or omissions would infringe the constitutional rights of the accused. An incidental infringement, therefore, could not be sufficient to trigger exclusion. It would seem that the narrower interpretation has won the day in that it has now been endorsed by the Supreme Court, albeit by a majority, in People (DPP) v. Kenny[183] where the point was directly in issue.

A further restriction on the scope of this exclusionary rule was adverted to in the O'Brien case. Even if evidence has been obtained by a conscious and deliberate breach of the accused's constitutional rights, it can still be admitted if there are extraordinary excusing circumstances. Such a situation arose in People (DPP) v. Shaw[184]. In that case the Supreme Court upheld

the admissibility of evidence despite the fact that it was obtained from the accused who had been held in police detention for longer than was legally permissible. The gardai involved had detained the accused deliberately beyond the period permitted by law because they believed that he could lead them to a person who had been kidnapped. It was possible that the kidnap victim was still alive and might survive if found in time. The Supreme Court noted that in this situation there was a conflict of constitutional rights. On the one hand there was the right to liberty of the accused and, on the other, the right to life of the kidnap victim. The Court reasoned that the need to protect the latter, which was the most fundamental right of all, would amount to an extraordinary excusing circumstance if its protection necessitated an infringement of the former. Accordingly, the evidence was admissible even though it was obtained consequent on a conscious and deliberate violation of the accused's constitutional rights.

These limitations on the exclusionary rule indicate that it has not been developed primarily as a means of coercing higher standards from the police. A more credible rationale is a judicial desire to protect and vindicate the constitutional rights of the individual. This is clearly illustrated in the Shaw case where, in order to protect the constitutional rights of the accused's victim, the Court refrained from applying the exclusionary rule. The

paramount consideration, therefore, would appear to be the protection of constitutional rights. The judges resort to the rule in order to avoid the spectacle of being seen to acquiesce in deliberate and unjustifiable attempts by servants of the State to put the State's interest in the prosecution of crime before that of the fundamental rights of the individual. Admittedly it will have, or be seen to have, a deterrent effect on the police in some circumstances. That, however, is merely an incidental consequence of the rule's application in some cases. It is never applied purely for the purpose of punishing the police for, or deterring them from, acts or omissions which infringe the constitutional rights of the individual.

Support for this view can be found in the fact that the courts will always look for a causative link between the infringement of the accused's constitutional rights and the obtaining of the impugned evidence. The judges will only be seen to acquiesce in police wrongdoing if they permit evidence obtained in breach of the accused's constitutional rights to be used against him at the trial. If, however, the evidence is acquired independently of any unconstitutional behaviour on the part of the police the judges can avoid this dilemma. Since the evidence has been produced by perfectly constitutional means they can admit it without being seen to sanction anything else that the police may have done in the course of the investigation. Examples would be: where the suspect has made a voluntary,

incriminating statement while in lawful custody and subsequently was detained for longer than the law permits; or where the suspect makes a voluntary, incriminating statement before being denied access to his solicitor. Since there is no causative link between the unconstitutional police action and the incriminating statements the courts would refuse to exclude them. The clear message is that the Irish courts do not see the exclusionary rule primarily as a method of supervising Garda conduct.

The message is also reflected in judicial pronouncements on those rare occasions when the Irish judges have addressed themselves to the use of the exclusionary rule as a deterrent against police misconduct. In the O'Brien case, for example, Walsh J. had this to say:

> " Every judge in our Court is bound to uphold the laws and while he cannot condone or even ignore illegalities which come to his notice, his first duty is to determine the issue before him in accordance with law and not to be diverted from it or permit it to be wrongly decided for the sake of frustrating a police illegality, or drawing public attention to it.[185] "

Later in the same judgment he adds:

> " [I]f a stage should be reached where this court was compelled to come to the conclusion that the ordinary law and police disciplinary measures have failed to secure compliance by the police with the law, then it would be preferable that a rule of absolute exclusion should be formulated rather than that every trial judge, when the occasion arises, should also be asked

> to adjudicate upon the question of whether the public good requires the accused should go free without full trial rather than that the police should be permitted the fruit of the success of their lawless ventures.[186]
> "

When Walsh J. adverts in this passage to the use of the exclusionary rule as a disciplinary measure against the police, he is clearly referring to a hypothetical situation that may or may not arise in the future. The implication is that that situation does not exist now and, therefore, the rule is not currently used for disciplinary purposes. Furthermore, the prospects of the hypothetical situation becoming a reality in the future are negligible given the adoption of a citizens complaints procedure in 1986.

(c) Judicial Discretion

(i) Generally

The third situation in which an exclusionary rule can operate is where the trial judge exercises his discretion to exclude otherwise admissible evidence. The Irish judges accept that, in addition to the absolute exclusionary rules, they have a discretion to exclude evidence where its prejudicial weight outweighs its probative value.[187] In practice, however, the most relevant discretion to police accountability is that which permits the trial judge to exclude relevant, probative evidence on the ground that it was obtained by unlawful or improper police action. Examples which have been covered already are unintentional violations of the suspect's constitutional rights and the

existence of extraordinary excusing circumstances surrounding the conscious and deliberate violation of such rights. Also included, however, are unlawful practices or procedural irregularities, such as a breach of the Judges Rules, which do not amount to a breach of constitutional rights. This is summed up in the following quotation from Walsh J. in People (Attorney-General) v. Cummins:

> There is ample authority for the proposition that a confession which was induced by a false pretence or a trick or a fraud, however reprehensible they are in themselves, is not necessarily excluded from evidence provided that the trick does not in itself constitute an illegal act or a breach of the accused's constitutional rights. In the former event the Court could exercise its discretion to exclude, and in the latter it must do so subject to the exceptions set out in O'Brien.[188]

THe very fact that the Irish judges do not automatically exclude evidence obtained by unlawful or improper police action suggests that they do not regard the exclusionary rule as a police accountability weapon. Further support for this interpretation of their approach can be found in the manner in which they exercise the discretion.

The basis for the exercise of the discretion was addressed by Kingsmill Moore J. in the O'Brien case. He explained that the task for the trial judge was to weigh the public interest in the detection and punishment of crime against the interest in ensuring that the individual should not be subjected to illegal or inquisitorial methods of investigation. In every case a determination will have

to be made on whether the public interest is best served by the admission or exclusion of evidence obtained by unlawful or improper means. In making that determination in each case factors that must be taken into account include: the nature and extent of the illegality; the degree of blameworthiness attaching to the police; and the degree of urgency under which the police were acting.[189] Kingsmill Moore J. went on to declare that so long as police action stayed within the law he would not be heavily influenced by any alleged unfairness to the accused. While subsequent judicial pronouncements have adopted the notion of fairness to the accused as the touchstone for balancing the competing public interests at stake they have not adopted his distinction between unlawful and improper police practices. In the Shaw case, for example, Griffin J. explained that a voluntary confession could be excluded as evidence if "by reason of the manner or of the circumstances in which it was obtained, it falls below the required standard of fairness."[190] He did not specify exactly what the required standards of fairness entailed apart from a general reference to the minimum of essential standards that must be observed in an accusatorial system of justice which reflected the Irish constitutional emphasis on fundamental fairness of procedure.

Fairness to the accused was also approved as the correct basis on which to exercise the discretion in DPP v. Lynch[191] and DPP v. Healy[192], but without any further

elaboration on what it might entail. Admittedly, in DPP v. Healy it was acknowledged that access to a solicitor for a suspect in police custody was a fundamental requisite of fairness in that it contributed towards some measure of equality between the suspect and his interrogators.[193] In that case, however, the Supreme Court went on to hold that this right of access was so fundamental to fairness in the administration of justice in our accusatorial system that it had constitutional status. Accordingly, the case is not a specific authority on what is encompassed by fairness to the accused in circumstances which fall short of an infringement of constitutional rights. Nevertheless, taking the cases together it would seem that fairness to the accused is to be interpreted against the background of our accusatorial system of justice and our constitutional emphasis on due process and fair procedures. The key question is not whether police action can be classified as unlawful as opposed to merely improper, but whether it has unlawfully or improperly put the suspect in a position where he cannot respond to the police from a position of near equality. If the police illegality or improper practice did not have that effect there would be no question of the court exercising its discretion to exclude the evidence under this heading.

(ii) The Judges Rules

The Judges Rules provide the most convincing evidence of the judicial reluctance to use the discretion as a tool

for police discipline. The Rules originated in 1912 in response to a request to the English High Court Judges from the British Home Secretary who was seeking guidance on how police interviews of suspects should be conducted to ensure the admissibility of any evidence that may result.[194] Although the Rules have been updated on several occasions in Britain, in particular by the addition of administrative directions from the Home Secretary,[195] the Irish Courts continue to apply the old English 1918 version.[196] Broadly speaking[197] the Rules constitute a code of protection for the suspect in police custody. In particular, the code specifies that the suspect should be cautioned, the form the caution should take and the circumstances and timing of the caution's administration; this would be the equivalent of the Miranda warning. Also included are: a prohibition on the cross-examination of suspects on any statement given and any request for a response to an accomplice's statement; a requirement that statements should be taken down in writing and signed by the suspect; and a general recognition that a police officer investigating a crime can put questions to anyone from whom he thinks useful information may be obtained. A key feature of this code is that it does not carry the force of law. It bears the status of administrative guidance; a breach of which does not confer an automatic right of action on the suspect affected.[198] Nor will a breach result in the automatic exclusion of a confession.[199] However, a breach will constitute

improper police procedure which is sufficient to raise the judicial discretion to exclude evidence obtained as a result.[200] In practice this discretion is rarely exercised. In People (DPP) v. Farrell[201], for example, a verbal statement made by the accused was admitted despite the fact that it had not been reduced to writing at the time it was made; as required by Rule IX of the Judges Rules. A similar result occurred in The People v. Pringle[202] and The People v. Kelly.[203] In The State v. Scully[204] a statement was admitted despite the fact that it was obtained, contrary to Rule VIII, by confronting the accused with a statement which had been taken by a co-accused. In all of these cases the Court was unwilling to exclude the evidence simply because the police had treated the suspect improperly. Indeed, this judicial attitude has rendered Rule III a virtual dead letter. Originally, it was interpreted as precluding the questionning or cross-examination of a suspect in police custody.[205] The fact that the police now question a suspect in custody almost as a matter of routine is a reflection of judicial reluctance to exclude voluntary confessions obtained in this manner.[206] The judicial concern in exercising the discretion is to ensure fairness for the suspect; not to discipline the police.

3. Conclusion

Clearly, the exclusionary rule has got potential to strengthen the accountability of the police. The very fact

that police ill-treatment of the accused during the criminal investigation can be raised as a major issue at the subsequent public trial represents, in itself, a powerful accountability weapon for potential victims of police misconduct. Further bite is added by thr prospect of the charges being thrown out as a result of the police failure to follow proper procedure. Not only would this represent a windfall for the accused, but it would also set at nought all the work that the police had invested in bringing the accused to trial in the first place. Despite the accountability potential of the exclusionary rule the Irish judiciary patently have declined to apply it for that purpose. They take the view that the role of the exclusionary rule is to protect the constitutional rights of the accused against deliberate infringement and to ensure equality of arms between the State and the accused. To stray beyond that to use the rule as a weapon for policing the police would raise fundamental issues about the whole balance of our criminal procedure. Is it right that the individual criminal should go free and the public be denied a successful criminal prosecution simply because the police have committed a technical error in the course of the investigation? There is no simple answer to this question.[207] In the final analysis it comes down to a subjective policy determination on where the balance should be struck between, on the one hand, the need of the individual and the general public for a police force which can tackle crime efficiently and effectively and, on the

other hand, the need to ensure that individuals and the general public are protected against over-zealous police practices. Given the fact that there are other remedies for police malpractice it would be impossible to say that the Irish judiciary have struck the balance at the wrong point on the scale.

JUDICIAL REVIEW

1. Introduction

Judicial review has emerged as another option for challenging the legality of police action. Given the central role of discretion in the police function it would appear to be a particularly useful weapon for combatting unacceptable police practices both at the level of policy decision-making and at the level of individual action on the street. It becomes relevant when a public body vested with specific powers is suspected of exercising its powers unlawfully or failing to exercise its powers lawfully.[208] Similarly, it is relevant if the body in question is charged with a duty and either omits to discharge it or discharges it in an unlawful manner. In any of these eventualities the body will be vulnerable to an application for a judicial review on one or more of a number of established grounds. Those that are most potentially relevant in the police context are: acting in circumstances where there was no power to act;[209] a failure to follow

fair procedures;[210] exceeding the limits of a relevant power on the facts of an individual case;[211] and the wrongful exercise of discretion.[212] Since only the last has featured significantly in litigation further elaboration on these grounds will be confined to it.

2. Reviewing Administration Discretion

(a) Introduction

At first sight it might seem anomalous that a court should have the power to question the exercise of a discretion which has been vested by law in another body. If, for example, the legislature had empowered another body to "impose whatever conditions it thinks fit" on the grant of a licence surely a court would be subverting the will of the legislature if it subsequently quashed, as unlawful, conditions which the body, in the exercise of its power, had imposed on the grant of a licence in an individual case. Indeed, it might be argued that the court was assuming to itself the discretion which parliament had specifically allocated to another body. Courts have always been conscious of this danger to the extent that in some cases in the past they have refused even to examine the exercise of certain discretionary powers.[213] Today, however, both the Irish and the British courts are very hostile to any claim that a discretionary power is unreviewable.[214] While they still retain a healthy respect for the freedom of a subordinate body to exercise its discretion untrammelled by interference from outside,

nevertheless they will exercise jurisdiction to check that the body exercises its discretion in a proper manner in each case. This balancing act is summed up neatly in the following quotation from Kerr L.J. in R v London Transport Executive, ex parte G.L.C.:

> "Authorities invested with statutory powers by an Act of parliament can only exercise such powers within the limits of the particular statute. So long as they do not trespass their statutory powers, their decisions are entirely a matter for them .... subject, however, to one important proviso. This is ... that they must not exercise their power arbitrarily or so unreasonably that the exercise of the discretion is clearly unjustifiable."[215]

(b) Grounds

The grounds upon which the courts are prepared to brand the exercise of a discretionary power unlawful have become readily identifiable in recent years. Perhaps the most commonly used is known generally as the Wednesbury test of reasonableness. The appellation Wednesbury comes from the fact that Lord Greene M.R. is credited with handing down the generally accepted test of reasonableness in this context in the case of Associated Provinicial Picture Houses Ltd v Wednesbury Corporation.[216] It can be summed up as follows:

> "... a person vested with a discretion must ... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the power of the authority."[217]

The second ground is closely related. It consists of using the discretion to achieve a purpose other than that for which it was conferred. This will often arise in circumstances where the body has either taken irrelevant considerations into account or failed to take relevant considerations into account; hence the overlap with reasonableness. However it is by no means confined to such circumstances. The court is primarily concerned with ascertaining what purpose or objective was intended to be served or achieved by the law conferring the discretion. If the body has exercised the power primarily to achieve a wholly different purpose or objective it has acted unlawfully.[218] If the body has set out to do this deliberately it has acted in bad faith.[219]

The third ground concerns the failure to exercise a discretion. What is at issue here is not so much a body's decision to take no action in the exercise of its discretion, but its failure to apply its mind to the question whether it should act or not. The courts generally take the view that where a body is confronted with circumstances which call for a decision on whether or not it should exercise a specific discretion vested in it by law it must make a positive decision on whether or not to exercise its discretion. While it is free to decide not to exercise its discretion it has no power to make no decision at all.[220] Clearly this is a ground of review which will often be difficult to apply lucidly in practice. The case

law, however, reveals at least two situations which can be identified as unlawful failures to exercise discretion. The first is where the body in question allows some other body to dictate the outcome.[221] In the context of police a simple example would be a garda failing to exercise his power of arrest in an individual case where it was available, solely because the Commissioner had issued a standing order that arrest should not be used in such cases. In this eventuality the garda would have failed to apply his mind to the question whether or not he should exercise the discretionary power of arrest vested in him. While he is entitled to take the Commissioner's instruction into account in deciding whether or not to exercise his discretion, he is not allowed to regard the instruction as conclusive. The second situation is where the body in question follows its own predetermined policy in the exercise of its power.[222] It is, of course, perfectly legitimate and often necessary, for a body to formulate general policies for the exercise of its discretionary power. To elevate such policies into rigid rules to be applied automatically in individual cases is tantamount to a failure to exercise the discretion in those individual cases. The body in question must always consider with respect to each individual case whether the predetermined policy should be applied or whether there are grounds to depart from it.

(c) Sensitive Cases

The availability of judicial review on any of the grounds above will not normally be affected by the nature of the power in question nor by the identity of the individual or body in whom it is vested. However, it is still possible to detect the survival of a judicial reluctance to interfere in certain circumstances. The most typical situations arise in the context of national security and the existence of a state of affairs in the economy or public order which may require resort to extraordinary measures. A classic example in Ireland is provided by s.4 of the Offences Against The State (Amendment) Act, 1940 which empowered the Minister for Justice to order the detention of any person where he is of the opinion that that person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State. When considering the constitutionality of this measure in a reference from the President under Art.26 Bunreacht na Eireann Chief Justice Sullivan said:

> "The only essential preliminary to the exercise by the Minister of the powers contained in section 4 is that he should have formed opinions on the matters specifically mentioned in the section. The validity of such opinions cannot be questionned in any court."[223]

This conservative approach was consistent with the prevailing view in the British courts as evidenced in Liversidge v Anderson,[224] and it was later followed by the Irish Supreme Court in In re O'Laighleis.[225] Although the judicial reasoning behind these decisions was based primarily on a literal interpretation of the relevant

statutory provisions, it was clearly influenced by the sensitive nature of the discretion vested in the Minister.

There has been a judicial retreat from this conservative approach both here and in Britain. The Supreme Court's decision in East Donegal Cooperative Society v Attorney General[226] has become the standard-bearer of the more activist approach in Ireland. The courts no longer accept that statutory expressions which confer an unqualified or an arbitrary power should be intrepreted literally; such powers must always be exercised fairly. In State (Lynch) v Cooney[227] Chief Justice O'Higgins even went so far as to refer specifically to In re Art.26 and the Offences Against The State Bill and In re O'Laighleis to say that the approach of the Supreme Court in these two cases no longer reflected judicial orthodoxy. He went on to apply the new approach, albeit obiter, to s.31 of the Broadcasting Act, 1960. This provision empowers the Minister for Communications to prohibit the broadcasting of certain matter where he is of the opinion that it would be likely to promote or incite to crime, or would tend to undermine the authority of the State. Chief Justice O'Higgins concluded that a precondition for the lawful exercise of this power was that any opinion formed by the Minister under s.31 should "be one that is bona fide held and factually sustainable and not unreasonable."[228]

It may be a mistake, however, to accept the declared

judicial activism in Cooney at face value.[229] Indeed, in that case the court concluded that the Minister's discretion had been exercised with complete propriety despite the fact that there was nothing in the broadcasts themselves which tended to promote or incite to crime or undermine the authority of the State. It seemed that the court's declared willingness to review ministerial decisions in the abstract was heavily tempered in practice by the national security and sensitive political implications of the facts of the case. Judicial reluctance to interfere in such matters is stated in more direct terms in Savage and Mc Owen v DPP.[230] In that case the court was asked to review the DPP's power to send for trial in the Special Criminal Court persons accused of non-scheduled offences. Section 46(2) of the Offences Against The State Act, 1939 (as amended) stipulated that before exercising that power the DPP must be of the opinion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to such a person on such a charge. The court held that so long as the DPP actually held that opinion it could not be reviewed on the ground of reasonableness or any other ground.

Of particular relevance here is the government's statutory power to appoint and remove the Commissioner of the Garda Siochana.[231] Given the very sensitive nature of this office with its pivotal role in protecting the

national security and stability of the State it is crucial that the government of the day has absolute confidence in the incumbent. In Garvey v Ireland,[232] therefore, the Supreme Court accepted that the government's reasons for dismissing a Commissioner were not subject to review unless they constituted a flagrant violation of the Constitution. Of course, unreviewable powers need not be confined to matters of national security. A different example would be a government power to act where it is of the opinion that the state of the national economy is such that certain remedial measures are necessary.[233] It is highly unlikely that a court would feel competent to review the reasonableness of such an opinion. The key factor is that in such matters it is perfectly plausible to hold widely divergent views on what is necessary based on the same set of facts. If the legislature has delegated the responsibility for forming such opinions to an executive authority which is answerable to democratically elected representatives of the people, the courts will not feel competent to intervene. Their concept of what might be reasonable in such matters can carry no greater authority than that of the body best placed to form the relevant opinions.

(d) Non-Justiciable Review

A closely related limitation on the judicial review of discretionary power emerges from the fact that not all decisions taken pursuant to a public power are amenable to

judicial review. This factor is most evident when the government as a collective body, or any individual government Minister, takes decisions pursuant to the general executive power inherent in government. Examples would include decisions to enter into an extradition arrangement with another State, to hold a referendum on divorce, to make no provision in the annual budget for increases in social welfare entitlements, to allocate resources to one part of the State as opposed to another, to privatise a State industry, to arm the Garda, to establish an environmental agency and to fail to provide halting sites for travellers. Although such decisions will please and/or confer advantages on some sections of the community at the expense and/or displeasure of others they would not normally be amenable to judicial review. The explanation lies in the absence of any relevant criteria which the courts can use to assess legality in these matters. What is at issue in these decisions is choices from among competing economic, social, political, cultural and moral values and from among rival claims to a larger share in the distribution of the national cake. Unless the legislature has imposed constraints on the government's freedom of choice in such matters, or the choices adopted by the government amounted to a clear infringement of the Constitution, there would be no legitimate basis on which a court could assess the validity of the government's choice in an individual case. Indeed, any attempt by a court to substitute its own preference for that of the

government in such matters would be interpreted as a naked infringement of the separation of powers. It does not follow that persons aggrieved cannot call the government to account for the policy decisions that it takes in such matters. It is just that they should pursue their grievance through the political, as opposed to the judicial, process.

(a) Remedies

The whole point in seeking a judicial review of the exercise of a discretionary power is to secure a remedy for the unacceptable consequences of its exercise in an individual case. The remedies available today in these actions include[234]: a simple declaration that the decision or action taken was unlawful, an order to cease the unlawful action, an order to quash the unlawful decision, an order to take a decision or adopt some course of action, a combination of these or any of these plus damages. The availability of such powerful remedies is clearly essential if the individual is to secure protection or relief against the unlawful exercise of discretion by a public body. It must also be borne in mind, however, that hundreds, perhaps thousands, of others may also have been affected by that same single exercise of discretionary power. The price for seeing that justice is done in the case of one individual might be major financial loss, social upheaval or administrative dislocation for the others. Accordingly, there are controls on the availability of the remedies by way of judicial review. First, a

prospective applicant for judicial review must seek leave to apply. This is essentially a procedural filter designed to throw out those cases which are vexatious, an abuse of the process of the court or which have little chance of success. Second, an applicant must establish that he has sufficient locus standi for the remedy he seeks.[235] Broadly this requires him to show that the decision or action he wishes to challenge affects him to a degree over and above the effect it has on the public generally.[236] Even if he does surmount the locus standi requirement it does not follow that the court will grant the applicant his remedy. He may fail because he did not bring his application within the very narrow time limits.[237] Furthermore the public law remedies and the injunction and declaration are available only at the discretion of the court.[238] Remedies have been refused in the exercise of this discretion on the grounds, inter alia, that the applicant had not acted in good faith, had not disclosed all the relevant facts or had been guilty of exaggeration. In most cases if an applicant is denied his remedy in a judicial review the accountability potential of judicial review will have been frustrated.

4. Reviewing Police Discretion

(a) Introduction

The potential attractiveness of judicial review for police accountability stems from the scope of police discretion. It has been seen already that when a garda

decides to arrest or to use force to restore public order, or to enter onto private property, or to restrict freedom of movement or to seize private property his discretion is so broad that the ordinary remedies for abuse in tort and at criminal law are often inapplicable. Similarly, the Commissioner's power to formulate and implement policies and decisions for the deployment of the force is so broad that neither tort nor the criminal process can offer much in the way of accountability. Judicial review, however, holds out much greater promise. Even after taking into account its inherent limits it would seem that judicial review has valuable potential to fill the huge gaps in police accountability to the law which are apparent from the tort and criminal remedies.

(b) Policy Decisions

The judicial review of a chief officer's operational policing policies and decisions first received serious consideration in these islands in Blackburn (No.1).[239] A central issue in that case was whether an individual could seek a judicial review of the Commissioner's operational policy in the enforcement of the Betting, Gaming and Lotteries Act, 1963. The Court of Appeal found that the Commissioner was under a legal duty to enforce the law generally.[240] The existence of the duty, however, presumed the existence of machinery to enforce it. The Court had no difficulty in concluding that that machinery was provided by the courts themselves through their power

to issue the prerogative writ of mandamus consequent on an application for a judicial review by a private individual.[241] Denning and Edmund Davies L.JJ. also envisaged the duty being enforced by the Attorney-General seeking an appropriate remedy on an application for a judicial review in his capacity as guardian of the public interest. Since Blackburn (No.1) the Metropolitan Police Commissioner has found himself in court defending the legality of his operational policy instructions in an action for judicial review on at least three occasions; all of them at the suit of Mr. Blackburn.[242] In all of these cases it was accepted that the Commissioner's policy instructions were amenable to judicial review. Similarly, in R v Oxford, ex parte Levey[243] it was accepted without question that a judicial review would lie against the operational policy instructions of a chief constable. In this case the applicant had been robbed in Liverpool by individuals who were chased by the police into the Toxteth area. In retrospect it appeared that the chase would have been successful had it not been called off by a local commander acting in accordance with the chief constable's policy instructions. The remedies sought by the applicant were, inter alia, (1) a declaration that it was unlawful for the chief constable of Merseyside to adopt a policy whereby the Toxteth area of Liverpool was deemed to be a "no-go" area for the police, (2) an order of mandamus directing the chief constable to rescind the order and to maintain an adequate and efficient force in the Toxteth

area, and (3) damages for breach of the chief constable's statutory and common law duties in these matters. Dealing with the argument that the chief constable's operational policy instructions were not subject to review by the court Sir John Donaldson M.R., in the Court of Appeal explained:

> " There is no doubt that it is a duty of the chief constable and other constables to keep the peace and enforce the law. Nor is there any doubt about the jurisdiction and readiness of the courts to interfere by mandatory, prohibitory or declaratory orders, if it is established that they are failing in their duty. "[243]

(c) Success

Initially it seemed that the courts might frustrate the police accountability potential of judicial review by a strict interpretation of the locus standi requirements. In Blackburn (No.1), for example, the Court of Appeal voiced some doubt about whether the applicant had a sufficient personal interest in the enforcement of the gaming legislation.[244] It was not enough that he was merely a member of the public to whom the Commissioner owed the duty to enforce the law. Subsequent developments, however, suggest that the courts have no intention of using locus standi as a device to protect police operational practices from bona fide challenge at the hands of concerned citizens. In the Levey case, for example, the Divisional Court decided that the applicant had no particular interest in the chief constable's law enforcement policies for Toxteth over and above that of the average member of the public in Liverpool. The Court of

Appeal, by contrast, concluded that since he had been robbed in Liverpool and his chances of recovery diminished by the policy in question he had sufficient standing in the matter.

Although locus standi has not posed a significant obstacle in practice the reality is that judicial review has not lived up to its' police accountability potential. In none of the cases to date has a British court found that an operational police policy crossed the bounds of legality. The explanation for this one hundred percent failure rate rests in the very stiff test imposed by the courts. Lord Denning in Blackburn (No.1) set the tone when he said:

> " Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere."[246]

From the remainder of this passage (quoted earlier) it is clear that he would not subject a chief officer's operational policies to review merely on the ground that they did not satisfy the Wednesbury test of reasonableness; or any of the other standard grounds for review. The courts would interfere only if he had issued a policy instruction which amounted to a blatant contradiction of his duty to enforce the law. The example offered by Denning was an instruction that no person should be prosecuted for stealing goods less than £100 in value.[247] This judicial reticence to interfere with the operational freedom of chief police officers has been confirmed in the subsequent

Blackburn cases[248] and in Levey where Sir John Donaldson said:

> " ... chief constables have the widest possible discretion in their choice of the methods whereby they will discharge [their duty of law enforcement]. Any police officer who finds that his chosen policing methods are ineffective will be under a duty to re-examine them and consider whether any and, if so, what alteration is required, but one incident or even several would not necessarily be a sound basis for such a re-examination or, a fortiori, a change." [249]

As yet there is no Irish case law on the judicial review of operational police policies. However, there is no reason to believe that the Irish judiciary would depart from the approach adopted by their British counterparts when confronted with the issue. It follows that judicial review cannot be presented as a sufficient response to the failure of the criminal process and the tort action to subject operational police policies to adequate public accountability.

(d) Decisions in Individual Cases

It would now appear that judicial review also provides a forum in which the exercise of police powers in individual cases can be challenged. Traditionally, this has been the preserve of the criminal process and the action in tort. In Holgate-Mohammed v Duke,[250] however, the House of Lords ruled that the decision to exercise a police power in an individual case could be reviewed on the basis of Wednesbury reasonableness even though the preconditions for the availability of the power were satisified on the facts

of the case. In Holgate-Mohammed the court concluded that the arresting officer suspected, and had reasonable grounds for suspecting, that the appellant had stolen some jewellery. Accordingly, one option lawfully available to the officer, which he exercised, was his power to arrest the appellant. Subsequently, the House of Lords accepted that in deciding whether or not to effect the arrest the officer was exercising an executive discretion which was as amenable to review on Wednesbury grounds of reasonableness as any other executive discretion. The House of Lords went on to say that any challenge to the reasonableness of the officer's decision to resort to arrest was not confined to proceedings for a judicial review but could also found a cause of action at common law for damages for the tort of false imprisonment.[251]

The distinction drawn by the House of Lords between the fulfillment of conditions precedent to the lawful availability of a police power in any individual case and the executive discretion inherent in the decision whether or not to use the power was not altogether unprecedented. A similar issue had arisen in Lindley v Rutter[252] where an arrested suspect's brassiere was forcefully removed in accordance with internal standing orders for the protection of suspects against self-inflicted injury while in custody. The Divisional Court accepted that police officers were under a duty to take all reasonable measures to ensure that a prisoner in their custody does not injure himself. The

discharge of that duty may be facilitated by the promulgation of suitable standing orders. However, it also held that it was incumbent on the police officer concerned to address his mind to the circumstances of each particular case, and should only deprive a prisoner of his property for very good reason.[253] More recently Watkins L.J. in R v Chief Constable of Kent, ex parte G.L.; R v DPP ex parte R.B.[254] indicated that a police decision not to prosecute or even possibly to caution in an individual case where a contrary decision was lawfully open could be vulnerable to judicial review.

Once again, however, the availability of judicial review as a check on the soundness of the exercise of police discretion must be set against the extreme judicial reluctance to interfere in individual cases. In Holgate-Mohammed, for example, the House of Lords did not accept that the police power of arrest under section 2(6) of the Criminal Law Act 1967 had been exercised unlawfully on the facts. Lord Diplock reasoned that one of the primary purposes of detention upon arrest was to enable the police to use that period of detention to dispel or confirm the reasonable suspicion they entertained against the suspect. Accordingly, it was perfectly reasonable, in the Wednesbury sense, for the police officer in this case to use his power of arrest as a device to encourage the suspect's co-operation with the police investigation. The difficulty with this decision is that the interpretation of the

purpose of arrest goes far beyond the traditional purpose of rendering the suspect amenable to the process of the court. By extending its purpose in this manner Lord Diplock has given police officers much greater freedom to use arrest as a technique of criminal investigation without overstepping the boundaries of Wednesbury reasonableness. In any event, it is highly likely that the courts would follow the lead of Blackburn (No.1) and display extreme reluctance to interfere with a police officer's exercise of executive discretion when taking law enforcement decisions in individual cases. Indeed, in R v Chief Constable of Kent, ex parte G.L.; R v DPP, ex parte R.B. Watkins L.J. referred specifically to Blackburn (No.1) and (No.2) as authorities for the proposition that the courts would only interfere in extreme cases with a police refusal to prosecute or caution.

5. Conclusion

The potential of judicial review for police accountability purposes is only beginning to be charted in the jurisprudence emanating from the courts in Britain and Ireland. To date, however, there is no reason to believe that it will have a significant contribution to make in filling the gaps left by the criminal prosecution and the action in tort. Its' greatest potential lies in keeping a check on the contents of the operational policies formulated and implemented by the chief officers. The legacy of the Blackburn cases, however, seems destined to

strangle this potential at birth. It follows that if the shortcomings of the criminal prosecution and the action in tort are to be overcome serious consideration will have to be given to other potential accountability mechanisms. This is the subject of chapters 8 and 9.