

Book Review: Police and Government - The Governance of the Police, by Laurence Lustgarten

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POLICE AND GOVERNMENT[©]

The Governance of the Police. By Laurence Lustgarten. London: Sweet & Maxwell, 1986.

REVIEWED BY PHILIP STENNING*

When all is said and done, there is not a great deal that is truly new in Mr. Lustgarten's examination of the issues surrounding the governance of the police in England and Wales (Scotland and Northern Ireland are excluded from his attention). Indeed, his candid acknowledgement throughout this excellent book of his reliance on the work of others who have toiled in this remarkably cultivated field of scholarship, is as welcome as it is refreshing. Despite the fact that it treads so much well-worn ground, however, this book can undoubtedly now be recognized as the best and most comprehensive analysis of these important issues currently available. As such, it deserves (and will amply reward) careful attention.

The main theme of *The Governance of the Police*,¹ which permeates the entire book, is that the distinctiveness which the exponents of "police independence" (be they policemen, judges, politicians or academics) have claimed for the problem of police governance — as compared to other public services which have a hybrid national-local character — has been, and continues to be, grossly exaggerated, at least throughout most of the twentieth century. Central to this analysis is the contention (entirely correct in this reviewer's opinion) that the argument that policing decisions have their source exclusively in "the law" and not in policy, is, and always has been, untenable both theoretically and empirically. It is an argument which Mr. Lustgarten ably demolishes with a barrage

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¹ L. Lustgarten, *The Governance of the Police* (London: Sweet & Maxwell, 1986).

of historical, legal, constitutional, political, and to a lesser extent empirical, analysis, culminating in the last chapter of the book, which, in terms at least of the preceding academic and policy literature on the governance of the police in Britain, is as radical as it is powerful. In it, he argues that the way of "democratic constitutionalism" demands that the main pillars of the infamous doctrine of "police independence" (according to which virtually all of the important policy and operational decisions of the police should be immune from effective political scrutiny, let alone control) should be swept away and the principal political responsibility for the democratic control of policing should be returned (for historically this would be the right word) to the hands of locally elected (and accountable) authorities (although he omits to mention exactly what the composition and status of such authorities — "organs of local government" — should be).

The role of central government in the governance of the police would be confined to promulgating and insisting upon the observance by local police forces and their authorities of minimum standards of technical competence and of respect for fundamental human rights and civil liberties, and the establishment and administration of certain necessary "national" police services, including a genuinely independent and effective body to hear and dispose of the more serious public complaints against the police. This central government influence would be exerted principally, as now, through the leverage of central government subsidy of local policing expenditures, administered through Her Majesty's Inspectorate of Constabulary.

As for the courts, Lustgarten urges that they should continue to exercise great restraint in intervening in areas of police policy, and should confine themselves to the usual areas of judicial review, treating the police no differently from other public servants. As he indicates, there is some evidence that the English courts are already moving in this direction.²

The essence of Lustgarten's reform proposals is that the current, largely unaccountable hegemony which Chief Constables, (there seems to be some disagreement as to whether it is more or

² See *Holgate-Mohammed v. Duke*, [1984] A.C. 437 (House of Lords).

less) in concert with the Home Office, exert over police policy and operational decision-making, should be broken in favour of genuine democratic local control in this area. While his argument in favour of reform, which builds throughout the book, is solid and persuasive enough, however, his articulation and justification of the new structures and protocols of police governance which he recommends are confined to the last chapter of the book and are disappointingly sketchy. Given that, in the context of what exists now, they are so radical and will undoubtedly evoke a very negative reaction from the current police policy "establishment," this failure to specify and justify them more carefully may turn out to be a fatal weakness of the book. Lustgarten's cursory discussion of how genuinely national, as opposed to local, policing needs are to be defined and met under the reforms he proposes is particularly disappointing. For while his preference for local control and accountability understandably leads him to recommend a transfer of governance of the Metropolitan London force from the Home Secretary to a more locally-based (but unspecified) elected authority,³ his glib suggestion that the "national functions now performed by the Metropolitan Police" should simply be turned over to the Inspectorate of Constabulary, responsible to a Ministry of Justice, is scarcely an adequate disposition of this issue, and leaves the reader with the uncomfortable feeling that Lustgarten does not really understand (or has not bothered to properly think through) the implications of his recommendations.

As this reviewer has learned from his own experience of this phenomenon in Canada,⁴ police, judicial and government policy-makers have demonstrated a remarkable capacity to simply ignore or discredit any argument, however well articulated, which seeks to debunk the current mythology of "police independence" or disturb current arrangements for police governance. Indeed, Lustgarten himself acknowledges this reality when he laments that "in terms of practical effect on political and judicial elites," Geoffrey Marshall's excellent treatment of the subject in his book *Police and Government*

³ *Supra*, note 1 at 179.

⁴ P. Stenning, *Legal Status of the Police* (Ottawa: Supply and Services Canada, 1985).

(1965),⁵ written more than 20 years earlier, "might as well never have been written."⁶ The possibility that someone will be saying something similar about Lustgarten's book in twenty years' time (or less) is all too real.

One area of Lustgarten's analysis which appears particularly weak, but is very important, is his treatment of the situation of the individual constable making discretionary decisions in individual cases. Lustgarten seems to vacillate on this issue. At one point, referring to the notorious predicament of Constable Joy in Kent, he states that the primary lesson to be learned from this case is "how tightly the constable's wings are clipped by the structure within which he works. P.C. Joy's superiors were able to substitute their discretion for his."⁷ Only two pages later, however, he asserts as "a matter of vital importance for police governance" the fact that "no superior officer can take away the discretion granted to the individual constable by statute, either by requiring him to arrest, or forbidding him to arrest, a particular individual or anyone who falls into some predefined category," referring to this as the essence of a constable's independence "in the sense of freedom from interference in the exercise of that discretion."⁸

To this reviewer, the distinction between telling a subordinate officer not to arrest someone (which senior officers apparently cannot do) and substituting their own discretion for his after an arrest has been made (which apparently they can, and do, do) seems rather too fine to be persuasive. In the end, Lustgarten comes out in favour of a constable's independence in this regard, justifying it in the following terms:

Only the constable personally aware of the facts can form the reasonable suspicion necessary in law for an arrest or search. For any political body, however popularly representative, to order the arrest of X or non-arrest of Y is – quite apart from the question of motive – to usurp a power Parliament has allocated elsewhere.⁹

⁵ G. Marshall, *Police and Government* (London: Methuen, 1965).

⁶ *Supra*, note 1 at 33.

⁷ *Ibid.* at 12.

⁸ *Ibid.* at 14.

⁹ *Ibid.* at 171.

This is neither persuasive nor consistent with Lustgarten's analysis throughout the remainder of the book, however. For his main argument (most clearly articulated in Chapter 1 on "Police Discretion") is that *any* law enforcement decision, whether at the level of general policy or with respect to an individual case, involves not only legal considerations (are the legal grounds to justify an arrest satisfied?) but also policy considerations (is this the kind of case which is best dealt with by invoking the legal process?), and can therefore be properly regarded as "political" (in a non-partisan sense). It is difficult to see why the argument that sustains most of Lustgarten's recommendations (that because law enforcement decisions are fundamentally political in this sense, they should be subject to democratic accountability and control) should not apply equally to the constable's decision with respect to an individual case as it does, for instance, to his Chief Constable's decisions with respect to the size or deployment of a particular squad. Further, to suggest that the constable's decision should not be subject to democratic accountability and control because the power to make it has been conferred on him by Parliament, seems to beg the very question Lustgarten is seeking to answer. Clearly he would not invoke the same argument to support the independence of a Chief Constable in the exercise of his (equally statutory) responsibilities for the "direction and control" of his police force. The vital question is *should* such statutory powers be exercisable independent of any democratic accountability and control?

No one suggests that a constable should be liable to be ordered to make an arrest where the legal criteria for an arrest are not satisfied. The question, however, is whether, given that the legal criteria are satisfied in a particular case, anyone (including his superior officers) should be able to instruct a constable as to whether he should exercise his power of arrest in that case or not. The law currently provides no clear answer to this question. In P.C. Joy's case, it was left essentially unresolved. In a comparable case in Canada a few years ago, a court relying principally on the particular wording of the statute, which made the sergeant concerned "subject to the orders of the Commissioner" in the performance of his duties, but also invoking the famous *dicta* of Lord Denning in

the first *Blackburn* case¹⁰ in support of its conclusion, upheld a senior officer's right to order his sergeant to terminate a particular criminal investigation.¹¹ Had someone other than a senior officer been trying to direct Sergeant Wool to cease his investigation, however, it is quite possible that the court would have taken a very different view of the matter.

As Lustgarten has rightly argued, the question of whether the individual constable is to be regarded as free from democratic accountability and control in making law enforcement decisions in individual cases is critical to the debate over police governance. This is because of the ease with which police executives can invoke the "slippery slope" argument, according to which democratic control over *any* aspects of law enforcement will inevitably lead in the end to "improper" interferences in the disposition of individual cases. However specious this argument may be, it has great popular appeal, and must be met with a convincing rejoinder by anyone who seeks to convince the police to yield some of their treasured independence. Lustgarten's argument in favour of individual constabulary independence, while it may be strategically wise, is not very persuasive in this respect, especially since it seems to conflict with almost everything else he has to say about the nature of police discretion. Furthermore, it is difficult to see how it can be reconciled with the realities of police organization and management, to which he has also drawn attention in his book.

Despite its very real strengths, Lustgarten's book illustrates well the empirical desert within which the issue of police governance must still be discussed in Britain. While Lustgarten himself has made a commendable attempt to supplement the "merely formal study of the constitutional allocation of power"¹² with some empirical evidence about the way police governance actually works in practice, even this worthy attempt must ultimately be recognized as inadequate. The evidence drawn upon is largely anecdotal,

¹⁰ *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, [1968] 1 All E.R. 763 (Court of Appeal).

¹¹ "Supreme and County Court Decisions – *Wool v. The Queen and Nixon*" (1985-86) 28 Crim. L.Q. 162 (Federal Court of Canada, Trial Division).

¹² *Supra*, note 1 at 100.

unsystematic and drawn for the most part (understandably) from highly publicized, often politically charged cases which cannot be claimed to reflect the day-to-day realities of routine police governance with any accuracy.

The responsibility for this lack of systematic empirical information as a base for analysis and the formulation of policy in this area cannot, of course, be laid at Lustgarten's door. Rather, it reflects the closed and secretive character of the police and Home Office establishments which, until very recently, have not shown any serious willingness or inclination to allow researchers adequate access to the realities of police governance. Such secretiveness has, of course, come to be recognized as one of the characteristics of government more generally in Britain, although other countries of the Commonwealth are by no means paragons of virtue in this regard either. Nevertheless, it must be said that authorities in Canada have permitted a degree of empirical research on the realities of police governance in that country¹³ without apparently suffering any disastrous consequences for the police or anyone else. It must be noted, too, that the more recent work of Morgan and Swift¹⁴ and Loveday¹⁵ in England, despite its obvious limitations, represents a very welcome sign in this regard.

The results which emerge from such empirical investigations are not always what one might expect them to be. But that is another story. The point here is that until the realities of police governance in Britain can be more adequately revealed, even the best efforts of authors such as Lustgarten to advance rational public policy in this area must be regarded as inadequate, and will be all too easily discredited by their opponents.

¹³ See, for example, P. Stenning, *Police Commissions and Boards in Canada* (Toronto: Centre of Criminology, University of Toronto, 1981), and R.G. Hann *et al.*, "Municipal Police Governance and Accountability in Canada: An Empirical Study" (1985) 9 *Canadian Police College Journal* 1.

¹⁴ R. Morgan & P. Swift, "The Future of Police Authorities: Members' Views" (1987) 65 *Pub. Admin.* 259.

¹⁵ B. Loveday, *The Role and Defectiveness of the Merseyside Police Committee* (Liverpool: Merseyside Police Committee, 1985), and "Progress of the Joint Boards" (1987) 3 *Policing* 196.

Despite such reservations, however, Lustgarten's book is a fine work of scholarship, beautifully and clearly written, which should be required reading for anyone interested in police governance in Britain or elsewhere. His description of the impotence of local police authorities in England is made particularly memorable by his observation that "if power without responsibility is the prerogative of the harlot, responsibility without power is the prerogative of the eunuch."¹⁶ Hopefully, the same will not be true of Lustgarten's book itself.

¹⁶ *Supra*, note 1 at 125.