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The importance of liberal values within policing: police and crime commissioners, police independence and the spectre of illiberal democracy

Abstract

The introduction of Police and Crime Commissioners (PCC) in England and Wales has reignited discussions about police governance. This paper contributes to these debates by focusing on the role liberal values play within liberal democratic ideals of policing. It suggests, policing principles historically have been informed primarily by liberal goals; that is to say these principles are liberal before they are democratic. Policing in England and Wales today, however, is increasingly informed by democratic values at the expense of liberal principles. The spectre of illiberal democracy is considered here as a warning in light of this development. The paper argues that there is a growing disparity between the rhetoric of liberal policing principles, historically rooted in pre-democratic times, and the reality of contemporary policing in societies that are increasingly sensitive to democratic expectations. Police independence is used to illustrate this argument. Police independence is still revered in rhetoric today, but the liberal origin of this concept is not recognised. But the idea that the police should retain a degree of freedom from political interference makes sense from a liberal perspective, one that is increasingly difficult to defend as liberal values decline in importance, and democratic aspirations come to the fore. The paper concludes by suggesting that liberal values are, on the one hand, increasingly difficult to accommodate within contemporary ideas of policing, but are at the same time becoming more necessary, especially following the introduction of PCCs.

Key words: liberal democratic policing; police independence; police and crime commissioners; illiberal democracy

Introduction

The election of the first Police and Crime Commissioners (PCC) in England and Wales in November 2012 marked a significant departure from the tripartite arrangements for police accountability that had been in existence since the Police Act 1964 (Gilmore 2012a; Newburn 2012; Sampson 2012; Lister 2013; Millie and Bullock 2013; Rogers

2013). This development has been presented as the most momentous change in British policing since 1829 by supporters and critics alike (May 2012; Orde 2012). It is part of a number of radical policing reforms that have reignited an already growing political interest in police accountability (McLaughlin 2005; Jones 2008; Gilling 2013; Reiner 2013; Rogers 2013; Lister and Rowe 2014; Turner 2014).

The most contentious aspect of the introduction of PCCs from the perspective of this paper is the fact that candidates are directly elected into post (see Jethwa's 2012 collection). There is a fear that this endangers the long-standing assumption that the work of the police should not be controlled by persons/bodies with a partisan political agenda (Chakrabarti 2012; Joyce 2011; APA 2010; Lister and Rowe 2014). At the very least, as Lister (2013, p.240) suggests, electoral pressures on PCCs increases the likelihood of them seeking 'to interfere in what Chief Constables do'. This concern is heightened by what Loader (2014, p.44) sees as an 'impoverished' understanding of police work narrowly conceived exclusively in crime fighting terms. This fosters, he continues, a greater likelihood of external pressures on police to act in ways that pay little concern for 'unpopular minorities . . . civil liberties and the rule of law' (Loader 2014, p.48).

A concern in this paper is the extent to which liberal values are being forsaken in police practice and policy. There is, I suggest, a growing gap between the rhetoric of policing ideals, which are rooted in nineteenth century liberal values, and the increasingly democratic sensibilities of the twenty-first century that reject liberal ideals as elitist. Sklansky (2008) charts a transition in democratic ideas in America over the past sixty years that has seen a decline in the fortunes of a liberally informed pluralist perspective that places faith not in the masses but rather in elites and responsible leaders. In its place, participatory and deliberative forms of democracy that champion

public engagement and involvement as goods in and of themselves are come increasingly to the fore. He argues that this shift in democratic thinking has coincided with a complementary shift in ideas about policing from a liberally framed professional model, intended to ensure ‘insulation from partisan politics’ (Sklansky 2008, p.37), towards a community model that seeks to dissolve any such insulation to maximise the democratic influence communities can have on policing matters.

The democratic idea that policing should be influenced by the will of the people is not new (Scarman 1981; Waddington 1999; Home Office 2004). Indeed, as indicated above, such a view has become increasingly dominant within notions of democratic policing (Sklansky 2008), despite resistance from chief police officers under the banner of police independence (Gilling 2013). PCCs, if nothing else, clearly have the potential to undermine the police independence defence in practice (Newburn 2012; Orde 2012), irrespective of commitments to it rhetorically (see especially point 30 of the Policing Protocol Order 2011). This has raised concerns within policing bodies, summed up by Sir Hugh Orde, President of the Association of Chief Police Officers (ACPO), in an early response to the idea of a directly elected official being given the responsibility of holding the police to account:

Even the perception that the police service of this country... is under any political influence, I think that suggests you cannot argue that you are a proper democratic society. It's as simple and as stark as that. (Sir Hugh Orde, cited in BBC 2009).

It is difficult to see how this idea of police independence, underpinned as it is by liberal considerations, can survive in practice. The shift in democratic norms referred to by Sklansky (2008) have resulted in liberal democracies becoming more democratic but less liberal (Zakaria 2004) and the concept of police independence is consequently vulnerable. But whilst police independence is perceived by some to have been abused

far too frequently, it has also provided an important constitutional conceptual bulwark against the idea of a police state or anything that comes close to resembling such a thing (Sklansky 2008). The spectre of what Zakaria (2004) has identified as illiberal democratic tendencies creeping into police practices in England and Wales becomes a concern in this regard.

Zakaria's (2004) use of the term illiberal democracy is premised upon an understanding of liberal democracy that stresses a tension between liberal and democratic values. This tension is considered in more detail later in the article but for the moment it is important to note that if the liberal component is removed from the equation, then democracy per se will not necessarily address concerns beyond the interests of the majority. Liberal and democratic sensibilities are thus seen as contradictory components within a harmonious whole in which they interact in a complementary fashion. Liberal values restrain democratic impulses to give more voice to the majority by emphasising the importance of individuals, especially non-conformists (Mill 1849). Democratic values restrain the liberal inclination towards elitism by insisting on giving more people in society a say on public matters.

The idea of illiberal democracy is used to characterise a society in which people are given a say on public matters, but without safeguarding the rights of minorities. Dryzek and Dunleavy (2009, p.25) refer to this as 'competitive authoritarianism', in that there is a democratic electoral process between participants that are in substantive terms equally authoritarian.

Policing was liberal before it was democratic

Police independence is illustrative of the liberal underpinnings of the police ideals established in 1829. It is part of a long standing set of policing principles that have

endured for almost two hundred years (Rogers 2013). They are increasingly articulated today in democratic terms (Aitchison and Blaustein 2013; Reiner 2013) but it is important to note that they originate and make more sense from a liberal perspective.

Resisting political influence over policing makes sense from a liberal perspective, one that favours strong independent and autonomous areas of social life beyond the direct control of government (Gray 1995; Zakaria 2004). It requires what Sir Paul Stephenson, former Commissioner of the Metropolitan Police Service, refers to as an ‘appropriate space between policing and politics’ (cited in Caless and Tong 2013, p.4). Appropriate space expresses the need to insulate policing, at least partially, from democratic forces. This accords with a liberal standpoint but it is difficult to sustain within the democratic expectations and sensibilities of contemporary society (Fukuyama 2011). Democracy does not require such space and this is becoming increasingly evident within policing contexts. As Baldi and LaFrance (2012, p.149) note, the introduction of PCCs shifts the focus of police accountability towards ‘responsiveness to citizens and elected officials’ as opposed to ‘deference to and the maintenance of an image of professionalism’. This represents, they suggest, a shift towards a political form of accountability, informed by democratic values, as opposed to a professional form of accountability, influenced by liberal values.

The emergence of modern police in pre-democratic Britain

A key argument in this paper is that liberal values have had a distinct influence upon police governance especially within England and Wales (Lustgarten 1986; Uglow 1988; Stenning 2011). Modern policing emerged in England and Wales at a time when Britain lacked the credentials to be considered a democracy by today’s standards and expectations. In particular, the lack of popular participation is highly problematic from

today's ideas of what constitutes a proper democracy (Lister and Rowe 2014). In 1829, less than 3% of the male population in Britain were entitled to vote (Zakaria 2004), and in the five general elections between 1812 and 1830 three quarters of Parliamentary seats were returned uncontested, thereby denying the overwhelming majority of the tiny democratic franchise the opportunity to vote during this period (Cox & Ingram III, 1992). Britain at this time is described by Acemoglu & Robinson (2000, p.1167) as 'an "oligarchy" run by an elite'. Britain only gradually became a substantive democracy over time following the franchise extensions in the 1832, 1867 and 1884 Electoral Reform Acts, and the extension of the vote to women in the Representation of the People Acts in 1918 and 1928.

The 1832 Reform Act made little substantial change at the time to Britain's democratic credentials (Phillips and Wetherell 1995); nor was it brought about because of significant popular pressure (Lizzeri and Persico 2004). Notwithstanding the growing influence of Chartism in Britain, the involvement of the masses at this time is felt much more through non-democratic expressions of violence of the kind cited by Emsley (2009), e.g. the Gordon Riots in 1780 and the revolutionary turmoil in France a decade later.

However, the fact that Britain was not a democracy in 1829 is often ignored when references are made to Peel. There is a danger of an ahistorical analysis of Peel's police and this is nowhere more evident than in a speech delivered by Damian Green, the Minister of State for Police and Criminal Justice, at the Policy Exchange in October 2012. He cites the oft quoted Peelian notion that the police are the public and the public are the police and from this normative statement he goes on to make the rather dubious empirical claim that modern policing 'was created by public minded citizens forming themselves into groups to protect society' (Green 2012).

The Minister is ignoring the considerable opposition to the introduction of the police in 1829 and the ensuing disorder and anti-police riots in the 1830s and 1840s (Uglow 1988). More importantly, he is failing to recognise the considerable effort that was required in order to establish and maintain the somewhat ‘mythical’ doctrine (Brogden and Ellison, 2013, p.91) of policing by consent (Reiner 2010, Uglow 1988, Waddington 1999).

None of this is to say that the introduction of police in Britain did not follow democratic processes, but rather that the society at large at that time was not democratic. Importantly though, Britain was a liberal society with a developed civil society (Zakaria 2004), and it was perceived as such, as ‘a land of liberty’ (Emsley 2009, p.13). The introduction and development of police in England and Wales was informed and shaped by these prevailing liberal values, which are characterised by a cautious distrust in the state and a reluctance to give too much power to public authorities. The liberal ideal of police is captured well by Uglow (1988) when he questions the legitimacy, from a liberal perspective, of proactive policing on the grounds that it is unnecessarily intrusive. Consequently the principles of policing that emerged from the discussions and struggles in the early part of the nineteenth century in Britain gave shape to an idea of police that is both empowered (as experts insulated from overbearing government control) and constrained (through limited powers and restricted interventions into the lives of free born individuals) by liberal, not democratic, values.

The healthy tension within liberal democracies

It is important here to emphasise that liberal democracy comprises both a liberal and a democratic component. The relationship between these two components has been

historically problematic (Held 2006) and there is a fundamental contradiction between liberal and democratic sensibilities, albeit one that can produce a healthy liberal democratic sum that is greater than its liberal and democratic parts (Dryzek and Dunleavy 2009).

The two components counterbalance one another. The liberal component limits the extent to which democracy influences all aspects of social life, and the democratic component challenges the authority that elite groups have over the majority. The liberal component is derived from principles that support a strong civil society (Boyd 2004) and champion the individual (Gray 1995). Democratic ideals on the other hand capture the popular will of the people and are thereby rooted in majority views (Hobsbawm 2007) that demand a more involved form of governance (Bellamy 2000). The logic of liberalism is to preserve space beyond the reach of publically elected officials; the logic of democracy on the other hand is to bring more aspects of social life into the public realm.

This liberal democratic tension can be seen within policing, to the extent that the idea of constabulary independence, which seeks to insulate operational policing from public scrutiny, sits ‘uneasily alongside the potentially more democratic idea of policing by consent’ (Loader 1996, fn.3, p.177). Sklansky (2014, p.344) presents this tension in terms of the contrast between a professional view of the police and the ‘citizens in uniform’ concept. Similarly, Stenson and Silverstone (2014, p.430) note a tension within police accountability mechanisms between the democratic inclination towards giving ‘citizens what they want’, and the provision of a liberally informed framework of ‘values and practices that prioritise the worth of the individual, recognise minority rights, require checks and balances on the exercise of executive political power, and contain the use of force’.

Liberalism, as Gray (2000) argues, has different traditions that give rise to variations in liberal thinking. These range from a focus on liberty that primarily favours limited government, to ideas that are much more morally informed. Stenson (1991, pp.8-9), for example, defines liberalism as ‘progressive approaches to social and economic policies’ that involve governments taking responsibility towards improving the lives of the most disadvantaged and vulnerable. However, within criminological discourse liberal values have come to be associated increasingly with the rise of neo-liberalism (Reiner 2013; Turner 2014). Neo-liberalism adopts a largely amoral stance on matters of social justice (Garland 2001), suggesting that the promotion of market principles are the only normative commitment required of government (Diamond 1997).

The lack of any moral substance to neo-liberalism on matters of social justice means that it is incapable of providing the kind of liberal balance to democratic authority outlined above. The liberal component of a liberal democracy needs to be rooted in something more morally substantial than what is offered from a neo-liberal perspective in order for the liberal democratic tension to be meaningful. The liberal component needs to provide values that limit the extent to which public life can be determined by popular choices. Neo-liberalism lacks such moral conviction beyond supporting the market, which is itself an economic mechanism for maximising a particular kind of popular choice.

However, the liberal democratic tension can be lost also if the morality provided by the liberal component becomes overbearing. Gray’s (2000) identification of two faces of liberalism is instructive here. In particular the tradition he identifies as a consensus seeking approach to liberal thinking is informed by a positive expression of freedom (see Berlin 1958) that establishes what it means to be human in ways that can be universalised. This tradition informs the elevation of human rights within liberal

democracies and has become increasingly influential within democratic contexts and conceptions of democratic policing (Manning 2010; Reiner 2013).

However, there is a danger that establishing a moral consensus diminishes the tension between the liberal and democratic components of a liberal democracy. A moral consensus is, after all, yet another form of democratic expression, in which moral and consensual legitimacy become one and the same thing¹.

The liberal concept of toleration is relevant here. Sabl (2009) argues that liberal toleration addresses social problems in ways that contemporary forms of moral consensus such as dignity, respect and rights cannot. This is because these consensual moral concepts ‘yield uniform conclusions . . . that fail to address complications of circumstances’ (Sabl 2009, p.527). Liberal toleration, on the other hand, focuses on the individual circumstances that express differences and deviations from the norm.

This is supported by Paetzold’s (2008) reference to Michael Walzer’s ‘normative maxim’ on toleration: ‘Toleration makes difference possible; difference makes toleration necessary’ (cited in Paetzold 2008, p.942). But as Dworkin (2000) argues, democratic arguments challenge liberal toleration for failing to take heed of a community’s ethical stance on important social values. Democracy, in this respect, pushes us towards ‘majority rather than minority’ preferences (Dworkin 2000, p.213) and thereby pays less attention to preserving and tolerating minority values.

This brings us back to a concern that democracy cannot guarantee liberal values. As Innes (1999) notes, authoritarian policing measures, such as zero tolerance policing, tend to attract popular support. Hobsbawm (2007) is more forceful. He says, ‘the case for liberal democracy rests on its constitutional liberal component rather than its

1 See Rescher (1993) for a critique of consensus and Simmons (2001) on the difference between consensual and moral legitimacy.

democratic, or more precisely electoral, component', and furthermore, that 'freedom and toleration for minorities are often more threatened than protected by democracy' (Hobsbawm 2007, p.97).

The irresistible rise of democratic sensibilities

The degree to which democracy has become so widely acknowledged as the most legitimate form of governance in a relatively short space of time is astounding. As Fukuyama (2011, p.10) argues, democracy is the only form of 'just governance' endorsed by 'important international institutions' to the extent that authoritarian regimes feel obliged to stage elections to appear legitimate. However, it is not until the nineteenth century that democracy ceased to be viewed in negative terms, 'as the enemy of liberalism' (Dryzek and Dunleavy 2009, p.18). Hobson (2008) argues it is only through the coupling of democracy with representation through the ideas of Thomas Paine and Maximilien Robespierre within the American and French Revolutions respectively that it came to be seen as a viable option in modern times. It is not until 'well into the twentieth century' (Fukuyama 2011, p.322) or indeed the 'late twentieth-century' (Held 2006, p.95) that democracy is established fully in North America and Western Europe.

Democracy versus electoralism

Democratic theory developed over the 19th and 20th Centuries and, in particular, beyond the seminal liberal democratic definition provided by Schumpeter (1942). Diamond (1997) notes the increasingly complex manner in which democracy is discussed today citing a review of 150 studies conducted by Collier and Levitsky (1996) that noted 550 'subtypes' of democracy.

Importantly though, within these subtypes there is a growing concern that democracy should be about more than elections. Consequently, ‘representative democracy’ is increasingly ‘viewed as insufficient’ (Newman et al 2004, p.204). Diamond (1997) cites the work of Dahl (1971) as an early proponent of democratic involvement outside of, and supplementary to, electoral processes². The ‘fallacy of electoralism’ was coined by Karl (1986) and has been influential in fostering more complex and substantive variants of democracy (Diamond 1997). Sampson (2012) has also used the term electoralism to emphasise the rather narrow democratic credentials of the PCC centred police accountability mechanisms.

Importantly though, the success of democracy, and its theoretical development, has been at the expense of liberalism. This shift from liberal to democratic values, particularly in the second half of the twentieth century, is captured by Arblaster’s (2002, p.107) positive reference to E.H.Carr’s call for ‘mass democracy’ to replace ‘the old liberal democracy of the nineteenth century’. It is also expressed negatively within Oakeshott’s (1991, p.386) observation, first made in 1949 that, ‘Liberty has become the emblem of frivolous or of disingenuous politics’. Liberal ideas have not disappeared completely but within liberal democratic debates they are increasingly subsumed within democratic considerations. This is evident within discussions about democratic policing.

Democratic Policing

The democratic credentials of policing as presented by Manning (2010) and Reiner (2013) emphasise the need to go beyond merely seeing democracy in electoral terms. They both stress democratic characteristics that are derived from concerns with human rights and issues of equality and justice. Manning (2010, p.viii) in particular focuses his

² see also Reiner’s (2013) reference to Tawney (1964)

discussions on the political philosophy of Rawls (1971; 1993)³ by asking: ‘If a democracy rests on equality, justice, and basic rights and responsibilities, what role do the police play in shaping them?’ Manning (2010) argues that these underlying, fundamental virtues by which we judge democratic societies should be the qualities by which we measure the performance of the police.

Reiner (2013) likewise is concerned with ensuring that policing is underpinned by the kind of democratic characteristics outlined by Manning (2010). He is particularly concerned with challenging ‘the last three decades of neo-liberal hegemony’ that have undermined the achievement of a more equitable society (Reiner 2013, p.161).

As Turner (2014) notes, Manning (2010) and Reiner (2013) both emphasise the achievements of policing in making society more democratic as opposed to focusing on the mechanisms that make the police more responsive. However, it is responsiveness that is prioritised through the Government’s promotion of PCCs and even prior to the introduction of PCCs, policing was increasingly being discussed and defined in such democratic terms. Responsiveness, representation, participation, involvement and transparency are all ideals that have featured prominently in normative discussions about policing over the past decade or so. Millen and Stephens (2011) point to the difficulties local police authorities had in demonstrating representation of ‘the diverse views of those they are serving’ (Millen and Stephens 2011, p.268), a challenge that many feel is going to be difficult for PCCs to overcome (Barton and Johns 2014; Lister and Rowe 2014; Loader 2014). Millen and Stephens (2012) argue PCCs need to acknowledge and address the failings of the preceding tripartite structure of accountability, and provide more space for citizen involvement but as Bullock and

³ It should be noted that Rawls is widely recognised as the most significant contributor to liberal moral philosophy in the twentieth century (see Gray 2000; Bridgeman 2004).

Leeney (2013) and Brunger (2011) note, this is more difficult to achieve than anticipated. Importantly, for the purposes of this paper, these are democratic priorities that challenge the erstwhile importance reserved for the liberal ideal of police independence.

PCCs and the reassertion of the police independence ideal

Whatever the introduction of PCCs means for operational independence in practice, there has been an outpouring of support for it as an idea. In this respect at least, there has been a reversal in the fortunes of the police independence ideal, which appeared to be losing support following Patten (1999).

The justification for police independence had been articulated most forcefully in a well cited and much quoted 1968 legal ruling by Lord Denning⁴ (see Lustgarten 1986, pp.64-65; HAC 2010a, pp.17-18). This common law justification for constabulary independence arose in lieu of a statutory definition (HAC 2010a; Brown 1998) and suggests that the police are answerable to the law rather than to democratically elected representatives. As Loader (1996, p.8) notes, constabulary independence, premised upon the constitutional positioning of the office of constable, establishes that a police officer of any and all ranks cannot be directed by an ‘external authority’. For Oliver (1997, p.20) the acceptance of constabulary independence as a valid doctrine in accordance with Lord Denning’s ruling has simply been beyond doubt. Indeed it became established as a legal source in support of operational independence despite much academic opposition and criticism (Marshall 1978; Lustgarten 1986; Stenning 2007; Stenning 2011).

⁴ R v. Metropolitan Police Commissioner, ex p. Blackburn [1968] 2 Q.B. 118.

Lustgarten (1986, p.67), is particularly vocal and candid in criticising Lord Denning's ruling, arguing it is 'replete with errors of logic and historical analysis, and marred by crude value judgements inappropriate to the judicial function'. Patten (1999) also viewed operational independence as a flawed concept in his review of policing arrangements in Northern Ireland. His preference for the term operational responsibility garnered support more widely, for example within the Home Office's (2004) promotion of neighbourhood policing (see Wood & MacAlister 2005).

However, despite these criticisms and developments, and despite the extent to which policing has been subject to more political control and direction in recent years (Stenning 2011), the Police Reform and Social Responsibility Act 2011 strengthens and reaffirms the importance of operational independence in policing. This support is reiterated and developed within the Policing Protocol Order 2011 to the extent that the introduction of PCCs could be seen to have paradoxically increased the autonomy of chief officers. At the very least it has established operational independence significantly within legislation, albeit without necessarily resolving pre-existing ambiguities (Lister 2013; Turner 2014).

The enduring problematic of police independence

Despite this appearance, operational independence remains a difficult and problematic ideal to realise in practice and this is exacerbated as democratic expectations increase within England and Wales. Indeed, the Coalition Government's commitments to the operational independence ideal have been accompanied by high profile interventions in policing matters, illustrated for example during the 2011 riots in London and other English cities. Irrespective of the commitments within the Policing Protocol Order 2011 towards enhancing the operational independence of the police, the introduction of the

PCCs is seen much more as a significant moment in the redefining and narrowing of the parameters of police autonomy in practice (Newburn 2012; Orde 2012).

It is also becoming more apparent that constabulary independence is a peculiarly British preoccupation (Stenning 2011). In most parts of the world, including other common law jurisdictions, there is much more of an expectation that police will be directed routinely by elected officials. Outside of common law jurisdictions police operations fall under the direction and control of judicial authorities and as such, independence is articulated not in policing, but rather in judicial, terms (Lustgarten 1986). In many respects, Lord Denning's articulation of constabulary independence is fundamentally a reiteration and bolstering of judicial independence. It roots the idea of police independence firmly within the judicial branch of the state, ignoring the responsibilities of those within the executive branch of the state to hold the police to account politically (Mark 1978).

Lord Denning's approach to police independence

There are two points to emphasise here regarding Lord Denning's ruling. Firstly, it appeals to an idea of police that is rooted in the office of constable, a pre-modern, pre-democratic institution that is granted a significant degree of discretion and autonomy (Brogden and Ellison 2013; Winsor 2012). The office of constable articulates a liberal concept of authority and has served the police well in allowing them a significant degree of protection from external interference. As Brain (2010, p.423) notes, policy makers have been frustrated by 'having to deal with an office that is somewhere in the region of a thousand years old'.

Of course as Waddington (1999, p.186) reminds us, despite references to the 'medieval origins' of the office of constable, the introduction of the New Police in 1829 marks a significant break in policing tradition. More importantly, Peel drew upon the

historical role of constables primarily to ‘placate political opposition’ to his new body of police (Waddington 1999, p.186).

It is increasingly difficult to see how the office of constable fits within a modern democracy, especially given the declining importance of liberal values within contemporary society. Indeed, Brogden and Ellison (2013, pp.116-117) argue that the high degree of discretion granted to police through the office of constable status is paradoxically a contributing factor to what they present as ‘mission creep’ within policing. In other words, they see the protection of police independence as a factor in undermining the liberal characteristics of police in England and Wales and producing something that equates more closely to the features of an illiberal democracy as defined by Zakaria (2004).

The second point to note regarding Lord Denning’s ruling is that it establishes police independence through essentially non-democratic means. As Lustgarten (1986, p.67) notes, this ruling along with others, establishes ‘the proposition that the judges will control the actions of a chief constable in relation to law enforcement’. This is something that Sir Robert Mark (1978) found most objectionable. He raises a concern that such judicial directing of the police implies a potential conflict of interest to the extent ‘that a court should seek to direct a chief officer to prosecute matters in respect of which it might have to sit in judgement’ (Mark 1978, p.137). Likewise, Sklansky (2008, p.92) argues that it has long been felt ‘that judicial oversight of policing frustrates democracy’.

At the very least, we might say that if police independence is to be sanctioned legitimately, it should be done through a democratic process that involves the masses rather than being asserted by an unelected judge, who is free from the immediate constraints of democratic pressures. Whilst the support for operational independence

articulated in the Policing Protocol Order 2011 goes some way towards providing a more democratic justification, it has hardly been the conclusion to an involved or significant democratic debate (Lister and Rowe 2014). Rather it merely regurgitates the legalistic underpinning of Lord Denning's ruling and is likely to be interpreted as such, for example, as and when legal issues between chief officers and PCCs arise. This is illustrated well by Turner (2014), in particular through her reference to Winsor's (2013) interpretation of the Policing Protocol that prioritises a chief officer's interpretation of the law over the political direction of a PCC in a way that takes us back to Lord Denning.

The political understanding of police independence

As Lustgarten (1986) argues, given the nature of police work it makes little sense to say that the police are accountable to the law and nothing else. He provides the example of what can happen legitimately and within the law when an officer is called to the scene of a fight where common assault has resulted. He identifies different responses that police officers routinely carry out under such circumstances, including enforcing the law against one or all parties engaged in the fighting, but also interventions that are primarily mediatory or conciliatory. The police response can be formal or informal; it can involve a caution or an arrest. What happens is determined fundamentally by the police officer's assessment of the situation rather than the law per se. As Lustgarten (1986, p.11) explains, the fact that an officer 'must uphold the law, or is responsible to the law, is in practical terms meaningless'. Policing, despite claims to the contrary, is unavoidably political (Sklansky 2008; Loader 2014).

The political nature of policing is reflected in the difficulties and problems associated with trying to provide precise legal parameters of operational independence, as noted by the Home Affairs Committee (HAC 2010a). But as the Committee also

notes, the lack of a precise, legal definition had not unduly hindered the preceding tripartite arrangements of police accountability. Indeed, Walker (2000) has argued that a degree of vagueness allowed for a necessary level of informality and political manoeuvring in the tripartite structures. Walker (2000) and Lustgarten (1986) both argue against a black and white approach to the issue of operational independence, arguing that political interference in policing matters can be both appropriate and inappropriate in different circumstances. Likewise, Stenning (1999; 2007) has argued that directing and controlling the police is not the same as holding them to account. The police can thus be accountable and independent at the same time (Stenning 1999, 2007). More importantly in the context of this paper, the political pressures to interfere in policing are driven by democratic values, just as the resistance to such interference is motivated by liberal principles.

Operational independence remained a central component in the tripartite structure of police accountability (Marshall 1978; Lustgarten 1986; Reiner 1993; Walker 2000; Jones 2008; Rogers 2013), and perhaps more than any other concept it has retained a significant degree of support in debates about police accountability. It was a recurrent concern expressed within the evidence presented to the Home Affairs Committee's consideration of PCCs (HAC 2010b) and in a subsection on operational independence HAC (2010a) reiterates the Government's (Home Office 2010) stated intention to preserve operational independence as a fundamental aspect of British policing (see Newburn 2012). For Thorburn (2010), the legitimacy of the police is premised upon the disinterested, impartial position of the officer as established within the notion of police independence.

Police independence in a post liberal world

The tripartite arrangements and the ideal of a politically independent, disinterested and impartial police are informed by the same liberal line of reasoning that leads to the separation of powers within liberal democracies. As Zedner (2009) notes, the separation of powers is commonly expressed in terms of a triumvirate of authorities in the forms of the executive, the legislature and the judiciary, in order to provide checks and balances to limit the potential of an overbearing authority being applied indiscriminately. Whilst the separation of powers analogy might have its problems when applied to the tripartite police accountability mechanisms (Stenning 2011), it usefully draws out the liberal underpinnings of the police independence ideal. Indeed, Arblaster (2002) argues that the separation of powers became an important constitutional feature within liberal democracies because of mistrust in democracy and the fear that an excessively democratic society would result in a democratically elected majority imposing its power against minorities. It is in this sense that nineteenth century liberals such as John Stuart Mill and Alex de Tocqueville stressed the dangers of the ‘tyranny of the majority’ (Kennedy 1999, p.107). The separating of powers within liberal democracies acts, ideally, as a liberal constraint upon democratically derived authority, and from this liberal perspective police independence is intended to act as a constraint and protection against the popular, democratic will.

Declining support for liberalism has seen arguments underpinning independence come under fire. MacIntyre (1985) argues that liberals are not ethically neutral but rather champions of particular ethical values. Reiner (2010) likewise questions whether the police can ever be non-partisan and such reasoning is reflected in Patten’s (1999) view that operational independence was inappropriate in the highly partisan context of policing in Northern Ireland. Ellison (2007) argues that Patten was determined to ensure

policing in Northern Ireland reflected the needs of late modern societies in which many of the assumptions about policing in liberal democracies were being called into question.

There is an evident trend towards policing becoming ever more responsive to communities, driven by democratic values and enabled by the declining influence of liberal principles within contemporary society. Despite repeated commitments to the idea of operational independence, it is hard to see how it can be retained in practice without serious modification. At the very least, as Newburn (2012, p.42) notes,

the introduction of PCCs will focus attention once more on what is meant in practice by “operational independence” . . . and what forms of political influence over policing are appropriate.

Given the declining influence of liberal ideals and the increasingly uncritical acceptance and promotion of democracy, there is a very real danger that operational independence could come to be seen, to mimic Oakshott’s (1991) reference to the declining fortunes of liberty, as frivolous and disingenuous.

Concluding remarks

The view that PCCs are in danger of falling short of the most basic and minimal of democratic expectations (Gilmore 2012b; Edwards 2012; Sampson 2012; Millie and Bullock 2013; Reiner 2013; Lister and Rowe 2014) is well made and worthy of further attention. However, a more pressing concern is the lack of recognition given to the liberal characteristics of policing principles, which are becoming increasingly vulnerable within advanced democracies. Liberal values remain important constraints on democracy to reduce the likelihood of the kind of ‘fig-leaf of populism’ that Reiner (2013, p.174) warns against. They are necessary if we are to avoid the kind of illiberal

democratic characteristics identified by Zakaria (2004) and the mission creep referred to by Brogden and Ellison (2013) developing further within British policing.

Policing in England and Wales today is arguably more democratic than ever and Britain is much more democratic than when the police were introduced in 1829. But conversely, policing in England and Wales is becoming increasingly illiberal. The powers afforded the police have grown significantly in recent years (Crawford 2008; Brogden and Ellison 2013) in spite of apparently liberalising measures such as the Human Rights Act 1998 (Ewing 2010).

Therefore, it is not sufficient to point out the importance of constabulary independence to liberal democratic ideals of policing. It is also necessary to stress the important role that liberal values have played historically in constraining potential democratic excesses within liberal democracies. It is not enough to assume liberal traditions, such as the office of constable, which by today's democratic standards seem ever more arcane and inappropriate. A case needs to be made today for the professional independence of police officers.

Liberal democratic policing itself needs to be reconstituted. The principles associated with Peel⁵ do not reflect contemporary policing despite claims to the contrary. It is beyond the scope of this paper to say what form this reconstitution should take but Sherman's (2011; 2012) arguments about the role the College of Policing can play in providing an independent voice as a counter balance to the democratic pressures emanating from the PCCs is a useful starting point. The importance of ensuring that the College is 'self-governing' and 'independent of government control or funding' is stressed by Sherman (2011) as a necessary means of maximising the positive

5 Lentz and Chaires (2007) note these principle are largely constructed by Reith (1940; 1956)

contribution police can make within a liberal democracy. Likewise, there is perhaps a need to recognise the shift in political theory away from the Rawlsian focus on distributive justice towards a growing concern with the primacy of order, as being ‘arguably more fundamental than the distribution of goods’ (Tralau 2011, p.3).

The tension between liberalism and democracy comes to the fore as a consequence of growing instabilities internationally (Ignatieff 2004; Wilkinson 2006). What Lustgarten and Leigh (1994, p.7, fn.15) present as ‘extreme’ and ‘infrequent’ examples of chaos and disorder are arguably becoming more common twenty years on. As Tralau (2011) has argued, there is a growing interest in the concept of order as a primary political concern, reflected in the growing attention paid to Hobbes (1651), and more controversially, the German legal scholar Carl Schmitt⁶. Schmitt’s argument that the extension of the electoral franchise leads to a democratic undermining of liberal values within a liberal democracy is cited by (Bellamy 2000, p.73): ‘The incompatibility of liberalism and democracy went unnoticed so long as the franchise was limited’. Increasingly though, as the masses become more engaged in the democratic processes, there is a plethora of ‘conflicting interests and passions that cannot be reconciled through rational debate’ (Bellamy 2000, p.74). For Schmitt,

Instead of spreading the liberal virtues of discussion within a heterogeneous population, democracy subverts rational debate and replaces it with a putative homogeneous popular will. (cited in Bellamy 2000, p.75).

However, this is not to say that liberalism and democracy are necessarily incompatible. Indeed, there are many reasons why democracy is favoured by liberals. Sen (2009) argues that democracy has played a significant role in enhancing the power that reason

⁶ Carl Schmitt was a jurist in Weimar Germany but also active in the early years of Nazi Germany

can have in society. He refers favourably to the deliberative flavour of Mill's idea 'of democracy as "government by discussion"' (Sen 2009, p.xiii). Muir and Loader (2011) similarly promote a deliberative democratic response to the introduction of PCCs suggesting the centre-left embrace the democratising aspects of the initiative and turn it to their advantage.

Democratic pressures upon the police were already significant before PCCs were introduced. PCCs are not the cause of police independence becoming more problematic, but rather a formalisation of the view that the police should not be above the law, and nor should they be beyond politics. Democratic pressures are not necessarily problematic in policing, but they need to be balanced by liberal constraints in order to preserve the liberal democratic characteristics of policing. More thought needs to be given to how this can be achieved in a post liberal society, which is highly suspicious of elites and anything that implies a behind-closed-doors way of dealing with social problems.

Nonetheless, we need to recognise the importance of liberal values within democratic societies and be more willing to accept that not everything in a democratic society should be decided by the popular will of the people. If this recognition is unacceptable, then it is hard to see how police independence can be sustained, and perhaps more alarmingly, how the spectre of illiberal democratic trends can be avoided in the policing of England and Wales.

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