MARX AND EXEMPTION CLAUSES:

Can Marxian theory explain the State's approach to exemption clauses

by Allyson M West*

Introduction

The object of this paper is to analyse the law's treatment of exemption clauses, in the light of the Marxian theory of law, with a view to assessing the ability of this theory to explain the problem of exemption clauses and thereby to hint at its possible validity today. Of all the legal theories available, the Marxian theory was chosen because it is the one that most openly stresses the importance of economic considerations in explaining legal phenomena. According to Marx, all laws can be explained in terms of the economic structure of the State. Since the exemption clause belongs to the world of economics it seemed a logical approach to attempt to explain such a problem by the application of an analytical method which focuses on the relationship between law and the political economy.

Outline of the Marxian Theory of Law

According to the Marxian theory of law, the means of economic production is decisive in determining the general character of the legal, social and political processes of life. The means of production is basic in that it is the infrastructure of society, whereas law, no more than part of the superstructure, is merely an ideological reflection of the underlying economic realities. The existence of law is determined by economic forces. Its interpretation and application on the other hand are determined by the group of individuals

who, because of those forces, control the economy.[1]

The Capitalist is seen by Marx as belonging to the dominant group in a bipartite society, which not only controls the means of production and consequently the economic life of the entire society, but also, through his economic power, dictates the social and political processes. Society's wealth is concentrated in the hands of this comparatively small group which, through the various means at their disposal aspire to maintain and enhance their position to the detriment of the other larger group, the proletariat. The result is a disharmonious society, where the capitalists aim to maintain the imbalance while the proletariats aim to have a greater share in the fruits of their labour. Thus, Marx sees an inter-class struggle intimately interwoven with the institution of private property.[2]

The capitalists protect their interests,"inter alia", through the means of the law, which according to Marx, was designed for that sole purpose. The State an ostensibly independent organ, arose as an engine of compulsion to shield, by the means of the law, the class of property owners from the property-less class.[3]

Thus, the State, the creation of the capitalists, "makes itself independant "vis-a-vis" society and indeed the more so, the more it becomes the organ of a particular class ..... the conscious interconnection between the political struggle (ruling versus oppressed class) and its economic basis become dulled and may be lost altogether."[4] By emphasising the autonomy of the State and law it is possible to perpetuate the mythology of a total society in whose interests, these institutions

operate, as well as the belief that the State and law by reason of their apparent autonomy are value neutral. The capitalists, therefore, by encasing their instrument, the State, in an aura of independence have procured the general obedience of their unsuspecting economic inferiors to what are essentially capitalist dictates and thereby have ensured fulfilment of their objects.

The Exemption Clause and Capitalist Exploitation

The exemption clause seems to typify Marx's idea of the struggle between the properties and the property-less class.

Exemption clauses, alternatively called exception or exculpatory clauses, are clauses in contracts which exclude or limit the right of the injured party to bring action for damages.[5] The limitation can refer to the amount of damages payable or the time within which action must be taken.

Exemption clauses can be mutually beneficial. On the one hand, the producer of goods is given the opportunity to experiment with more efficient methods, more economic but untested materials without the grave risk of being sued into bankruptcy if his produce is inferior or defective. On the other hand, the consumer, accepting the risk of the possibility of inferiority, is able to purchase these objects at lower prices, products which he might not previously have been able to afford. There is mutual consent to the sharing of risks for the sake of mutual gain. This, of course, pre-supposes the theoretical pre-requisites for the formation of a contract - negotiation and equality of bargaining power. Unfortunately, however, with the ascendancy and popularity of the adhesion

contract today, these are absent in the majority of transactions.[6]

"Adhesion contracts," a term coined by the Frenchman, Raymond Saleilles, was defined by him as preformulated stipulations, in which the offeror's will is dominant and the conditions are dictated to an undetermined number of people.[7] Embedded in this type of contract, often inconspicuously placed in fine print, the exemption clause had become, in the hands of producers, a powerful tool of exploitation of the wider class of consumers.

Classical contract theorists would argue that if the clause was that detrimental to the consumer he was free to refrain from entering the contract, thereby failing to appreciate, or disregarding, the fact that the consumer has little choice. In the first place, the consumer is usually unaware of the presence of these clauses and even if his attention is drawn to it, its significance would probably escape him. Secondly, even if this were not so, he is not free to negotiate new terms. He is presented with the contract on a "take-it-or leave-it" basis. What choice does he have?[8] Standard form contracts are so-called, not only because the producer offers the same terms to all potential purchasers, but because all producers of the same product have basically the same contract. If the consumer wants the product he must take it on those terms.

It can be seen therefore, that combined with adhesion contracts in which they are most often found, the exemption clause does indeed exemplify Marx's theory. Capitalists "saddle" consumers with their mass produced, low-quality products,

depriving them at the same time of their right to sue for damages. The capitalists thereby enrich themselves at the expense of the proletariat through the exploitation of the exemption clause. How then does the State approach this problem?

The State's approach to Exemption Clauses

Constitutional theorists identify three organs of the State - the legislature, the executive and the judiciary, but to date only the first and last of these have been involved to any appreciable extent with the problem of exemption clauses. For ease of discourse, the approaches of these arms of the State will be dealt with separately.

A. The Courts

The courts have gone through a process of evolution in their approach to exemption clauses. They started from a covert, "standoffish", "enforcement-of-the-freedom-of-contract stance", to the more overt attitude of protection of the consumer. Three distinct stages can be identified.

The first stage is characterised by the traditional approach. This approach was aptly described by Sir Jessel, M.R. in Printing and Numerical Registering Co. v Sampson when he said

> "If there is one thing which more than another public policy requires is that man of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice."[9]

For many years, the courts completely abstained

from interference in contracts written, signed and complete in themselves, even in the light of glaring injustices. It was the firm position of the court, as late as 1934 that, as long as a contract had been signed the parties are entirely bound by it, even though it may contain a particularly harsh exemption clause.[10]

On the occasions when the courts did interfere in contractual transactions, they did so in an indirect, unsatisfactory manner - unsatisfactory in the sense that it was to the detriment of the consumers. They insisted on the observation of formal requirements, in the absence of which they declared that the consensus with respect to the exemption clause was negated. Thus, the signing of contractual documents created a presumption of consensus which was rebuttable on proof that the exemption clause was hidden or was beyond the range of reasonable expectation. The rationale behind this appears to be that there is nothing inherently wrong with these terms or their presence in contracts generally. It seems that the courts chose to ignore the absence of freedom of choice and the ignorance of the consumer with regard to the significance of these clauses. The form but not the substance of the contract was attacked.[11]

Eventually, with increased litigation, reflecting a more vociferous opposition to consumer exploitation by means of the exemption clause, the courts were forced to become more involved in the solution of the problem. In this second stage of evolution the courts employed various methods of interpretation as a device for control. The most radical among these is "interpreting out" the exemption clause. The courts find that the clause has not become part of the contract either because

notice was not given in time[12] or when the clause is not incorporated in the contractual document.[13]

Less radical is the "contra preferentum" rule by which the courts interpret ambiguous clauses against the parties seeking to enforce them.[14] In this line of cases, but worthy of special mention, are those clauses which attempt to exclude liability for negligence. Here, the courts insist that attempts to exclude liability for negligence will fail, unless the language used to achieve this end is clear and unambiguous and leaves room for no other interpretation.[15] Here again the freedom of contract doctrine rears its head, the philosophy being, if no other interpretation can be placed on the clause, then the parties must have intended to contract on this and therefore it should be considered binding on them.

The courts have gone a step further in their second stage of evolution in that they have adopted a position contrary to the "parol evidence rule" and allowed statements made prior to the signing of the contractual documents to play an increasingly important role in assisting them in interpretation and ascertaining the intention of the parties. Sometimes they hold that the statement is an integral part of a partly written, partly oral contract,[16] and sometimes they hold that it amounts to a misrepresentation and so precludes reliance on writing.[17]

The third stage followed the emergence of more skillfully drafted exemption clauses which forced the courts to apply more overt and direct methods. Thus express substantive prohibition is now being developed through broad concepts and by complete expulsion of exemption clauses from certain areas.

With the rise of these devices a semantic attack is no longer the only method of striking at the oppressive terms.

The most widely used barrier to exemption clauses is connected with the notion of "fundamental breach." This doctrine had its origin in cases of carriage by sea and it has only in comparatively recent years been generalised. The effect of the doctrine was though, until 1966, to be that, whenever the court found conduct which it held to constitute a fundamental breach of contract there was a rule of law which prevented the party in breach from relying on an exemption clause drawn in his favour.[18] The test is only operative in extreme cases. Nevertheless, it reflects a modern approach to contracts in general. It is concerned with the more or less objective functions of contracts and therefore can be regarded as affiliated to the doctrine of frustration. It's development, however, seems to have suffered a setback in the House of Lord's decision in the Suisse Atlantique case.[19] By this decision, the doctrine has now been unquestionably degraded to the ranks of a rule of construction.[20] It is still, however, a powerful tool and as yet the most widely employed in its class of devices.

Another manifestation of the overt attack on exemption clauses consists of their expulsion from certain areas of Commerce. This is especially prevalent in the United States. Enterprises offering a public service are denied the right to contract out of liability for negligence, because their duty is held to be not only to serve the public, but to serve it properly.[21]

The courts have, therefore, gone from complete or

near-complete non-interference, through an attack on semantics, to an attack of even greater intensity. It can be seen that the courts, in relatively recent times, have greatly expanded their control over exemption clauses. By placing these broad, indefinable concepts at their disposal, the courts have made it possible to effectively control the use of the exemption clause.

B. The Legislature

Until very recently the legislature has been conspicuous in its absence from the battle between producers and consumers over the exemption clause. In general, they have tended to err on the side of caution, with the result that they have done little more than sanction judicial intervention. However, like the courts, they have finally seen the need to become more active, and have done so, initially limiting themselves to dealing only with individual abuses of standardised contracts. Particularly in the fields of public transport and insurance, special provisions have been drafted to help solve the problem of victimisation of the weaker party. Thus the exclusion or limitation of liability in contracts for the conveyance of passengers on public service vehicles has been prohibited in England.[22]

Recently, however, the English legislature has made a more positive effort to solve the problem, so much so that Trietel can be seen as justified in saying that the most important limitation on the efficacy of exemption clauses are now statutory.[23] The outstanding piece of legislation in this area is the Unfair Contract Terms Act, 1977. It employs two techniques of control; some exemption clauses are simply made ineffective while others are subject to a test of reasonableness. The Act limits

itself to dealing with the problem of exemption clauses in consumer, as opposed to commercial contracts. The Act has not had time to prove its worth, but its provisions seem to indicate that at last some headway will be made in the area of correction of the problem wrought by the abuse of the exemption clause.

Can the Marxian Theory Explain the Approaches

The Marxian theory of law, at first glance, seems readily able to explain the doctrine of the exemption clause and especially the State's approach to it, but is this really so?

For Marx, law represented the average interests of the ruling class. "Capitalists", he said, "gave their will a universal expression as the will of the State, as law."[24] This seems to have been epitomised by the initial attitude of the courts to exemption clauses, their insistence on the validity of all signed contracts and their enforcement "in toto" despite grave injustices. As mentioned above, freedom of contract is fair in the right setting, but with the innate trend of capitalism towards monopoly, the meaning of contract changed and the approach of the courts should have changed with it. Instead their insistence on freedom of contract enabled that doctrine to become a one-sided privilege. By proclaiming freedom of contract they guaranteed that they would not interfere with the exercise of power by contract. This enabled industrialists to legislate by contract. Because the courts did nothing but interpret the contractual document and insist on its performance, contracts became, in fact, quasi law. Standard contracts, therefore, with their exemption clauses, became effective instruments of exploitation in the hands of powerful industrial and commercial overlords to impose a new domination on a host of

vassals. Thus the freedom of contract of many was destroyed through the freedom of contract of a few. As was said

> "..... the power given to one party by its class position, the pressure it exercises on the other - the real economic position of both - all this is no concern of the law .... that the concrete economic situation compels the worker to forego even the slightest semblance of equal rights - this gain is something the law cannot help."[25]

or rather refuses to help.

This power is all the more strengthened because it is obscured by the seemingly value-neutral position of the State because many fail to appreciate the fact that

> "behind the fiction of equality there stands the reality of the capitalists exercising a delegated power to command."

The State's standoffish position with regard to exemption clauses thus clearly seems to depict Marx's belief in the synonymity of the State and the ruling class. But how does Marxian logic explain the change in the approach of both the courts and the legislature.

At first both the courts and the legislature intervened in a piecemeal, fragmentary manner using partially effective methods which the industrialists, with their highly-skilled drafting techniques, soon rendered useless. Marx might probably have explained this in terms of the State attempting to maintain the illusion of equality of all, and the autonomy of the State. He thought that it was important to remember that it may be necessary to lose a battle to win a war; that it

may be more important to uphold values fundamental to the capitalistorder than to gain a particular legal victory. He used this theory to explain the success of the workers in the industrial era in gaining a reduction in the length of the working week. Although an ostensible victory for the workers, it was achieved, not by their pleas, but by the realisation by the capitalists that a large number of healthy people working for a reasonable length of time could produce more than a constantly depleting group of overworked individuals. Thus equality before the law is linked with freedom of the individual without which capitalism could not be maintained. In the same way, the partial intervention of the courts and legislature can be viewed as an attempt to maintain the illusion of state autonomy and equality of individuals be they consumers or capitalists.

Recently,however, the trend has been towards more active intervention by the courts and, more importantly, the (English) legislature with the introduction of the Unfair Contract Terms Act 1977 which, though as yet not fully exploited, should go a long way in correcting the evils of exemption clauses. As was mentioned before, this Act limits itself to dealing with consumer contracts. Marx seems to have recognised that consumer should be differentiated from commercial transactions. As Maureen Cain said in her paper on Marx's and Engels' "theory of Law"

> "Within the ruling class the law, it seems, operates as systems theorists would have us believe. It irons out conflict in the best interest of the whole, and maintainsthe unity and integrity of the class. But to see law only this way is to fall prey to

> the mythology of the total society."[26]

However, the Marxian theory of law does not seem to be able to explain the active approach of the State to the problem of the exemption clauses - the argument above would seem to be inadequate in the light of recent developments.

Conclusion

It seems then that, although the Marxian theory of law may be useful in analyzing and comprehending certain trends in the law, it seems to fall short in areas. It could well be that this theory, developed in the height of the industrial revolution when "laissez faire" was the principle guiding economic and social thought and development, was valid to explain the position of the State at that time. However, with the adoption in even the most capitalist State of some degree of socialist doctrine, Marx's theory is no longer sufficient to explain recent trends. As was said by Fleming

> "Disclaimer (exemption clauses) belong to the era of free enterprise, the rejection of disclaimers to the era of social welfare."[27]

Perhaps, the same can be said of Marx's theory.

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FOOTNOTES

1. Maureen Cain, The Main Theories of Marx's and Engel's Sociology of Law, 1974

2. Ibid

3. Ibid

4. F. Engels, Ludwig Feverbach and the end of Classical German Philosophy as cited in Maureen Cain and Alan Hunt, Marx and Engels on Law (1979) 120-1

5. See Coote, Exception Clauses, (1964) 4-7; Baxter, The Freedom to Contract without Liability (1971) C.L.P. 531-58

6. See Kessler, Contracts of Adhesion - Some Thoughts about Freedom of Contract (1943) 43 Col. L. Rev. 629

7. R. Saleilles, De la Declaration de velontes (1901), 229. The English translation of the definition, as appears in the text, was taken from the judgement of Francis J. in Henningsen v Bloomfield Motors Inc (1960) A 2d 69

8. See Lord Denning M.R. in Levison v Patent Steam Carpeting Co Ltd (1977) 3 W.L.R.90

9. (1875) L.R. 19 Eq. 426, 465

10. Scrutlon L.J. in L'estrange v Graucob (1934) 2 K.B. 394 at 403 said "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he had read the document or not."

11. Supra at note 6

12. Olley v Marlbourough Court Ltd (1949) 1 K.B. 532; Thornton v Shoe Lane Parking Ltd (1971) 2 Q.B. 163

13. Chapelton v Barry Urban District Council (1940) 1 K.B. 532

14. Andrews Brothers (Bournemouth) Ltd v Singer and Co Ltd (1934) 1 K.B. 17

15. White v John Warwick and Co Ltd (1953) 1 W.L.R. 1285 Lord Denning at p. 1293 said, "if there are two possible heads of liability on the part of the defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him of his liability for negligence."

16. Couchman v Hill (1947) K.B. 554

17. Curtis v Chemical Cleaning and Dyeing Co (1951) 1 K.B. 805

18. Karsales (Harrow) Ltd v Wallis (1956) 1 W.L.R. 936

19. Suisse Atlantique Societe D'armament Maritime S.A. v N.V. Rothersamsche Kolen Centrale (1967) 1 A.C. 361

20. Photo Productions Ltd v Securicor Transport Ltd (1980) 1 All E.R. 556

21. Hennigsen v Bloomfield Motors Inc Supra Note 7

22. Road Traffic Act, 1960 S.151

23. G.H.Trertel, The Law of Contract, 5 ed (1979) 179-180

24. Marx and Engels, The German Ideology (1965)

25. Engels, Origin of the Family, Private Property, and the State, cited by Maureen Cain in, The Main Theories of Marx's and Engels' Sociology of Law, p 142

26. Maureen Cain, Supra 143

27. Fleming, Law in the United States of America in Social and Technological Revolution (1974) 106

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"Law is merely the expression of the will of the strongest for the time being."

(Brooks Adams)

THE POLICE CONSTABLE IN THE CARIBBEAN: INDEPENDENT OFFICER OR SERVANT OF THE STATE?

by David Gafoor*

"The history of the police is the history of the office of constable."[1] The status of a constable in the Caribbean is unique and, in some ways, anomolous. Is he a servant or an agent? If so, of whom, his chief constable, the police authority, the local authority or the State? The answer to this question is important because if he is a servant of some authority, that authority is and should be made liable for the constable's wrongful acts committed in the performance of his duty; but if he is not a servant he alone may be liable for his actions. In addition, if he is injured by a third party the authority can sue that person for loss of the constable's service only if he is the authority's servant; not otherwise.[2] In examining these issues, it must also be borne in mind that, the preservation of law and order and the prevention and detection of crime are matters of great importance to the maintenance of organised government.[3] In fulfilling these duties, the modern police officer in the Caribbean enjoys certain common law powers although the professional police forces as we know today date only from the 19th century.[4]

Background:

It has been said that, "to the criminal law, society delegates the task of protecting its values, or at least the values that one held by those who have the power to legislate. To the police, society

delegates the irreconcilable tasks of enforcing the law by means which, if they are to be effective, must necessarily infringe the principles that the law protects".[5] What then are these powers which a policeman enjoys as previously alluded to? It has been suggested that a police constable in uniform has special powers of arrest, but in general he is in the same legal position as any member of the public whose duty it is to assist in keeping the peace and to apprehend criminals.[6] The British Royal Commission on Police Powers and Procedure of 1929 said that a policeman in the view of the common law is only "a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily. Indeed (they added) a policeman possesses few powers not enjoyed by the ordinary citizen."

It is submitted that the above statement is dangerously misleading and totally ignores some of the vital powers and functions of the Police. According to Critchley[7] "the mystical fusion between the Policeman and the ordinary citizen was built up out of the confluence of the vast number of complex local currents which contributed to the political and social histories of towns and rural areas of England and Wales during the nineteenth century." While a constable's main power is that of arrest and search, special powers of arrest and search without warrant are also conferred upon him.[8] De Smith places the police in the context of "specialists" and points out that they have special common-law duties in connection with the maintenance of law and order such as protecting persons and their property against reasonably apprehended violence.[9]

A constable also exercises certain statutory powers and duties and it is a statutory offence for anyone

wilfully to obstruct a constable in the execution of his duties. A useful synopsis of the present day functions of the Police was given by the British Royal Commission on the Police of 1962 which outlined five major powers and functions:-

(i) The duty to maintain law and order, and to protect persons and property.
(ii) The duty to prevent crime.
(iii) Responsibility for the detection of criminals.
(iv) Responsibility of deciding whether to prosecute suspected criminals.
(v) The duty of controlling road traffic, and advising local authorities on traffic questions.

Having briefly outlined the powers of the Police, it is now appropriate to consider the main topic of this essay: the status of the police officer in the Caribbean. Wade and Phillips, though speaking of the United Kingdom, could just as well have been referring to the Caribbean in stating that the courts have not always found it easy to define the precise status of a police officer.[10] Furthermore they claim, in relation to vicarious liability, at common law a constable was certainly not in the employment of the Crown since he was neither appointed nor paid by the Crown, and this position was not affected by the Crown Proceedings Act 1947.[11] By this Act, the Crown sought to deny liability for the actions of police officers committed within the course of their employment.[12]

De Smith contends that constables are public officers and that it is arguable that they are Crown servants. On the other hand, he concedes that for certain purposes a police officer is undoubtedly an officer of the Crown since the maintenance of law and order is pre-eminently a

function of executive government.[13] Garner adds that a police officer is not a servant of the local authority in whose force he serves, and consequently the authority is not responsible at common law for the acts of a police officer committed in the course of his duties of detecting or preventing crime.[14] Wade emphasizes that the truth is that a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force.[15]

Common Law:

To what extent are these propositions, made in relation to the United Kingdom, supported by case law? In Coombes v. Berks Justices,[16] the question was whether a block of buildings including a police station was liable to be taxed. The Court answered in the negative. In the course of his judgment, Lord Blockburn stated that, "I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and the prevention of crime by means of what is now called police, are among the most important functions of Government, nor that by the constitution of this country, these functions do, of common right, belong to the Crown."[17] This dictum was restated with approval in Metropolitan Meat Industry Board v. Sheedy[18] where it was held that a debt due to a public board vested with discretionary powers (to which the Police were likened) was not a debt due to the Crown.

One may, however, question the usefulness and relevance of the aforementioned cases, particularly since great stress was placed upon them by McCardie, J. in his much quoted judgment in Fisher v. Oldham Corporation.[19] In this case, it was sought to make the corporation of the borough of Oldham liable in

damages for the actions of the Oldham police who had wrongfully arrested and detained Fisher, a Plaistow timber merchant. The learned judge concluded that the police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation, so as to render that body liable to an action for false imprisonment.

In the course of his judgment, Mc Cardie, J. also cited with approval another section of Blockburn, L.J.'s judgment in Coombes v. Berks Justices to the effect that, "the general Government administers law and justice, and keeps order; but it necessarily does it in different localities separately .... It is a purpose of the imperial Government, carried out in a particular locality, but not the less a purpose of the imperial Government."[20] Mc Cardie,J. follows this up in stating that, "Prima facie therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation."[21]

The learned judge also cited Griffith, C.J. in Enever v The King[22] to the effect that, "at common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown," Griffith, C.J. also went on to point out that, "the powers of a constable, or a peace officer, whether conferred by common law 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."

Based therefore upon the status of constables at common law and with a handful of earlier decisions in which police functions had figured directly or indirectly, Mc Cardie, J. held that, "the defendants are not responsible in law for the arrest or detention of the plaintiff. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn to "preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace."[23]

While it would be desirable to endorse fully Mc Cardie, J.'s conclusion in Fisher v Oldham Corporation, it should be pointed out that the premise on which it is based seems to be inherently weak. In Coombes v Berks Justices, upon which the the learned judge placed so much reliance, the time question according to Marshall,[24] was whether a block of buildings used for various local government purposes, but partly for police and judicial purposes, was exempt from taxation. Lord Bromwell in that case[25] stated his opinion in terms much wider than those implied by Mc Cardie, J. saying explicitly that the ratio decidendi of the case was that the purposes of the police were "public" purposes or purposes "required for the government of the country." Although Coombes v Berks Justices was approved in Metropolitan Meat Industry Board v Sheedy,[26] again the real question here was whether a board administering the meat industry in New South Wales could be held to share the financial immunity of the Crown. These cases therefore make no more than an indirect reference to the status of the Police and really amount to no more than claiming for the Police, in the exercise of certain of their powers, a privilege enjoyed by the Crown

itself as well as its servants. What they fail to do is to prove definitively that the Police, as Mc Cardie, J. concluded, are the agents or servants of the State.

Perhaps stronger authority to support the proposition that a police officer is a servant of the State may be derived from Lewis v Cattle,[27] where a journalist failed to give the Police information relating to a suspected offence under sec. 2. of the Official Secrets Act, 1911. The ratio of the case was that a police officer, whether he be a member of the Metropolitan Police Force or a member of the police force of a country, city, or borough, holds the office of constable and as such is a "person who holds office under His Majesty" within the Act.[28] But this still may not be sufficient to make him an officer of the Crown as evidenced by Lord Hewart, C. J.'s remarks in the same case: "There are may officers which are held under His Majesty. So also, there are many persons in the service of His Majesty who do not in any proper sense of the words hold office under his Majesty."[29]

A case which requires more detailed treatment is A.G. for New South Wales v Perpetual Trustee Company[30] in which both the High Court of Australia and the Privy Council held that the Crown could not recover compensation for the loss of a police officer's services because the relationship between the Crown and a police officer is not that of master and servant. The decision has been taken,[31] as lending further judicial support to Fisher v Oldham Corporation, though it may be argued that it has no direct bearing on the more general question of constitutional independence. According to Marshall, "it would be substantially true to say that the New South Wales case decided that the domestic relation of master and servant upon which the old common law

action had turned was not to be extended to modern public 'services'."[32]

Sower usefully compares and contrasts the views of the Australian High Court with the decision of the Privy Council in two illuminating articles.[33] Kitto and Fullagar, JJ., he points out, espouse the view in the High Court that, the relationship of master and servant in private law, which carries vicarious responsibility and a claim to damages for loss of services, requires that "the power of direction residing in a person must belong to him for the purpose of enabling him to conduct his own affairs"; this cannont be asserted of the situation of the Crown in relation to any of its "servants." Futhermore, Webb, J. with support from the two aforementioned judges, asserts that "a police constable has always been an arm of the law and never a servant employed to do a master's bidding on all occasions and in any circumstances. His authority is original, and not derived from a master or exercised on behalf of the public." The Judicial Committee, as Sower states,[34] came down on the side of the Australian "modernists" (Fullagar and Kitto, JJ.) in regarding the action per quod servitum amisit as a barbarous survival, not to be extended any further than imperative authority, narrowly construed, requires. Viscount Simonds claimed that "there is 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. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract."[35]

Relevance to Caribbean:

To what extent is the above case relevant to the

Caribbean. Since the Police in this region seem to fall under the highly centralized branch of executive powers, as will later be adverted to, similarly to Australia and unlike England, it is suggested that this decision is extremely relevant. Of the implications of the Privy Council decision, Sower seems to have reached the core of the matter by pointing out that,[36] "we are threatened with an extension of the pestiferous doctrine which insulates the public treasury from responsibility for may kinds of official wrong, because of an antiquarian concentration on what 'The Crown' can command, when a more contemporary approach would be to inquire merely whether the officer in question is carrying on the business of government." Dixon, J. (as he then was) also mentioned in the Australian High Court that, "No one has yet denied that the Crown is liable for the tort of an officer committed within the scope of his duty, except in situations where the duty which he is attempting to fulfil is one cast upon him by law to be executed as an independent responsibility, so that the Crown is not acting through him."[37]

Marshall reaches the conclusion, quite appropriate it would seem, that a police officer has been termed a 'servant of the State' and 'a ministerial officer of the central power' as well as being deemed to hold office under Her Majesty. However, at the same time, he is not quite, it would seem, a servant of Her Majesty or of the Crown. The learned author goes on to state that "all this adds up to a curious theory. The implications which have been drawn from it ascribe to police officers an independence and freedom from control unique amongst officials exercising executive functions."[38]

Marshall indeed also makes reference to the fact that the growth of what he terms a "thesis of police

independence" has also been assisted by the fear of partisan political interference with police duties by local authorities dominated by political or commercial interests.[39] Wade and Phillips note that in a stable society it is easier for the police to seek to play an impartial and a non-political role but even this role has latent political significance. In less stable conditions issues of law and order may acquire a more immediate political content.[40] Two relatively modern cases would seem to illustrate this proposition. In Francis v Chief of Police,[41] the question was whether a law prohibiting the use of a noisy instrument (in this case a loudspeaker) at a public meeting without the permission of the Police Chief was ultra vires the St. Christopher, Nevis and Anguilla Constitution sec.10 which guaranteed freedom of communication. In holding that the law did not contravene the Constitution, Lord Pearson though that, "whatever may be the exact construction of sec.10, it must be clear that (1) a wrongful refusal of permission to use a loud speaker at a public meeting (for instance of the refusal is inspired by political partiality) would be an unjustified and therefore unconstitutional interference with freedom of communication, because it would restrict the range of communication ...." And in R v Metropolitan Police Commissioner, ex parte Blackburn,[42] the question centred around the Commissioner's duty to enforce the law against gaming houses. Lord Denning stated that, "I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive."[43] He added that, "in all these things he is not the servant of anyone save of the law itself (and that) he is answerable to the law and to the law alone."[44]

Police Officers and Vicarious Liability:

Valiant attempts to resolve the question of the

status of police officers have been made by seeking to peg this issue to liability for their wrongful actions. In other words, when does Peter pay for Paul?; and by identifying Peter, it is said that we thereby ascertain the status of Paul. This method, however, requires careful scrutiny. Wade suggests that, "since police officers are nobody's servants in the exercise of their peace-keeping functions, it follows that no-one is liable at common law for their misdeeds in the capacity of their employer. But if there were no way of charging to police funds the liability for wrongs committed by individual police officers, serious injury might be done and there might be no defendant worth suing."[45] Reference has already been made to Dixon, J.'s statement in the Australian case alluded to.[46] As Ducille points out,[47] it is worthwhile noting that a police officer is personally liable if, acting in excess of his powers, he commits a tort.[48] In Christie v Leachinsky, the House of Lords held two police officers to be liable for false imprisonment because in arresting and detaining the plaintiff they (the police) had failed to inform him of the nature of the charge which it was their duty so to do. It follows, therefore, that a constable is not an agent, but is personally laible for any misuse of his pow s or any act in excess of his authority and he cannot plead that he is obeying the orders of his superior officer ...."[49] In spite of this, some writers maintain that in practice, if a policeman was made liable in damages for false imprisonment, the local authority normally "stood behind him" and paid the damages.[50] Wade and Phillips, in the context of the United Kingdom, claim that such a decision on the part of police authorities to pay any damages and costs awarded against police officers remained a matter for their discretion until Parliament changed the law via the Police Act 1964.[51] The effect of this piece

of legislation (which does not exist in the Caribbean with the possible exception of the Associated States owing to reception)[52] is to place liability for torts of police officers squarely upon the shoulders of the Chief Constable if such officers are acting under his direction and control, (sec. 48).

It seems that the Crown in the United Kingdom has expressly refused to admit itself to be vicariously liable for the rots of the police officers committed in the course of their employment. This may be gleaned from sec. 2(b) of the Crown Proceedings Act, 1947 which denies liability for any acts of its officers not appointed directly or indirectly by the Crown and not paid wholly out of the Consolidated Fund nor any other Parliamentary grant.[53] Although such legislation is enacted in a number of Caribbean territories, the position is, it would seem, quite different. As Lewis, J. pointed out in the Antiguan case of Gordon v A.G.[54], "In England, although a policeman is referred to as a servant of the Crown, he is nevertheless no a servant for the purposes of the Crown Proceedings Act, 1947 (U.K.), and that is because of the language of S.2(6) of the Act .... Section 2(6) of the (U.K.) Act corresponds to S. 4(6) of the (local) Ordinance, but it cannot be contended that the immunity from liability for the tortious acts of policemen which the Crown enjoys in England by virtue of S.2(6) of the Crown Proceedings Act, 1947 (U.K.) is for a similar reason enjoyed by the Crown in this Colony under S.4(6) of the Ordinance, for the salaries of policemen in this Colony are .... a charge on the revenues of the Colony."

Indeed, in Gordon v A.G., a landmark decision in public law from the Caribbean region, Lewis, J. took pains to emphasize that "the position of a policeman in England is substantially different from

that of a policeman in this Colony."[55] Although the preservation of the peace is a royal prerogotive and are of the primary functions of any State, the administration of the Police in England has always been on a local basis.[56] The reasons for this have varied from fear of central political control to the more substantive element of historical development.[57] Furthermore, as this article has already suggested, "a police officer in Great Britain is an independent holder of a public office and exercises his powers as a constable by virtue of that office; he is an agent of the law of the land, not of the police authority nor of the Central Government.."[58]

As Alexis suggests,[59] one may question whether it is safe to airlift certain principles enunciated in relation to the English Police and apply them wholesale to the Caribbean. In this region, the central Government is charged with financing the national police service out of funds specifically allocated for that purpose.[60] Certain powers also vest in the Heads of State of Caribbean territories to determine the salaries of police officers, amend, vary or add to their classification as well as issue to them arms and ammunition as exemplified by the Police Service Act, 1965 of Trinidad and Tobago.[61] One may therefore conclude that, according to Blackman,[62] "The Police in the West Indian Independent Territories are the instrument for enforcing the rule of law .... the nature of Police work is generally said to be the preservation of law and order or the maintenance of the peace."

Caribbean Police and 'Dismissibility at Pleasurer

The status of the police officer in the region was neatly illustrated by Lewis, J. in Gordon v AG when he stated that, "the provisions of the Police

Act (W.L.), in my opinion show that the position of policemen in this Colony is substantially the same as that of civil servants in regard to service. They are appointed, paid, controlled and dismissible by the Crown and they would therefore appear to be in the fullest sense of the expression 'servants of the Crown' notwithstanding that the Crown may not in Law be liable to control the way in which they do their work;.... but I would say that they are the servants of the Crown, for the Crown having employed them and having chosen them for the work they must do, has in its hands 'the ultimate sanction of good conduct - the power of dismissal.'"[63]

Thus in Thornhill v A.G.[64], it was contended on behalf of the appellant[65] that for the purposes of the (Trinidad and Tobago) Constitution police officers are to be regarded as exercising coercive powers of the state. The respondent countered that the police are deemed to be crown servants only for the limited purposes of the Police Service Act 1965.[66] The Judicial Committee however, found that it is beyond question that a police officer in carrying out his duties is acting as a public officer carrying out an essential executive function of any sovereign state - the maintenance of law and order.[67] Their Lordships accordingly reached the conclusion that contraventions by the police of any human rights as fundamental freedoms guaranteed by the Constitution fall squarely with what had been held in Maharaj v A.G.(No 2)[68] to be the ambit of the protection afforded by sec.6 dealing with contraventions 'by the state or by some other public authority endowed by law and coercive powers.'[69] The Privy Council in that case also noted that a similar provision existed in the 1962 Independence Constitution[70] and parallel sections exist in other Commonwealth territories (which include Caribbean

countries).

Questions have emerged concerning the applicability and relevance of the concept of dismissibility at pleasure in relation to police officers. Okpaluba opines that, "it is common knowledge that the concept of dismissal at pleasure was established by the common law judges in order to frustrate actions by public servants against the Crown for wrongful dismissal. It was established when the Crown could not be sued in its Courts on any account and at a time when the entire common law of dismissal from employment was heavily weighted in favour of the employer."[71] The learned author further submits that the concept of dismissal at pleasure is an anochronism in public law, and is obsolete as a doctrine in view of the emergence of independence Constitutions, the attainment of republican status in some Caribbean countries and public policy generally.[72]

As if to remedy this 'anochronism', a golden opportunity arose for the Courts to settle this question of the status of police officers once and for all in Thomas v A.G.[73] While the Attorney-General in this case contended that all police officers were public servants and therefore dismissible at pleasure, Thomas, a police inspector, maintained that he was protected by the Police Service Act 1965[74] which, according to Alexis,[76] abrogated the common law rule of dismissibility at pleasure. The Privy Council held that the right of the Crown to dismiss the servants had not been transferred to the Police Commission and was inconsistent with both the 1962 Independence Constitution and and the present Republican Constitution (which establish the Police Service Commission); accordingly, a police officer was not a servant of the Crown dismissible at pleasure.[76]

Similar constitutional provisions exist in the Antigua and Barbuda Constitution 1981 which seems to follow the trend of the other Commonwealth Caribbean Constitutions. S.105(1) states that "the power to appoint persons to hold or act in offices in the Police Force ... and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission", with provision for the delegation of any powers to the Commissioner of Police with the approval of the Prime Minister. This "political" connection is perhaps somewhat nullified by S.105(7) which states that "a police officer shall not be removed from office or subjected to any other punishment under this section on the grounds of any act done or omitted by him in the exercise of any judicial function conferred on him unless the Judicial and Legal Services Commission concurs therein." One may contrast the Belize Constitution 1981 where the defence force seems to fall under the aegis of S.105 dealing with the Public Service. Parallel provisions to the new Antiguan and Barbudan Order exist except that in the latter document, such provisions are only entrenched by a two-thirds majority of both Houses while in Belize, these provisions are safeguarded by a three-quarters majority of all the members of the House of Representatives.[77]

Conclusion:

Reference must be made once again to Gordon v A.G.,[78] where Lewis, J. argued that, "the fact that a policeman has to perform duties which are imposed on him by statute does not by itself preclude him from being regarded as a servant of the Crown." Further, "a contrary view would lead to the astonishing result that a policeman in this Colony is a law unto himself, not responsible to anyone as to the way he performs his statutory duties and not accountable

to anyone if he chooses not to perform them." The learned judge came to the conclusion that, "if a person is employed to perform certain duties and has a discretion how these duties are to be performed, he is notwithstanding this fact in the service of the person who employed him to do them."

Marshall contends[79] that the majority of opinions expressed on the independence of the Police are merely self-reinforcing and stand upon a kind of inverted pyramid, with the legal apex of the pyramid being the judgment of McCardie, J. in Fisher v. Oldham Corporation. Support for this edifice is supplied by a number of other decisions both before and after the Fisher case. Perhaps one of the most notable cases is A.G. for New South Wales v Perpetual Trustee Company which, as Lewis, J. pointed out in Gordon v A.G.[80] only decided that a policeman was the holder of a public office and therefore the action 'per quod servitum amisit' was not appropriate to this case.

In view of the above, it seems proper to agree with Lewis,J. in Gordon v A.G. that, "I do not think that the question whether the police in this Colony are servants of the Crown can in any sense be regarded as a borderline case ...."[81] This is so particularly in view of the Crown Proceedings Acts which are substantially the same in the Caribbean as in England. Furthermore, it cannot seriously be denied that, although the various Public and Police Service Commissions seem to interpose themselves between the Police and the State, the Police are in fact the paid agents of the executive.

Thus, even though police officers may no longer be dismissible at pleasure, according to Thomas v A.G., they are nevertheless to be regarded, at least in the Commonwealth Caribbean area, as servants of the State due to the manifold executive function which

they perform.

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FOOTNOTES

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5. B. Whitaker, The Police (1964), p.19
6. J.F. Garner, Administrative Law (5th ed.), (1979), p.469
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12. Ibid. p.345
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14. Garner, op.cit.p.469
15. H.W.R.Wade, Administrative Law (4th ed.)(1977) p.133

16. Coombes v The Justices of the County of Berks, (1883) 9 A.C.61

17. Ibid.p.67

18. Metropolitan Meat Industry Board v Sheedy, (1927) A.C.899

19. Fisher v Oldham Corporation, (1930) 2 K.B. 364

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23. Coombes v Berks Justices, supra n.16

24. G. Marshall, Police and Government (1965), p.37-38

25. Coombes v Berks Justices, op.cit.p.79 per Lord Bromwell

26. Metropolitan Meat Industry Board v Sheedy, supra n.18

27. Lewis v Cattle, (1938) 2 K.B. 454

28. Official Secrets Act, 1911 (U.K.) S.2(1)

29. Lewis v Cottle op.cit at footnote 27 per Lord Hewart, C.J. pp. 457-458

30. A.G. for New South Wales v Perpetual Trustee Company, (1952) 85 C.L.R.237; (1955) A.C. 457 (P.C.)

31. Marshall, op.cit.p.44

32. Ibid. p.44

33. Sawer, (1953) 16 M.L.R.97; (1955) 18 M.L.R. 488

34. Sawer, (1955). 18 M.L.R. 488

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37. A.G. for New South Wales v Perpetual Trustee Company, (1952) 85 C.L.R. 237, 249 per Dixon,J.

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42. R.v. Metropolitan Police Commissioner, ex p. Blackburn, (1968) 2 Q.B.118

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53. O'Hood Phillips, op.cit.p.409

54. Gordon v Attorney-General (1960) 2 W.I.R.235, 243 per Lewis, J.

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61. Act 30 of 1965 (Trinidad and Tobago)

62. H.B. Blackman, The Role of the Police in the West Indian Independent Territories (LL.B. Thesis - U.W.I.) p.9

63. Gordon v A.G., op.cit. p.244

64. Thornhill v Attorney-General, (1981) A.C.61

65. Ibid. p.64

66. Ibid. p.66

67. Ibid. p.73

68. Maharaj v Attorney-General (No.2.) (1979) A.C. 385, 396

69. Thornhill v A.G., p.74

70. Ibid. pp. 69-70

71. C. Okpaluba, Dismissal at Pleasure - The Persistence of an Anochronism, Anglo- American Law Review (1977), pp. 284-296

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73. Thomas v Attorney-General, (1981) 3 W.L.R. 601

74. Supra n.61

75. Alexis, op.cit. p.28

76. Thomas v A.G. op.cit. p.603

77. Compare S.47 of the Antigua and Barbuda Constitution 1981 with the Belize Constitution 1981 S.69 (3) protected by Schedule 2;

78. Gordan v A.G., op.cit. pp.240-241

79. Marshall, op.cit. p.34

80. Gordan v A.G., op. cit. p.238

81. Ibid. p.245

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"There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice."

(Baron de Montesquieu)