Probable cause

Preview

Probable cause is a constitutional concept, primarily. The concept offers a frame for judicial review of police action in law enforcement. There is no definition, only description, of probable cause. Judicial determination within the rubric of probable cause is therefore spread far and wide in search for an abiding principle. A process for determination, termed 'two step', requires a statement of the historical record of facts leading to, and an objective evaluation of probable cause. These means, in themselves, do not yield the desired result of a clear positive base of probable cause. Decisions are diverse. A host of variables change the ground for judicial determination. A deeper analysis then of the underlying features is expedient. Probable cause encounters inbuilt problems through elucidation. The need therefore is a search for an unifying principle through clear assessment of the action in law enforcement, to enable judicial review, is the need.

Introduction

At issue is the scope of probable cause and debate of reasonable suspicion in police action within that orbit. A previous study on this subject referred above was titled Police Decision in

Action - (*A profile in Legal Review*). The nature of police action came out in clearer relief through the prism of judicial review than its form experienced in everyday action. The setting of that analysis was in the Sri Lanka context primarily, but drew on judicial decision from the US and the UK. That study of police action at judicial review can be enhanced by setting the work within the frame of the probable cause – reasonable suspicion discourse. This article proceeds in that line of inquiry.

Probable cause or reasonable suspicion reflects their delimiting lines through police action. Police action entails a decision subject to review for probable cause. Such decision and review in many jurisdictions is continual through the action by police in as many law and order situations. The situational context for action frames the distinctive character in the police action and decision. Situation bears on the action. An expertise and a capacity in police action are developed in the process. These attributes inhere to the distinctive police action. Review comes in that wake of police action. In essence reasonableness is the guiding principle for police decision and action, in situ and in review. Reasonableness and probable cause are the legal concepts which measure police action. Such police action and decision needs necessarily to be within the law in that conceptual frame. Judicial administration on this principle has however been problematic. Assessment and review of police action is, perhaps, a continuing problem in this sense, the world over. Their colour only varies, different in the several jurisdictions. Initially the problem is one of definition, of probable cause, for review of police action within the defined limits of probable cause.

Definition

The Fourth Amendment provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. These rights shall not be violated. No warrants shall issue, but upon probable cause, supported by Oath or affirmation, specifically describing the place to be searched, the persons and things to be seized.

There is only the mention here, no precise definition of the term 'probable cause', delineating a basis for strict enforcement. Reasonable suspicion insinuates to the formula. There is then the want of clear differentiation between probable cause and reasonable suspicion for review. Instead of definition the term probable cause is described, for what it yet entails. Description is multi-faceted. Their effect is multi-directional.

Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found"[1]. Earlier in the case of *Carroll*[2] "Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offence has been or is being committed". "Articulating precisely what "reasonable suspicion" and "probable cause" mean is however not possible. They are commonsense, non technical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. We have described reasonable suspicion simply as "a particularized and objective

[1] Ornelas v. United States, 517 U.S.690, 696.

[2] Carrol v US 267US 132, 162, 288, 39ALR 790.15.

basis" for suspecting the person stopped of criminal activity…"[3]. In *Carroll*, the Supreme Court stated that probable cause to search is a flexible, common-sense standard. To like effect the Court ruled in *Dumbra*[4] "the term probable cause...means less than evidence that would justify condemnation[,]" reiterating *Carroll's* assertion that it merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that specific items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, non technical" probability that incriminating evidence is involved is all that is required. In *Illinois*[5] the Supreme Court ruled that the reliability of an informant is to be determined based on the "totality of the circumstances." In 2001 *Knights case*[6] said "[S]earch….supported by reasonable suspicion ….satisfied the Fourth Amendment…The Fourth Amendment's touchstone is reasonableness…." In 2002, in the *Arvizu case*[7] held "in favour of a standard less than probable cause in brief investigatory stops of persons or vehicles [that] the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot".

A considerable range of factors inevitably figures in the description of probable cause. There is through the above descriptive account no clear cut definition of either probable cause or reasonable suspicion. Their representation in law does not direct along a particular line for determination of probable cause. Probable cause and reasonable suspicion nearly merge into each other, barely discrete in themselves to mean about the same. The former has a constitutional base, reasonable suspicion only a commonsense understanding. Consequently there is, in fact, an insufficient basis

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[3] Ornelas op cit 696
[4] Dumbra v. United States, 268 U.S. 435 (1925)
[5] Illinois v Gates 462 U.S. 213 (1983).
[6] United States v. Knights 534 US 112 (2001).
[7] United States v Arvizu 534 US 266; cf. also US v Sokolov 490 US

for court review when probable cause is in question. On the other hand the idea of unreasonableness of search is a firmer based concept for judicial review. There have however been no cases of blatant unreasonableness which struck down executive action. Similarly there is no idea or concept of improbable cause which was the basis of court review of government executive action. Simply, these ideas in the negative have a more compelling force for determination. Negative conduct offends the constitution and the law. Reasonableness and probability are to the contrary vague of prescription to afford any definitiveness for law review. Their positive aspect is assumed only as reflected against the negative, not in themselves. In fact these negative and positive reflections of the problem identifying probable cause and reasonable suspicion have not engaged court determinations in the long list of cases reported. It is inevitable that judicial decision will reflect this uncertainty from imprecise definition.

In the void therefore of clear definition of probable cause the premise attracts diverse interpretations. There was, for example, two way split in the determination of probable cause in the case of *Falso*[8] . The difference arose from consideration of the quantum of factual material in support. The nature of the action was not the issue. But the court held the action was in good faith, meaning the intervention was reasonable. The two trajectories in quantum and nature of action are explicit in the text of this case, though of separate thrust. Good faith meant that the action was not unreasonable, to emphasize the negative. Meaning of reasonableness is clear and fixed from this negative perspective. From the positive angle the problem remains, undifferentiated. Probable cause and reasonable suspicion are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed"[9]. Latent in this statement are the material in support of action and the distinctive nature in context of action.

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[8] United States v Falso 06-2721-cr (2nd Cir. 2008.
[9] Ornelas v. United States, 517 U.S.690, 695-96.

Process

Police action is to be processed for review under probable cause or reasonableness in action. The procedure to determine probable cause has been closely prescribed to require "(1) a determination of the historical facts leading up to the stop or search, and (2) a decision on the mixed question of law and fact whether the historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause"[10]. This procedure applies in the event of a re-inquiry, or initial inquiry. The problem for determination of probable cause remains after *Ornelas* decision, infra, in 1996, as it has been a problem from well before that date. Specifically, the procedural way has not yielded a definite basis for determination which will constitute a clear guideline for the executive officer in the task of law enforcement. Determinations have instead varied considerably, from the lowest to the highest court, on the question of probability of cause for search and seizure.

The difficulty relates to the concepts deployed incurred in the prescription for procedure. The first is that of the record of historical facts leading to the search. Police law enforcement action is reviewed almost entirely on the basis of the historical record of the action taken. This is inevitable and basic. Yet in such situations the fact emerges that the historical record is an abstract of all that transpired. At each turn and event there is in fact a concomitant reaction on the part of the officer, even as he assesses the ravel and turn of event. Such assessment does not figure as a substantive component in the recount of the historical record of events that transpired. Reaction and action are barely translatable for historical account.

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[10] Ibid 690.

As a matter of practical experience there is an intangible connection of one event to the other leading to the ultimate search. Reference however to such an aspect is varied and incidental in judicial opinion. One instance describes it as 'an act of judgment formed in the light of the particular situation' – *Brinegar*[11]. Else where it said, 'the process allows officers to draw on their own experiences and specialised training to make inferences from and deductions about the cumulative information available' and the need to 'provide law enforcement officers the tools to reach the correct decision beforehand' – *Arvizu* 534 US 266 (decision). In the same case *Arvizu* it was remarked that [Officer's] 'assessment of the reactions of respondent and his passengers was entitled to some weight'. In *Ornelas*[12] the observation was that 'likewise, a police officer views the facts through the lens of his police experience and expertise'. Reference to such activity on the part of the officer is, in these cases, only ad hoc, as it arises. The matters of historical record take their meaning with the particular reaction of the officer, his individual contribution to the train of events and the exercise of a specific expertise in the task. There is no systematic concept though of such expertise in these determinations. There is in fact no concept of police decision incurred in such situations, decision which embodies these distinctive characteristics of a vital element that plays out in these cases.

The second step in these determinations is to identify an objective reasonable basis for the action. Objective is as it is evident to a third party. Subjective is posited in direct opposition to the objective standard. The remarks above clearly point to an aspect of the officer's action intrinsic to him exercised by virtue of his office. In a sense these attributes carry a subjective component to the officer's reaction and response. An objective standard for review is then, of itself, limited. In practical terms can be envisaged the fact that the same instance will not invoke

[11] Brinegar v U.S. 338 US 160, 176.
[12] Ornela op cit 699

the same reaction viewed by a normal civilian. In other terms this feature is referred to, in related literature, as professional skills, street skills, 'hunch' and the like. And yet in other writings the term discretion is applied, not to mean arbitrariness or caprice, but to mean prudence and sound judgment as the dictionary itself will allow. Hunch, as spoken, is equated with bare suspicion. But hunch as intuition means immediate insight or understanding without conscious reasoning. This dictionary meaning does not enter into the determining equation. A distinctive and unique character and expertise then inheres to the police action. There is however no such substantive idea or concept of this nature that drives determination of probable cause from such action.

The Court in the *Ornelas* case supra, also emphasized that the standard courts should employ is an objective one. "Would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" Lesser evidence would mean that the Court would tolerate invasions on the privacy of citizens supported by mere hunches - a result the Court would not tolerate. Factual evidence intrudes into the reasoning. The second step is to reach an objective reasonable basis for arrest or search. Reasonable suspicion, as with probable cause is no less problematic for definition or description. Objective and subjective factors interplay. This is the experience in the UK, discussed presently under suspicion and guilt.

And simple "'good faith on the part of the arresting officer is not enough.' ... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." — quoting *Beck*[13]. Good faith is reasonable. Good faith is nothing if unreasonable. Simple good faith and subjective good faith are even contradictions in terms.

[13] Beck v. Ohio, 379 U.S. 89 (1964).

In truth it is the opposite, the negative, of reasonableness or good faith that finds clear articulation in judicial opinion. The protest was against uncontrolled searches, that many with 'admirable qualities [when] deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject any hour to unheralded search and seizure by the police' –*Brinegar*[14] per Mr. Justice Jackson. Action is of the nature of invasion perpetrated by invaders in the dissenting words in this judgment. The projection is in the negative. There is little room for any positive prospect of direction, as suggested above, through this avalanche.

The two step process then needs some review for effective adjudication in these cases. There are still other problems to be contended with in this endeavour. Concept of historical statement and objective reasonableness are themselves fraught with in definitiveness to ground due process.

Probable cause and guilt

Another dimension which enters the discourse is that of guilt. Probable cause and evidence of guilt is often intermixed. There was a tendency to 'confusing and disregarding the difference between that required to prove guilt in a criminal case and what is required to show probable cause for arrest or search'[15]. "There is a large difference between the two things to be proved [to prove guilt and to show probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them"[16]. "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt"[17]. Guilt implies some measure of evidence as the

[14] Brinegar op cit 180, 181.
[15] Brinegar v. U.S. 338 U.S. 160, 172, 173 (1949)
[16] Ibid 173
[17] Brinegar op cit 175 (1949); Maryland v Pringle 540 US 366 (opinion) (2003).

basis for the belief. That eliminates surmise. Probable cause as an idea is pitched higher than reasonable suspicion, in general terms. Therefore the basis of probable cause is conceived as higher than that for reasonable suspicion. Inevitably therefore an evidential basis insinuates into the figure of the difference, bringing in evidence to the calculation. On this hangs the further question of admissibility of that evidence and so the validity of the belief. The above citations clearly seek to draw out the difference, separating their significance. A further comment may be added here. Apart from quanta and mode for proof, there is the nature of the action which leads to probable cause and reasonable suspicion.

In the UK too there is very much of the same problem which confronted the court. The separation was articulated by Lord Devlin in *Hussein v Chong Fook Kam*[18]. He described suspicion as, 'a state of conjecture or surmise where proof is lacking [which arises] at or near the starting point of an investigation'. Another statement said: "It may be contrasted with a mere intuitive hunch based on no ground that could be rationally evaluated by a third party". The dictum of Lord Devlin in the same case clarifies further, "Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie evidence is the end…Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all". There are in the end subjective but reasonable considerations in reasonable suspicion separate from evidence and proof of offence. In the case of *Holgate-Mohammed*[19], the House of Lords held that the decision to arrest could be impugned if some irrelevant matter had been taken into account, applying the UK Wednesbury principles. These observations clearly underwrite the difference between the initial entertaining of a suspicion and the matter of later proof. It marks out the two stages and two procedures in their process. This distinction makes out that the basis of reasonable suspicion and the

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18 [1970] AC942,948.

19 Holgate-Mohammed v Duke [1948] 1 ALL ER 1054.

validity of arrest has to be based on its own determination, proof of the offence based on later evidence. That position found explicit endorsement in a later case, *Castorina*[20]. In this case a lady who had been previously dismissed from the firm was suspected of burgling the firm. Police suspicion was based on that the suspect had a grudge with the firm and that the burglary was an inside job. The court held that it was a precondition of a lawful arrest that the police believe the suspect to be guilty. Here too the insufficiency of later evidence in proof did not vitiate the reasonableness of the suspicion initially entertained. Entertaining suspicion and proof of guilt are two different, discrete matters.. Their procedures too are different.

The confusion of reasonable suspicion and evidence in proof comes into sharp relief in the case of *Brinegar*, supra. In this case was alleged that suspicion "rested wholly or largely on surmise or hearsay….That evidence concerning prior arrest should not have been received"[21]. The court decision was that there was much more than the surmise or hearsay to show probable cause, that general reputation of offender helped to justify probable cause for arrest. Court held "that emphasis [on admissible evidence]…goes too far in confusing and disregarding the difference between that is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search"[22]. The difference is adverted to here but not positively asserted in the long line of decisions. The reason is plain that reasonable suspicion in probable cause takes into account a host of matters that are not admissible in evidence. The reason also flows from an undue distinction between probable cause and reasonable suspicion, when in essence they are the same. The use of words as 'mere suspicion' [ibid 176] confuses the issue further. Mere suspicion is neither probable cause nor reasonable suspicion. In fact it is personal observation of

[20] Castorina v Chief Constable of Surrey [1988] NLJR 180.
[21] Brinegar op cit 172.
[22] Ibid 172,173.

the officers which led to the stop of the vehicle, search of the car and the arrest of the three occupants in the case of *Pringle*[23]. In this case, though Pringle alone disclaimed knowledge, all the attending circumstances which led to the arrest on probable cause was held to be "an entirely reasonable inference from the facts here that any or all of the car's occupants had knowledge of, and exercised dominion and control over, the cocaine, a reasonable officer could conclude there was probable cause to believe Pringle committed the crime… either solely or jointly"[24]. It is not clear about the conviction of the other two occupants. Confusion of guilt and probable cause is not cleared sufficiently yet.

In 2002, the *Arvizu* case[25] referred to brief investigatory stops of persons or vehicles. The term 'investigatory stop' confuses two separate matters, stop and investigation. Stop is on the basis of reasonable suspicion entertained before investigation. Investigation relates to later evidence. A stop merely to investigate will not accord with the law. Such search has been referred to as "investigatory" rather than "probative" in the *Knights* case, supra, with the inference that stop and seizure for investigation is not in keeping with the Fourth Amendment. Brief stop with probable cause may be the appropriate concept.

Where, then, probable cause defies sufficient definition, where the means by which probable cause is assessed is insufficient, adequate direction is not afforded. Therefore variable factors weigh in the determination of reasonableness of police action in the relevant cases.

Variable factors

An array of variable factors enters the calculus of judicial determination of probable cause. Police action conceived in current legal discourse depends on the vicissitudes of determinable

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[23] Maryland v Pringle (2-809) 540 US 366 (2003).
[24] Ibid opinion.
[25] United States v Arvizu 534 US 266; cf. also US v Sokolov 490 US 1,7.

factors. Police action, police decision, its deployment singularly through all the changing circumstances, does not engage judicial assessment of probable cause. The sweep of such concerns needs to be examined.

Totality of the circumstances

A concept of a 'totality of circumstances' surrounds the idea of probable cause. This need arises in the absence of adequate definition or articulate concept of probable cause or reasonable suspicion a concept which can comprehend the matter in issue, namely the basis for action in all the circumstances. The essence in action is the principle, the binding thread beneath probable cause or reasonable suspicion. Responsible reasonable action ties up the situation, in the totality of circumstances, in all situations. "In making reasonable-suspicion determinations, reviewing courts must look at the "totality of circumstances" of each case to see whether the detaining officer has a "particularized objective" for suspecting legal wrongdoing"[26]; "[E]valuation and rejection of certain factors in isolation from each other does take into account the "totality of the circumstances" as this Court's cases have understood that phrase"[27]. That is one explanation. Clarifying further, this same case observed: "*Terry v Ohio* 392 US 1, however, precludes this sort of divide- and-conquer analysis". Totality of circumstance is basic to judicial determination. Relevance is the principle. All that is relevant would be applicable to determine probable cause too. Probable cause in plain meaning here, is that likely or very likely to happen, determined through all the attendant facts. Totality of circumstance is even redundant is such situation. Totality is self evident. The problem may be traced to a specific meaning attributed to probable cause by reason of its constitutional status. This constitutional base of probable cause is strained for

[26] United States v Arzivu 534 US 266 (2002)
[27] Ibid (opinion).

recourse in cases where the evidence is plain, proof of wrongdoing is beyond reasonable doubt. However the strain is more when the constitutional principle is exploited to have that evidence negated in the process. Such device sits uneasy with law.

Probable cause has therefore been variously determined, one through a fact-specific weighing of circumstances. Thus multifactor tests of totality of circumstances introduced an uncertainty and unpredictability into the Fourth Amendment analysis. Many factors were considered carrying little weight, others not enough for cause. Totality of circumstances is called in aid to contain the uncertainty. The term 'totality of circumstance' itself is dependent on many variables, tangible and that much else less explicit. Their objective to unify precedent and offer law enforcement with capacity and tools to reach correct decision beforehand is itself, fraught with difficulty. The *Terry* principle is illustrative of the difficulties encountered.

Ground context

Another variable is ground context. There is a volume of judicial opinion relating to the ground context in which probable cause or reasonableness is determined. Schools, motor vehicles, open fields 'borders' have figured considerably in the determinations. There are searches incident to a lawful arrest, irrespective of geographical context. All these different geographical situations have a bearing on the reasonable suspicion the officer brings to bear on the action. The essence of police action is in the skill he adopts to interpret the incident for reasonableness in the context of the geographical situation. This is a process the officer engages in and is trained for. The officer's approach is peculiar to his assessment of the incident in context. This distinctiveness of action is not freely recognized in judicial determination. Reference to such characteristic is incidental to determination though such is everyday occurrence. In passing as it were, the observation is made that "likewise a police officer views the facts through the lens

of his police experience and expertise"[28]. Reasonableness of the officer's action is much dependent on this capacity and expertise he brings to bear in the context for his determination. Such capacity and skill are not easily transmitted to nor appropriated by another. Reasonableness has an absolute value over all ground context, neither less nor more based on ground location.

Escalating disorder

As crime and wrongdoing escalate into serious proportions, probable cause is nudged otherwise. Probable cause, originally promulgated, was sufficient then. With growing problems commensurate action was required. These tested the probable cause provisions. Law enforcement action proceeded apace, with more cases taken to court. Judicial opinion is expressed in context of dealing with rapidly unfolding and increasingly dangerous situations when police may find it impracticable or impossible to obtain a search warrant before choosing to intervene. Of cases instituted, there appears to be none where evidence from search was lacking or 'cause' wanting. In all likelihood lack of contest is possible because those subject to search did not have cause for complaint. Or it may be that they subjected themselves to search with consent. Such search with consent or through compliance with the law is a regular occurrence, every day perhaps.

The other view needs attention. In the words of Mr. Justice Jackson in his dissenting opinion in the *Brinegar* case (p180-188) there is also the possibility that many of these searches are of an uncontrolled nature; at times unheralded searches by officers who themselves are the chief invaders; where nothing incriminating was found the search is an invasion of the personal liberty of the innocent; the citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate

[28] Ornelas op cit p 699.

violence; or consider the intolerable and unreasonable if the agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons using the highways to the inconvenience and indignity of such a search, etc. Few of these stops and search are challenged. Violation is not alleged in the face of escalating disorder which the community recognizes.

These dissenting comments are useful to set the balance of the problem at hand, of probable cause. It is a balance that needs to be achieved, between deterrent and deferred enforcement action, between proliferation of wrongdoing and want of effective ground action, between preventive action with minor intervention and dealing with such in catastrophic proportions. This dilemma is an everyday problem for law enforcement, the world over. Racial riots, terrorism, drugs and narcotics and even horrendous crimes as mass murders in schools, all have had very small beginnings. Want of action at the incipient stages for what ever reasons, even legal restraints, is at the bottom of serious problems for law and order. The drug situation in the US is no different. The law then is compelled to adjust to the new reality. The *Terry* stop with less than probable cause is an adjustment to the practicalities of growing disorder.

Law has to adjust to reality when the law itself proceeds on a discursive course. Adjustment was done in this case by resorting to first principles. The *Terry*[29] stop is one example. The adjusting items may be listed for discussion of each in turn.

i. Protection intended in Fourth Amendment is from 'unreasonable searches and seizures'. Stated in the negative the statutory protection is more explicit than 'probable cause' in its positive note. The Terry case brings forth this projection of probable cause from the negative for the first time, by way of adjustment.

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[29] Ibid (opinion)

ii. Reasonableness needs now to be determined within the 'probable cause' provision. Hitherto there was considerable debate between the two concepts of reasonableness and probable cause. Reconciliation has not been easy either. Two views prevail. Probable cause has a constitutional basis and is pitched higher than reasonableness, in one view. Other judicial dicta have it that probable cause is little more than reasonable suspicion. Judicial comments cited above reflect this variance. Use of other epithets as 'mere suspicion' 'simple good faith' 'mere hunches' did not help the differentiation. Reasonableness is nearly fused in probable cause.

iii. Adjustment has perforce to be made for situation and context. Hitherto 'stop and frisk' seizures had been freely resorted to for practical reasons without challenge. Accommodation is difficult in the prevailing mode of judicial thought. Reasonableness on the street is compared with that required to obtain a warrant for assessment of reasonableness. Facts are the same in either case, it says. Comparison is apposite when the quantum of fact is the basis for comparison. But the two are different in situation and context. Facts to make for a warrant are gleaned through investigation. Facts to make for reasonable suspicion on the street to warrant seizure are plainly one of observation, not investigation. Investigation follows the initial entertaining reasonable suspicion. Reasonable suspicion must be legally valid apart from investigation later which reveals facts. Thus the finding of offensive weapons on the person of Terry cannot justify the reasonableness of suspicion initially apprehended to arrest Terry at initial seizure. Reasonableness of suspicion for arrest needs to be assessed by itself, for reasons at that time, for its basis in that context. Considerable observation prior to seizure affirms this. Facts of this case make initial seizure of Terry eminently reasonable suspicion. Plainly, facts to lead to reasonable suspicion and facts to obtain warrant are qualitatively different. More important, action for arrest on street cannot be deferred for process of judicial warrant. In this case weapons were found.

What then when incriminating evidence is not immediately found on the person seized? Practical experience is replete with valuable evidence found much later. Challenge on constitutional and statutory grounds is generally offered when incriminating evidence is found and offence is proved beyond reasonable doubt.

iv. Adjustment to new realities has been difficult as the dissenting opinion shows. "We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action….To give police greater powers than a magistrate is to take a long step down the totalitarian path"[30]. There is much misconception of one having greater power than the other when the power is the same, with reasonableness in both cases the critical requirement, difference only, *in situ*. This point is discussed further under the title of contest, when in fact the two should be acting in concert towards the larger objective.

v. The proposition is that the *Terry* decision is reached 'by balancing the legitimate needs of law enforcement against the privacy interests of individuals'. Balancing interests is fraught with considerable variation, taken on its own. Read with reasonable suspicion, balancing of interests makes for meaningful strategy. The problem is that the need for balance has not occurred previously, for so long.

vi. Adjustment in *Terry* is in practical terms, when 'the police might find it impractical or impossible to obtain a search warrant before choosing to intervene', as the Court said.

vii. Flexibility and practicality are weighed in considerably to make for adjustment in the Terry case to a long line of decisions on 'probable cause' for arrest. These aspects are accommodated within the new line of determination to

[30] Terry v. Ohio 392 US 1 (1968)

'include the *right* [emphasis added] of police officers to stop persons suspected of criminal activity' and of the right of the police officer to protect himself and others from harm. In fact it is the duty of police officers to act in such situations, apart from exercising his rights. Duty rather than right to act spells better flexibility and practicability in constitutional interpretation.

viii. Finally the accommodation and adjustment is not unreserved, but subject to restrictions. Stop and frisk requires observation of unusual conduct, a stop no longer than necessary, must not be unnecessarily restrictive or intrusive, search to be limited to the suspect's outer clothing, only for the purpose of discovering concealed weapons. Reasonable basis for suspicions underwrites these restrictions. Probable cause without more may need reiteration of these restrictions.

National security is a growing problem for order in the US. The probable cause standard, so long upheld, has perforce to yield ground in the face of the escalating problem. There is speculation that a less demanding application of 'probable cause' in national security cases. National security may require less demanding 'probable cause'[31]. Courts recognize that, "the gathering of security intelligence is often long range and involves the interrelation of various sources and types of information….. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime"[32]. In the latter *Sealed Case* it was noted that "Congress allowed this lesser showing for clandestine intelligence activities – but not, notably, for other activities, including terrorism…" It may be argued that it is the focus that is different, not the standard. Yet the intention is clear that context in which probable cause applies has relevance

[31] Ibid 37. 38.

[32] United States v United States District Court, 407 US 297, 332 (1972); In re Sealed Case, 310 F.3d 717, 739 (F.I.S. Ct Rev. 2002)

to the determination. The escalating problem tells on the standards applied.

Balance of interests

In all the flux of context in which probable cause or reasonable suspicion is determined the swing of the pendulum is evident. Balance is inevitable. Another variable is then a principle of a balance of interest which also weighs on the determination of probable cause. The interests here are the public interest and the individual's right to personal security. "Because the 'balance between the public interest and the individual's right to personal security' tilts in favour of a standard less than probable cause in brief investigatory stops of persons or vehicles, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity may be afoot"[33]. A "search's reasonableness is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to promote legitimate governmental interests"[34]. Balance of interests has perhaps a pragmatic efficacy, exigent to variable circumstance. For purposes of unity of law and direction for law enforcement these vagaries will take their toll. Additionally, since the underlying validation is reasonableness and probable cause, subjecting these vital bases to vagaries of weighted interpretation does not augur well. Reasonableness cannot depend on interests, while interests should not compromise reasonableness of action. The cases of *Martinez-Fuerte*[35] and *Sitz*[36] are highway checkpoint cases where the balancing test between public interest and privacy determined reasonableness. These incidents took place at the 'border', by reason of which it is reasonableness based on

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[33] Ibid 332; 739.
[34] United States v. Brignoni-Ponce, 422 US 873. 878; United States v. Sokolow, 490 US 1, 7.
[35] Knights op cit 112.
[36] United States v Martinex-Fuerte 428 US 543, 556-62 (1976).

geography that is the critical feature in these cases.

An ill-balance can equally insinuate into the process. When overwhelming evidence of wrongdoing is proved beyond reasonable doubt, such is in the interests of the government and the public. But if that volume of evidence can be reduced to nothing by a manner of operation of the probable cause provision in the Fourth Amendment to negate the glaring fact, there is then another form of ill-balance. In this case the private interest prevails over the public interest. It is evident that this line of decision is not invariably the result. The constitutional argument has not prevailed in some cases. In these cases the distinguishing mark is that the evidence of wrongdoing was not suppressed on grounds that reasonable cause prevailed if not probable cause. A strict form of probable cause requirement was upheld in the other cases. It is evident that balance of interest operated precariously, with quantum of fact to explain the swing of the balance.

An observation of relevance is that in many other jurisdictions, in the UK, in Sri Lanka, are examples of situations in which persons found with contraband do not go before court to allege violation of rights. They had other fears. Persons arrested with them in the same transaction, on whose person there was no incriminating evidence, did go to court alleging violation of rights. A measure of ill-direction and uncertainty does intrude thereby into the vitality of the system. In the UK, this observation was made: "It may be difficult for an arrester to forecast whether a court will subsequently regard his suspicion as reasonable; but the question ought not to be raised if the suspicion was in fact correct…[Further] The law in giving a power of arrest does so in order that offenders, where necessary, be brought to justice. If this end has been secured, the arrester ought to be given qualified praise, and ought not to be penalized merely because he did not accurately know or believe the facts. What he did was objectively lawful"[37]. Balance of interest is finely held here.

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[37] Michigan Police v Sitz 496 US 444, 455 (1990).

Warrant for action

There is much significance attached to the matter of warrant for search. There was discussion on this earlier. The suggestion is that a warrant ensures probable cause than search without warrant. Search of an automobile on the public highway was without a warrant in two cases[38] leaving the decision to be based on probable cause. The facts proved probable cause. There was however a dissent on this in an earlier court. There is no specific mention of automobile in the Fourth Amendment. In point of fact it is practically difficult to obtain a warrant for search of vehicle on the highway. Occasion for such search comes suddenly and action is required instantly. At the same time it is inexpedient to have a search of this nature interrupted by other process. In *McArthur*[39] it was held that 'reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary.' In *Arizona v. Gant* (07-542 of 2009), the Supreme Court ruled that a law enforcement officer needs a warrant before searching a motor vehicle after an arrest of an occupant of that vehicle, unless there is a threat to the officer's safety or for preserving evidence. In this latter case the need for warrant can be dispensed with on simple reasonable grounds. Search of houses and other places present a different situation when warrant is feasible, except in hot pursuit. It is apparent that practicality rules procedure, that constitutionality bends to reality.

Diverse decisions

Divergence of the lines on which determination of probable cause are made is evident from the many diverse decisions. The result is disconcerting for the executive agent left with tentative

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[38] Glanville Williams in 'Textbook on Criminal Law' 2nd ed. 1983 .488, Steven and Sons London.

[39] Carroll v United States, 267 US 132; Brinegar v. U.S. 338 U.S. 160,165.

guidelines for action. There are several cases in which the finding in respect of probable cause followed a tortuous path. Findings by the Magistrate, the District Judge, the Court of Appeal and finally by the Supreme Court of the US, have experienced considerable variation in determination of probable cause, in each case. These findings can hardly offer a sure guideline for action by the government executive. Examples are many: *Brinegar* 338US 160 (1949); *Terry* 392 US 1 (1968); *Ornelas*, 517 U.S. 690 (1995); *Knights* 534 US 112 (2001); *Arzivu* 534 US 266 (2002); *Pringle* 540 US 366 (2003); *Lidster* 540 US 419n (2004); *Falso* 6-2721-cr (2008). These are some of the instances in which probable cause was differently determined.

Law enforcement by police and other government executive agents are in this process of varied determination, confronted by a practical problem from absence of clear direction for action. There is no firm idea of how much indecision has consequently affected the law enforcement task. There is however an apprehension that growing problems in related vital areas for crime control and law and order maintenance can be attributed to strains in effective action. There is no evidence to support this notion, but such is a fair inference from similar situations outside the US. The problem is that judicial determinations are reflective of the matter before court, but serve little to prescribe for guidance. Each decision nearly stands on its own. The decision is then hardly precedent for the next decision, the multiplicity of factors and their varied facets constituting a different context for decision. There is no single identifiable principle to anchor down the determination to a definite point of direction.

Statutory and Constitutional Interpretation

Recourse must in the ultimate be to the constitutional probable cause. The constitutional base of probable cause does not offer a clear focus. The Fourth Amendment does give probable cause constitutional status. Such draft had its pertinence at a point in history in the throes of colonial America. Long since then,

such constitutional status for probable cause lost that pertinence and that significance. Probable cause continued surely to apply in rapidly changing social and political contexts. Problems of drugs and security had to now contend with the constitutional clause for probable cause. Review of historical facts to determine probable cause took different trajectories, along the line, as they were weighed against the constitutional provision. The different assessment of the historical facts leading to the arrest or search came to be differently interpreted in a single case. This happened all along with the lower courts and therefore came up to the Supreme Court for final resolution. The problem of the review base yet continues. There is however a change noticed, that the Supreme Court has perhaps adapted the constitutional basis of probable cause for pragmatic exigencies. The *Terry* stop is one clear example of imaginative interpretation of a constitutionally instituted provision, implying an adjustment through an immutable principle. Practicality weighs in heavily with the law. Problems of definition or clarifying description of probable cause to make for a firm constitutional base for due action has continued to plague judicial determinations for long. The variations in decision reflect this. Interpretation of reasonable suspicion in the US did not have to be constitutionally determined, as such, when reasonable suspicion figured considerably in determination of probable cause.

Even though reasonable suspicion was the applicable principle in the UK as base for judicial review of police action, cases for review even on this basis were very few. In the UK, writers[40] noted the paucity of cases adjudicating reasonable suspicion. These authors explained that the lack of reported cases is more due to the fact that the law is vague as to reasonable suspicion and is thus unenforceable. There was no statutory prescription for reasonable suspicion in the UK. There was the common law understanding of reasonable suspicion. On this basis the cases of *Hussein v Chong Fook Kam, Holgate-Mohammed, Castorina* in the UK, noted above,

[40] Illinois v McArthur 531 US 326, 330.

the issue of reasonable suspicion for the arrest was held in favour of the police. The applicable principle was that 'Suspicion can take into account matters that could not be put in evidence at all'.

Reasonable suspicion and apprehension of breach of peace had long since been a matter of common law determination in the UK. The European Convention on Human Rights Article II which provided a statutory basis for individual rights was adopted by the UK in 1998. Since then it was held in the UK that there was a 'constitutional shift' of basis of rights for review of police action by courts. One consequence was that in the *LaPorte*[41] case 'imminence' at which breach of peace can be apprehended was very strictly interpreted to mean beach of peace occurring in the immediate preasure. This was a change from the long prevailing common law principle that reasonable apprehension can be entertained well before immediate. Notwithstanding this determination of that which is imminent the *Austin* and *Saxby* case[42] held that there was imminent breach of peace though there were no acts of violence; that the apprehension of the police well ahead was reasonable. These cases illustrate the possibilities of judicial determination of reasonableness varying with constitutional or statutory basis than with the common law understanding of reasonableness.

Flexibility and sensitiveness to ground reality is lost in the process of seeking to push the constitutional or statutory basis of the prescription for rights. There is ample example of strained judicial determinations in this line in the experience in Sri Lanka, discussed elsewhere (end note). Police decision stands at the core of the experiences encountered in the cases discussed above. Police decision in these situations is in effect police action, in concept and in context. Such is at the centre of the deliberations. Constitutional, statutory and common law principles seek to translate the validity

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[41] Sanders Andrew and Richard Young, in Criminal Justice, 1924 p. 26 Butterworths London.

[42] LaPorte v Chief Constable of Gloucestershire [2006] UK House of Lords 55, November 2006.

of the action in terms of their respective principles. The result of such application, in fact, varies considerably. On the one hand the judicial recount of the historical record which led to the arrest has been subject to differential analysis by court both the lower and the higher courts, consequently to differential validation of the action. On the other hand decisions adopt an accommodating attitude in recognition of the action. The Court in the *Ornelas* case supra, also emphasized that the standard courts should employ is an objective one. "Would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" Lesser evidence would mean that the Court would tolerate invasions on the privacy of citizens supported by mere hunches - a result the Court would not tolerate. Factual evidence intrudes into the reasoning.

"The Fourth Amendment's touchstone is reasonableness [apart from probable cause]," was the statement in the *Knights* case, supra. Again, the "substance of all the definitions of probable cause is a reasonable ground for belief of guilt", *Brinegar*, supra, 175. Want of adaptability of decision to the reality of the ground circumstance which then takes a rigid line instead, leads to contention.

Problems attending constitutional interpretation of probable cause are exemplified in the Brinegar case supra. In this case the historical facts were under constitutional provisions determined variously through the lower courts. Further issue was the relevance of the facts in the *Carroll*[43] case to that in the *Brinegar* case. The specific issue was that of variations in the historical record of facts leading to the search, that there were variations differentiating the two cases; that therefore the decision in one did not apply to the other. In one view the variations were such that the two cases were not similar. The ultimate decision was that the variations were insubstantial to distinguish the *Carroll* case. Both views had

[43] Austin and Saxby v Commissioner of the Metropolis [2005] EWHC 480.

the focus of the constitutional basis of probable cause in mind. Both cases took account of the historical record of the facts as a constitutional requirement. Results were always not the same.

This historical recount of the facts is mere enumeration of their sequence. The facts are not viewed as a train of events, one in which each step is bound to the next step by other influences of a less tangible nature. Thus personal knowledge of the officer, knowledge of general reputation which induced further action, act of judgment formed in the light of the particular situation, recognition of the driver of the vehicle, and such other aspects interspersed which give meaning to the historical facts. These facets of the incident are not objective in the sense known to judicial decision. They are essentially subjective impulsions which drive the action of the officer. Even more so are the responses and reactions between the offender and the officer of a subjective nature. To be even more accurate these exchanges take the form of inter-subjectivity which gives meaning to the action. The *Pringle* case, supra, cited in the *Bringar case* is a telling illustration of inter-subjectivity between the officer and the three occupants of the vehicle. Dominion and control by all the occupants over the contraband found in the automobile is based on the inter-subjective interaction enacted out at the search, though such issue does not figure in the judicial determination and opinion. Mention of these aspects is at best incidental or ad hoc in the judgments. In fact some of these comments cited above are extrapolated from the judgments in these cases as they occur, but are not systematically advanced in the arguments.

An attempt is made to collate these specific features of police action as they find mention in judicial decision and legal writings to present them in a systematic manner. The idea of police decision encompasses all these aspects in one concept. In all these situations when probable cause was in issue in respect of police action, the underlying fact is that police decision is a substantive component of the issues for determination. As much as it is an important consideration in the determining calculus, its specific features assume its profile and integrity of concept. Police decision

and action is heavily conditioned by context and situation which sets the frame for action. There is an expertise involved, which is distinctive and unique to police action. As such, police action is not simply executive or administrative action which figures in determination of probable cause and reasonable suspicion. Process for arrest, search, seizure and in public order situations invokes the distinctive nature of the police intervention that is brought into the action. This concept was advanced by the writer in a recent publication, vide end note. This idea may have some relevance to the probable cause-reasonable suspicion debate which engages the US Courts.

In this background and context the idea that admissions made after chase of the automobile is that point at which probable cause arose, and not before, betrays an artificial disjoining of the sequence. Such narration of the historical record of events in the first step to determine probable cause reflects faulty historical interpretation. That standpoint strips the course of events of their due meaning. Inevitable is then the result that objectivity is insufficiently construed.

Contest

A considerable variation of judicial determination of probable cause and reasonable suspicion based on a number of variables is therefore the experience. Some degree of resolution of the divergent tendencies is reached through a flexible and realistic approach, the above recount shows. Beneath these is a line up of opposing forces, tendencies posited in opposition, issues in contention. Dissenting opinion brings up these latent into clearer relief and is helpful to appreciate the underlying development.

Justice Douglas in the *Terry* case, supra, strongly disagreed with permitting a stop and search, absent probable cause. He said: "We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again."

(392 U.S. 1, at 37). "To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment." (392 U.S. 1, at 38).

The issues are posed in diametric contention, in this view. There is the concern that the police have greater authority to make a seizure than a judge can authorize such. Much of judicial review in cases of rights reflects this positional attitude, to seek statutory means by which the determination could be strictly enforced. The divergent decisions noted above flow largely from such position. There is plainly no idea, in such expression, of dissent and conflict of authority that the law is to one purpose; that rights are secured by both the judiciary and by executive action of the police. Discount of police executive action is here in a negative stance. Failure to understand its positive contribution is the result. Such disposition of the respective authorities in contention, one vying with the other, does not augur well for judicial determination. It is inevitable that this ill-balance has to be remedied. The remedy takes the form of the flexible and realistic only in some judgments, seen above.

The second point relates to the warrant to authorize seizure to be issued by the magistrate. In this view the need for seizure on the street, when recourse to warrant procedure is inexpedient, does not enter the calculus of the determination. In point of fact, both warrant and warrant-less search are both cogent, each in its particular context. There is little to contest between the two, to weigh authority with loss of authority. The larger point made in respect of separation of powers and the criminal justice system, that the agencies are not integrated and their process is not to a common objective, sounds an echo here too. These larger issues need not detain the discussion here. Lack of one clear objective which governs the legal regime is apparent.

The third point arising from this dissenting opinion, that any changes to the constitutional provision for search should be by due legislation, misses out another point. Legislation to cover search and

seizure can only be in general terms. Statutory and constitutional formulation cannot comprehend all the exigencies which attend search and arrest, matters of objective historical facts and other less objective considerations which lead to search or arrest. The desultory nature of so many court decisions on this account, noted above, which had to come before the Supreme Court for ultimate resolution, bears testimony to the effectiveness of constitutional or legislative prescription. There is much for judicial interpretation to contribute before legislation.

Justice Jackson's dissent in the *Brinegar* case, supra, is of a different order to the general run of decision. That opinion yet helps to bring the matter within focus. Justice Jackson expresses serious disquiet about the problems at hand and the need for constitutional safeguard against remiss. The problem is expressed in his words at p. 180 -188 of this case. They are: 'Deprivation of rights…crushing the spirit of the individual and putting terror in every heart; 'Uncontrolled search and seizure…[an] arsenal of arbitrary government; "homes…subject at any hour to unheralded search …by police'; 'officers are themselves the chief invaders, there is no enforcement outside of court'; 'search of an automobile but find nothing incriminating…the innocent too often finds no practical redress'; 'any privilege of search…, the officers interpret and apply themselves and will push to the limit'; 'an illegal search …is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment…of officers whose own interests and records are often at stake in the search'; 'The citizens choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence'.

Extraordinary, whether in the West or the East, is this prologue, so offered. There is no evidence adduced in support of these assertions, but that has a bearing on the decision in this case of *Brinegar*. These comments are obiter, since they were not in issue. Yet they are useful to the debate of probable cause and reasonable suspicion, how they figure in police action. Searches

are uncontrolled this opinion offers. Control by courts of search is the desired remedy. The fact that not all searches can be controlled by recourse to a court warrant, that only in some instances can warrants be obtained, as s matter of reality does not stay this opinion. Unheralded search at any hour is another problem envisaged. Heralded searches can cover up evidence and is not expedient. The innocent on whom no incriminating evidence was found in search of an automobile on the highway has no practical redress, this view asserts. That so many of these searches are conducted with consent and so with no complaint is not considered here. Further, the fact, there is such compliance, day to day, speaks to a positive means of upholding the law before court sanction. Search is not a privilege held by the officer, as expressed, but a matter of duty which the law requires. The manner of search by surprise and with haste is often pragmatic, where court supervision could have desultory consequences. At search it is not only the officers' interests that are at stake, as the opinion asserts, but the interests of the community.

There is much else in the language of this prologue which skews the determination out of the desired direction. References to 'a few bottles' 'stop every vehicle' 'shift from permissive to mandatory', with not the consideration of reasonableness in the shift, 'duress under colour of official authority' with no mention of the content of that authority, are examples of an injudicious judicial slant to the line of determination. These comments, though regretted, are offered to illustrate another point. Matters which enter into litigation on grounds of probable cause or reasonable suspicion are, in this mode of determination, posited in dialectic opposition with little turn for resolution of the contentions.

Summary

In summary then, the discussion on probable cause has to contend with the fact that probable cause though constitutionally posited carries no commensurate legal definition. Instead reference to probable cause is descriptive and rhetorical. Within

the descriptive representation of probable cause there is a heavy component of reasonable suspicion, although the two terms probable cause and reasonable suspicion are held to be different and distinctive. Reasonable suspicion itself defies precise definition but is taken in its commonsense meaning. The term reasonable suspicion is vague, that there are few cases decided as violating that standard. Consequently, the bare fact confronts the analysis, that probable cause and reasonable suspicion, as commonly used legal terms, have no precise legal definition to base determination. In fact probable cause and reasonable suspicion attract diverse interpretations. The two step process raises questions. Historical record of facts leading up to the stop is an abstract of the progress of incident, the intangible connection of one event to the other is lost in the process. Objective reasonable basis of suspicion has a substantial subjective component. In other words the determining concepts are not clear cut. In fact a host of variable factors have to be taken into the reckoning, such as totality of the circumstances, ground context, escalating disorder, balance of interests are invoked into the decision. Diverse decisions are yet not avoided. Statutory and Constitutional interpretation of the clauses makes for some rigidity in the application. Beneath these an idea of contest plays out through much of the determination. A host of besetting circumstances flit around as the core of probable cause is explored. The discussion may then be directed at another level of analysis.

Self – evidence

The manner in which the problem is presented through all the judicial opinion relating to the subject of probable cause merits some further analysis. The use of words, the language and the manner of argumentation in the legal opinions presents the scope for further inquiry, to understand the trends of legal discourse adopted therein. A deeper analysis on these lines will serve to assess the weight of their thrust, even to evaluate their effect.

Probable cause does not present a tranquil locus in law or concept which the law seeks. There is instead much activity beneath these legal concepts. In fact probable cause, as it is given, poses many other questions. A surprising array of questions arises, at every turn, as to probable cause. The preceding discussion points to the scope of the problem. It is imperative then that the concept must be defined, that limits be set for the cogency of probable cause as a living concept. The volume of judicial opinion in the cases referred to above does not pose the question of definition of probable cause explicitly. Difficulties in defining the idea are expressed. Descriptions are offered where definition is not easy. Comparison with reasonable suspicion has also been made, yet with no clear result. In fact probable cause and reasonable suspicion defy description, nor are their defining features plainly described. This does not make for good law. On the other side there is no attempt in judicial determination to set limits on these two concepts. Probable cause is posited constitutionally, by reason of which there is no idea that limits need to be set. The constitution does not have to be limited. Reasonable suspicion is less strung by statutory prescription. Reasonable suspicion operates in the law without definition and limit.

There is then no law, as such, which governs the operation of probable cause and reasonable suspicion. Instead there is a multiplicity of judicial construction as the many diverging decisions show. Facts can be pressed into demonstrating probable cause or the absence of it. Thus 'subscribing' to a target web site was determined both ways in the case of *Falso*, supra, that this ground was probable or not probable. Here too, the fact of 'subscriber' is only probable or not probable in the context. Decision either way is possible, since probability is the requirement rather than probable. The difference is recognized, that 'we deal with probabilities… as practical considerations…on which reasonable men…act'- *Brinegar* 175 op cit. That leaves the matter open, less defined, described only somewhat. There is then no precision of law which governs, much less a constitutional prescription which can serve as the determinant.

What articulation is then possible? This is a further question which arises in the discourse. Reasonable, prudent, factual and practical consideration and other such terms are deployed to serve for articulation of the concept of probable cause. These too do not offer fixed positions to guide the determination. There is still much that is adrift as to the point of view taken, whether the assessment is objective, or whether there is a subjective perspective of the officer which intrudes into the determination. Articulation can be difficult when such is sought by persons differently positioned, differently trained and experienced. Personal knowledge and individual experience, perceptions of facts 'through the lens of his police experience and expertise' –*Ornelas* supra, 699, process [which] allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available' –*Arvizu* supra, 266 are judicial expressions made now and again which point to the problem of specific articulation of probable cause. In short, legal articulation is variable and difficult.

There is then, as yet, no unifying theme to contain these problematic aspects. Consequently, there is the emergence of sub-groups when probable cause is to be applied differentially. Cases of search on the public highway for probable cause are differentiated from search and seizure in houses, private and public. International boundaries and state borders present a base for different application of rules for search. These vary as the ground context changes. Escalating disorder throws up further sub-group application of probable cause, when drugs and narcotics, national security (not including terrorism) albeit that this is legislatively provided for, gun crime situations are examples which drive probable cause in different ways. Through this entire variable endeavour there is yet no specific phenomenon the legal discourse of probable cause reveals. The wide discursive essay in the opinions reflects this feature. What unities of probable cause can form is another question which may also suggest itself.

That which is evident, plain and obvious in probable cause begs evidence in support, in its constitutional pitch of the concept. Self-evidence of probable cause, for constitutional or other legal purposes, is peeled off layer by layer till the essential principle of legal identity is revealed. The inductive probe can be deep and wide. Beyond the deductive statement of probable cause is importantly the intention and conscious activity beneath the concept. These need to be discovered. At the base is the specificity of the promulgation of probable cause, what precise articulation was there, of what it then said. Conditions and limits of the idea of probable cause will surround its meaning and legal content. Principally then probable cause in its legal formulation is an historical irruption, as it were, in that context. The concept did not emerge from other context, from nowhere else, to gain its intended meaning. Analysis of judicial determination of probable cause in the many cases, in this line, is useful.

Search is also wide. Probable cause as a concept does not have a rigorous structure, but does yet have a function. The function of probable cause was specific in the wake of colonial America. This reflexive aspect of probable cause in early times came to be less convincing in later times. Reflection back, later, of probable cause was through other recent social developments. Drugs, narcotics and national security impacted on probable cause in a different manner. Judicial determination of probable cause in their variation in succeeding case decisions reflects these changes. Legal structure of probable cause gave shape to the form of probable cause to serve as a legal term, in the evolving context. In a sense, therefore, the adjustment is open ended. Continual re-determination of the relevance of probable cause in the one instance of a single case, or in the many different situations of different cases can barely serve for precedent for the next. Want of unifying law and precedent can be seen in this light.

There is the question then of the adequacy of the concept of probable cause, the term to give real content to its legal abstraction. There is even a conundrum of the object in probable cause

predicated as a subject in the different determinations. Difficulties entail. There are different surfaces from which the idea of probable cause emerges. The initial post-colonial stage and thrust is clear. Other surface bases tell on the concept in different ways. Searches of automobiles on the public highway had naturally to cast the idea of probable cause on a different plane from search of house or premises. In either context there was the question of warrant from judicial authority and consequently much decision as to search with warrant and 'warrant-less search'. Much decision has sprung from that plane of warranted search for considered probable cause. The contention between judicial authority and police decision for search, referred to above, pointed in sharp relief to another angle and surface base to project probable cause. 'Border crime', the deadly threat from narcotics and drugs, gun crime, and national security add to the mix of perspectives for determination of probable cause. Investigatory stops and probative seizures was another matter of contention from a particular perspective and focus. These need resolution. Even more problematic to the determination of probable cause was the myriad factual base which came up in litigation to determine probable cause for action. The 'totality of circumstances' to be taken into account were myriad, that each sphere cannot easily be meshed with another. The example of difficult reconciliation of the facts of the *Carroll* case with that in *Brinegar* case, discussed above, is a case in point. Guilt and admissible evidence to establish probable cause add to the volatile circumstances relevant to the determination. All these different experiences reflect the different base surfaces and the different planes for pronouncement on probable cause.

Inevitably, the authority for determination, as much as the plane of projection, of these several dimensions had a bearing on the manner of approach to judicial decision. Decision in situ and review in retrospect inform different authorities, differentially. This is so in the main. There is no doubt recognition of the one in the other, even deference, at times. There is however no firm clear basis nor guideline for enforcement action all the way. In fact specifications for enforcement action with probable cause are

variable. Indeed complexities which afflict clear prescription for action with probable cause, perceived so, are the order. "However, if those [some cited above] standards were to be made applicable in determining probable cause for an arrest or for search and seizure, more especially in cases involving moving vehicles used in the commission of crime, few indeed would be the situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end"[44]. There is an intrinsic nature in the enforcement action which tells on the authority for determination of validity of action. This determination "necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances"[45]. Elsewhere the same means for decision was differently expressed: "This process [for decision] allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available"[46]. Therefore the different planes in determination, authority for decision, specifications for action with probable cause enter into the calculus of judicial determination in these cases. In short, the objective concept of probable cause does not establish itself for due legal purpose. Precise location of probable cause still eludes the search.

The analysis of probable cause through judicial interpretation has thus far not either yielded a coherent whole of the different aspects pertaining to the legal concept of probable cause. There is the need to restore the deductive architecture of the legal concept of probable cause for enforcement action. Some decisions contain rules of formal construction of the legal premise of probable action to control action. Many others are as rhetorical practices in the use of language. In trying to steer the way through the mass of incidence there is resort to phrases of an indefinite negative aspect

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[44] Carroll v united States 267 US 132, 39 A.L.R. 790.
[45] Brinegar v US op cit 174.
[46] Ibid 176.

to their meaning. Such negative phrase does not project the positive feature of probable cause. Instances of lax phrase deployed in the explication, do little to clarify. Examples of such usage are: 'bare suspicion' *Brinegar* p 175; 'mere suspicion and probable cause' *Brinegar* p 176,177; 'officer's whim or caprice' *Brinegar* 176; 'simple good faith… subjective good faith' Beck 89; 'uncontrolled search and seizure' Brinegar 180; 'unheralded search' ibid 181; 'officers are themselves the chief invaders' ibid 181; 'privilege of search' ibid 182; 'coercion and duress under colour of official authority' ibid 188. Their deprecatory stance is explicit.

These phrases cited above carry a negative projection against which is intended to project the integrity of probable cause in positive relief. Reasonable suspicion as an equally valid factor in the determination figures in the equation often. But opinion has it that probable cause and reasonable suspicions are different. They bear a different standard. The basis of the different standard applicable is not clear. As a result the positive is not silhouetted adequately against the cast of the negative features for comparison. At the other end of the spectrum of nuances are the improbable, unlikely, impossibility, unreasonableness, caprice, mala fide intention and arbitrary conduct. The burden of the Fourth Amendment is clearly to guard against outrageous conduct and intrusion into privacy. That much is clear to law enforcement. Less understood is the adjectivized slippage of ground for cause. Less clear are conceptions as 'probable' cause, 'reasonable' suspicion, 'totality' of circumstance deployed in a negative mode. These do not contribute to the analysis.

Probable cause is presented as a tranquil settled concept for legal analysis. Beneath that veneer of the abstract idea of probable cause is then intense activity in search of probable cause. The discussion reflects the manner of application of the given idea to the reality. The search is therefore mainly discursive than analytic. Probable cause is then much more than its reified legal concept. Probable cause is more accurately an inquiry.

Positive projection of police law enforcement action is a prospect for resolution of the contending issues. But this remains a daunting endeavour. Judicial review falters often over their relevance in determination. Legal concepts need to help clarify. Law concepts must be firmly entrenched on ground realities. More importantly, judicial decision needs to make for coherent determination of the lines of enforcement action, through identification of the intrinsic and inherent principle which predicates due police law enforcement action. There is one principle here, which applies in all situations, even to balance interests, to cover special needs and to meet the exigencies of a growing law and order situation. That unifying principle needs clear formulation.

Judicial determination so proceeding will pave the way for the purposes of the Law and the Constitution.

Jury Service For Police

The principle of a specific role of the police, a distinctive nature in the exercise of police action and a more ample scope of the policing function with police decision, are issues which keep emerging through relating legal discourse on jury service. The principle features of police action as much, in shadow outline though, within the subject of jury service for police. The features were outlined above under the subject of probable cause. This section on jury service follows. The next section is an inquiry into the expert nature of police action and testimony as of an expert. The previous study examined the role of police action and its nature reflected in judicial determination of 'probable cause' in the context of the US jurisdiction. The current inquiry pertains to the UK jurisdiction.

The nature of police action reflected through the focus of jury service is another sphere from which police action could be studied. Recent developments in the field of jury service in the UK reflect on the role of police for law and order and for the criminal process in particular. Police were hitherto exempted from jury service. Recently this exemption has been removed in the UK. The applicable principles which barred police from jury service for long and the recent removal of that barrier offer a background for consideration of the function of police, in its essential task. The suggestion here is that the specific nature of police action has not been appreciated when barring police from jury service.

Instead the consideration of police has only been of policing as a general function. Therefore the intrinsic nature of police action, its distinctiveness and thus its relation to the other functions and agencies for criminal justice, are occluded within the larger focus of administration of criminal justice.

Criminal justice, criminal process and the criminal law set an adversarial stage for their process. In that light of reflection the agencies which participate in the process for criminal justice have their roles and functions clearly set out in predetermined order. The process is essentially one of contest, in an adversarial mode. The roles of the participating agencies including the police are set in their separate spheres, each distinct and kept apart from the others. The role of these agencies, including the police, is identified discretely, one not relating to the other except in contest. In this mode of thinking, the larger objective of truth and justice is determined through the adversarial means and contest played out in the arena. The larger purpose is not charged to the duty of the agencies, including the police. Police and lawyers performing their respective roles in the adversarial process, have their function limited to that sectional conception. Their functions are determined, ordained and destined. These agencies are simply heir to that adversarial tradition. Therefore any change of direction is visited by long established concept and perception which tell on judicial determinations in many ways.

The lines on which judicial determination proceed in contending with the different persuasion is reflected through the judicial opinion in the House of Lords case [2007] UKHL 37, (HOL) on three appeals made on this point: bias from presence of police and lawyers on the jury panel which led to conviction through unfair trial, by that very reason. The very valuable contribution to judicial opinion in this case, their clear elucidation of the relevant principles, is the basis for the following comments. The writer is indebted to the opinion of the HOL which gives the background. Citations from this case will carry the paragraph and line number of reference in brackets. The focus of this section of the article too

is police action, police decision of a specific nature inherent in such action and the manner of its exercise, as with the previous studies.

The broad concern of criminal trial by jury is the integrity of the trial process, which depends on the reputation for independence and impartiality for public confidence in the system. Impartiality and independence is to be secured from contravening influences from lawyers and police on the final decision. Impartiality is constrained by the presence of police on the jury as they are professionally concerned with the administration of the law. Trial by layman in the jury will not be affected as laymen are not professionally engaged in the administration of the law.

The pertinence of these considerations springs from the adversarial nature of the process which governs the system. Those involved in an adversarial dealing within the process forfeit claims to impartiality at decision. This is the abiding principle underlying the process. The arrangement is adversarial up to the point of decision, by inference a measure of partiality figures in the process. Lawyers and police are professionally committed to one side in this adversarial contest. Problems of perceived partiality will arise from lawyers and police sitting as members of trial juries. Such is the configuration of this adversarial system.

The adversarial process has even a doctrinal status in this projection. Participation in the jury of those involved in the adversarial process is in violation of the doctrinal principle. Exemptions of lawyers and police officers from jury service are made on this basis. The case for doing so is self-evident (9-110, 4), report cited with approval. The notion of adversarial process bears further reflection. In its plain meaning the examination of two sides to a matter, one against the other, is the commonsense expression of the adversarial mode of determination. Projected on a legal basis on the other hand, adversarial process assumes a different status. The projection is now on a higher plane or surface of understanding, its activity pitched more intensely, and its consequences considerably more far reaching. The notion of adversarial trial is so structured to take in meanings and nuances

beyond the commonsense understanding of adversarial exchange. Impartiality does not accord with adversarial function, while partiality is easily ascribed to those engaged in professional activity in the adversarial proceedings. Plainly there is a divide in the structured order of adversarial trial.

There however is judicial expression which falls on either side of the divide between the plain and common meaning and the imputed structural order in the concept of adversarial proceedings. The concept of adversarial trial is yet firmly rooted in the law and criminal process in the UK. Within the settled concept of adversarial trial however, judicial expression through the opinions, in this case, reflect a subtle difference of meaning and nuance, even a flexibility of use against the rigid idea of adversarial trial. Illustration of the difference is expedient.

General ineligibility

The rigid and structured nature of the adversarial trial is endorsed in the following words: "…and it recognized problems of partiality, and perceived partiality if those professionally committed to the prosecution side of the adversarial trial process were to sit as members of trial juries" (9-6). Citing with approval (9.103-10) the words of the Morris Committee said: "If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded…" The reason for their exclusion is 'because occupation or position, has knowledge or experience of a legal or quasi-legal nature which is likely to enable him to exercise undue influence over his fellow jurors' (9.104-9). Paragraph (9.110 -1) is endorsed the words of the Morris Committee: "We have suggested that the description of the police who should be ineligible [for jury service] should be drawn more widely than under the present law relating to exemptions. The case for doing

so is self-evident". This prohibition should also extend to civilian staff in as much as "they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of the jury" (9.110-15). Yet again the same Committee said that no wholly satisfactory line can be drawn between those in whose interests of preserving the jury as an impartial lay element, and "those whose connection as a profession or occupation with the administration of law and order is sufficiently tenuous to justify their not being excluded" (9.111-5). The basis for exclusion of police for jury service is all but firm in these expressions.

The contention is that objective standard is not met where one of the jurors 'is employed full-time by a body dedicated to promoting success of one side in the adversarial process' (14 ibid). General ineligibility to serve in the jury of a body such as the police devoted to one side of the adversarial process engages public attention. 'Public perception of the possibility of unconscious bias is the key' (*Meerabux* 15). Public perception entails an objective test in apparent bias (16), distinguished from 'actual bias' based on a subjective test. Appearances are not without importance (16 *Hauschildt*). Application of the ineligible principle is here on a general basis. This case of *Hauschildt* is balanced on the other side of particular ineligibility, infra.

The matter in issue is in these terms not a particular case, but in general, "that these cases do not involve the ordinary prejudices and predilections to which we are all prone but the possibility of bias (possibly unconscious) which, ….inevitably flows from the presence on a jury of persons professionally committed to one side only of an adversarial trial process" (20). Ineligibility of police to serve as juror is structured; the possibility of bias is inbuilt within the organization, in this view.

Particular ineligibility

On the other side of the divide of opinion is the observation of Lord Justice Auld, cited at (10.30) of some anxiety that police 'would not approach a case with the same openness of mind as someone unconnected with the legal system', but would depend in each case, 'that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members……' Ineligibility for jury service is then on specific grounds in respect of a single member, than for a whole class of persons in this view.

The *Hauschildt* case, referred to above, considered that a perception of bias must be objectively justified, meaning that there must be 'some demonstrable and rational basis for what he suspects' (16). The question remains whether this refers to a particular suspicion to be demonstrated and reasoned, or whether the basis is general and ex facie. The question may be framed different, whether ineligibility from impartiality of jurors is a particular matter 'manifestly and undoubtedly' to be demonstrated, or whether generally taken thus. Underlying these considerations is a further dimension, whether the problem of impartiality and bias is patent or latent.

The *Pullar* case[47], is referred to by the HOL (17). This case was a borderline decision observed the HOL. Two references are pertinent to the determination of impartiality and ineligibility, whether general or particular in conception. One is that 'a mere suspicion of bias was insufficient to justify quashing a verdict, and it was necessary to prove a miscarriage of justice had actually occurred-observation by the Appeal Court recorded by the Strasbourg Court (17). The European Court pointed out that 'knowledge of a person [a juror] did not necessarily lead to prejudice….familiarity in question [needs to be] of such a nature and degree as to indicate a lack of impartiality on the part of the

[47] Pullar v United Kingdom case , (1996) 22 EHRR 391

tribunal' (ibid). These statements point to a particular application of the principle of impartiality and ineligibility than such on a general basis.

Bias

Bias is the concern in this debate, whether generally or only specifically. The basic idea of bias is in the proposition that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done', citation at (14). Appearance of bias is the critical concern. This principle of common law is followed in the statutory law (ibid) so that there is no difference in content. Other nuances of bias figure in the explanation, that objective judgment can is vitiated by 'actual partiality or prejudice' (ibid); that actual bias in rarely alleged and is difficult to prove (ibid).

The statement emphasises the second part of Lord Hewart's enunciation that 'justice should manifestly and undoubtedly be seen to be done'. The contention is that this standard is not met where one of the jurors 'is employed full-time by a body dedicated to promoting success of one side in the adversarial process' (14 ibid). The matter is then one of apparent bias.

The test of apparent bias has been one developing over time. Apparent bias can be admitted even unconsciously, 'allowed (it) unconsciously'. The impression such bias, albeit unconsciously allowed, could give to other people, matters. Then apparent bias means 'real likelihood of bias' (15). The test of bias extends further. Real possibility (15 *Porter*) is within the test of real likelihood. 'Public perception of the possibility of unconscious bias is the key' (*Meerabux* 15). Public perception entails an objective test in apparent bias (16), distinguished from 'actual bias' based on a subjective test. Appearances are not without importance (16 *Hauschildt*). These phrases are excerpts descriptive of apparent bias.

A strong point of contention against the principle in general is that police cannot be held to be generally impartial at jury service, if they are partial in their regular duties, their day to day pretrial investigations (41) per Lord Rodger. Police contribution to the adversarial process is not ipso facto partial and weighed down with prejudice. Police evidence is relied on during trial. There is then a glaring contradiction of issues which informed considerations over the whole criminal process, for long, an inconsistency arising from viewing the matter from two different angles. Furthermore, the line of argument that involvement with the criminal process in whatever capacity would disqualify criminal lawyers and police from serving on the jury comes up against another snag, that civil lawyers and their standing in this context is not considered. It is possible then to speculate that the Parliament's reform legislation to remove the bar on police and lawyers serving on the panel of jurors took into cognizance the inconsistency and contradiction of factors in these determinations. There is no countervailing opinion on this very point from the others Lords in their judgment in the HOL case.

Adversarial trial process

There are in the above analysis a series of questions over the system which lack sufficient resolution. General ineligibility or particular ineligibility of police and lawyers to serve as jurors is one line of contention. Bias, its particular nature is in need of clarification. Impartiality as the objective in these endeavours sits uneasy on these infirm foundations. All these relevant factors are issues which take their meaning within an overarching concept of an adversarial trial process. The concept of adversarial process as the founding base for these further issues is itself unquestioned. The inherent nature in the adversarial process, its purpose, its direction are not examined before determination of the pertinence and relevance of these other issues which considerably engage the several opinions of their Lordships in the HOL case under study. Neither is there an issue of the precise nature in the adversarial

trial process through the many other decisions of court cited in this case. References to aspects of adversarial process find only incidental mention. These can yet be utilized to address the more fundamental issue of the adversarial trial process.

Concerns for administration of justice are set firmly in the context of adversarial trial process. This adversarial trial process is the governing consideration from which many issues flow. Issues as impartiality, independence of mind, bias and eligibility are set in the frame of the adversarial process. References to the adversarial process even in this context figure differently, either upholding the idea or questioning its content.

The Morris committee is the first referent point. The Morris Committee considered that two occupational groups, those concerned in the administration of the law and police should continue to be ineligible. The Committee "recognized problems of partiality, and perceived partiality if those committed to the prosecution side of the adversarial trial process were to sit as members of trial juries" (9). Juries, to command public confidence, it is essential that they "should manifestly represent an impartial and lay element in the workings of courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded…."- (9.103). The reason for exclusion is not clearly articulated. Instead the assertion of public confidence is rhetoric. Impartiality and bias flows ipso facto from their profession. Occupation and position and experience of a legal nature are 'likely to enable him to exercise undue influence over his fellow jurors' (ibid). The Morris Committee "suggested that the description of the police who should be ineligible should be drawn rather widely…The case for doing so is self-evident" (9.110). The content of self evidence will be discussed presently. The Committee found it convincing the idea offered by Police themselves that civilian employees in the police "become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems

confronting members of a jury" (ibid). Parenthetically, the Committee went on to note that there is no wholly satisfactory line which can be drawn between an impartial lay element and those in a professional capacity to serve in the jury; that the excluding line is tenuous. The adversarial manner in the administration of justice overwhelms these considerations.

Further opinion in similar tone and text follow. A juror who is "employed full-time by a body dedicated to promoting the success of one side in the adversarial trial process" does not meet the standard that 'justice should manifestly and undoubtedly be seen to be done' (14). The two sides to the process are explicit here. Bias and impartiality can even have been allowed unconsciously, to offend the principle (15). The possibility of bias in the public perception, the real possibility, is the key consideration to determine ineligibility (ibid). Such perceptions are reinforced by attributes assigned to the police that "officers belong to a disciplined force, bound to each other by strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition" (24). These positive attributes have a disadvantage in that help to cast the police on the side of the adversarial process. These positive qualities are double-edged in effect as they put the police on the wrong side of the eligibility line; that by the very reason of these qualities lack of impartiality is nearly congenital. Whether the perception is that of the public, the fair-minded and informed observer, of that of court is a question. Either way the matter is essentially a 'construct of the court'-per Lord Mance (81). The adversarial trial process is one largely determined by court. Public perception of the adversarial cast of process depends heavily on court.

In fact the adversarial trial process is a structured concept, itself not called to question. The voir dire to select jurors who are free from relevant prejudices, in the United States, reflects the structured idea of the adversarial process. In the UK, such procedure has not been adopted. But the structured nature of the process persists.

Court opinion yet figures out the problem differently at times. Ideas are more flexible than structured, that the essential meaning of adversarial process is sought than its outward form. This requires more thought, a flexible opinion. "But then, being fair-minded and informed, the observer will think a little more on the matter" (32 – per Lord Rodger). Prejudices inbuilt or other wise are an every day feature not exclusive to police or lawyers deemed ineligible for jury service. Risk from prejudice is manageable within the system of jury trial, not inescapable or unavoidable. Court observes: "The mere fact that there is a real possibility that a juror may be biased does not mean that there is a real possibility that the jury will be incapable of returning an impartial verdict" (33). Verdict can rise above prejudice. Decision need not be constrained by station. The adversarial feature of the trial process, so construed, cannot restrain the positive potential of decision and verdict above prejudice.

Particular circumstance of prejudice, of a precise nature than a general idea, is the critical point at which public perception and informed observation is disturbed. Examples are given (35) which aim pointedly at the risk which the law needs to deal with. In such event justice [would] not be done and would 'manifestly and undoubtedly' not be done, to adopt the words of Lord Hewart (14). Such concerns are not merely that emanating from occupational groups as police and lawyers, but from across the board of jurors. Upholding law and order is the function and duty of police, all along from the very incipient point of trouble. Partiality in the enforcement of law is not an occupational hazard that plagues their endeavour. Was that the position, police would have been disqualified in public perception outright, from investigation and prosecution, not simply from jury service. Bonds of loyalty and *esprit de corps* and the idea of 'brother officer' which weigh on the question of partiality and ineligibility are essentially as seen from one side and only one stage of the adversarial process. These attributes serve to cast the police to one side of the divide, at one point only.

Imbalance

Balance against the other side can be a problem. The notion of adversarial contest in the trial process has its particular purpose, simply an arrangement for presentation of evidence. Taken beyond its plain meaning and purpose adversarial process can assume a doctrinal status which governs all thought. Adversarial trial then induces a mind set for calculation of all within its compass. Balance of perspective is disturbed. Jury trial is considered in the same mould. Police and lawyers, their presence in the jury offends the adversarial principle. But if the concept were enlarged to the criminal justice and criminal trial process than simply its adversarial aspect, the contribution of police and lawyers to the objective of truth and justice, are not necessarily partial and prejudiced. But the idea sets in that the adversarial process unquestionably delivers on the ultimate objective of truth and justice. There are other problems of desultory result from adversarial trial. Particular interests weigh heavy against other interests at adversarial trial. Imbalance is then between process and end.

Within the adversarial process itself, there is, through long experience of adversarial trial, an uneven representation of the contending interests. Defendant weighs more heavily over the victim. Judicial statement is that "even a guilty defendant is entitled to be tried by an impartial tribunal" (27). There is no corresponding expression of judicial words in respect of the victim. The 'Justice for all' was the extra judicial clamour pealed aloud and clear, in the wake of imbalance from adversarial trial. The UK government addressed these concerns and commissioned an inquiry following which was a 'White Paper'[48] representing the government views the aims and objectives. "Our goal is strong, safe communities. That means:

[48] 'Justice for All' CM 5563 July 2002.

- Tough action on anti-social behaviour, hard drugs and violent crime;
- Rebalancing the criminal justice system in favour of the victim; and
- Giving the police and prosecution the tools to bring more criminals to justice"

An imbalance of determination from the adversarial system is evident. Matters were seen invariably from one side of the divide, such adversarial perception deep seated and inbuilt. For want of balanced determination the adversarial process is given free rein. The contest of both sides is not contained from determination above the contest, the only inference from these observations. The ultimate objective of truth and justice in fair trial above the adversarial contest carries the better perspective, whereby the role of the respective parties in the system is regulated. The role of the police and of the lawyers would then be geared to productive endeavour, not merely in contested exchange. The occupational disqualification is then minimal. Perhaps nil, if the fact is that juries constituted with police and lawyers have returned 'not guilty' verdicts when partiality and prejudice can not be perceived. The defendants were found not guilty of two charges at the criminal trial - vide section 42 – in one case[49] which went up in appeal. Significantly, there is no mention of this fact in the HOL case (3). The fact that a questionable composition of jury could return both guilty and not guilty verdicts at the same time cannot establish partiality and prejudice, conscious or other wise. The idea that police and lawyers by reason of their occupation are incapable of fair verdict and are therefore ineligible for jury service, that engages much of judicial opinion in the HOL case, cannot stand much ground. Positive contribution to process and adversarial competition, without more, are principles simply in conflict. Intervention of parliamentary rebalance is inevitable.

[49] Abdroikov & Ors. R v [2005] EWCA Crim1986 (28 July 2005).

Judicial pronouncements around adversarial trial and jury verdict resonate yet, more within the perspective of the criminal trial. Unfair trial is the concern. The composition of the jury is then gravely important. In quantitative terms these judicial considerations touch but the fringe of the problem of crime and order. Only a small proportion of cases are brought before adversarial trial. Of these, estimates of convictions are around two to three per cent[50]. Commentary on these statistics reveals that 'of 100 offences committed only 45 get reported to police, 24 are recorded, 5 are cleared up and 2 result in conviction'[51]. Against this statistical background judicial opinion on adversarial trial has but a limited pertinence. About 95% of cases do not go before court and the adversarial proceedings. Judges would not be influenced by these background data, being concerned only with the matters before court. This background however has a bearing on judicial opinion as it appears. The difference of judicial opinion on jury trial, one strand of a strict and rigid nature, the other more flexible, is a reflection of the ground realities in silhouette. The considerable vagaries in the problem of crime do not afford a firm base for judicial pronouncement of eternal verities. In more specific terms the role of police without partiality and prejudice in the field of crime is of significance, in that control is far more outside courts than within it. A realistic approach to judicial determination is appropriate.

Parliament legislation might have cured the imbalance. Parliament legislation Act 2003 was not constrained by the adversarial process that prevailed for long, to continue to exclude occupational groups from jury service on those grounds. But long settled judicial attitudes however continued to exert itself even after the change of legislation. Certain judicial expressions reflect this. Thus continuing expressions in that mode recur: that 'Parliament appreciated that there were some cases in which they should not

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[50] Digest: Information on the Criminal Justice System in England and Wales, Home Office 1998 p 22.

[51] Zander Prof. in Hamlyn Lectures 2000:51, cited in 'Rethinking Access to Criminal Justice in Canada' 2001 p 21.

serve' (46); 'newly qualified jurors' (48); 'It is inconceivable that the Director of Public Prosecutions could sit as a juror in a case prosecuted by the CPS…' (51); 'the connection between the police and the prosecution too close for comfort [of the adversarial trial?] (53) Many reasons are given in the opinions in this HOL case for the change in legislation. The need for broad basing the jury service is evident. None of the reasons given adverts directly to the matter of the content in adversarial trial process. Exclusion and exemption of police and other occupational groups are plausible, only from a particular mind-set. Those associated with the prosecution were so perceived ineligible for jury service. Their impartial contribution to the total process above the adversarial trial, that investigation had to consider both sides and thus were not posited only in adversarial mode, that in effect they were officers of court primarily, did not gain recognition. There is nothing said of eligibility of non- prosecution defence lawyers for jury service. It is likely that Parliament perceived the task from above the strait-jacket idea of adversarial trial process.

Basically it is the result of such police action that is presented to court, from police action on the field which is investigatory more than adversarial of mode. Evidence tendered to court is not merely with adversarial intent. Investigation is weak if then. Much police action has a bent or frame of action of its own, investigation is not merely collection of evidence only on one side to the complete disregard of contending evidence. Investigation action is composite. But that action is however jacketed into the adversarial mould, for all intents and purposes, in later court proceedings. In the end the fact confronts, that despite Parliamentary clarification on the issue of eligibility for jury service, ensuing judicial decision yet turns largely on different perceptions, of the particular factual context of relationship. The question addressed is whether there was a reasonable possibility that the jury was biased by the inclusion among its number of the relevant police officer or Crown Service lawyer. Decision varies considerably as the opinions in this particular HOL case reflect. The informed observer views the same differently. Such variation is possible when the factual circumstance

is of an equivocal nature. But variance is unlikely where the facts reveal risk of prejudice 'manifestly and undoubtedly'. Examples of such instances are given in some opinions. Mere suspicion or possibility of prejudice is at one end of the spectrum while these illustrations stand in direct contrast. Parliament legislation clarifies the difference.

Adversarial trial is, in this discourse, a concept of an unquestioned and settled nature. Beneath that placid tranquil surface however there is much turbulent activity. Many questions rail around the abstraction of adversarial process. Reference to adversarial process at a trial is initially, but a description, neither defined nor limited in the texts of opinions in this HOL case. The question arises what articulation of the concept of adversarial trial process is feasible. The different projections of the concept in the different opinions in the HOL case speak to some variation in the articulation of its purpose and meaning of adversarial trial. Some of the opinions were considerable conditioned by the long legal notion of adversarial purpose. The doctrinaire representation of the concept did not constrain the other strand of determination which concluded the decision differently. Partiality or lack of independence of thinking was inherent in the one side of concept of adversarial process. On the other hand partiality or prejudice had to be manifestly demonstrated in the other view. There was also the problem of differentiation of particular and individual prejudice as against general ineligibility. Likewise the risk of unfair trail and partiality in the process had their different bases in the contending opinions. The locus of the concept of adversarial trial is then much disturbed through these perspectives to constitute a firm legal base.

The notion of adversarial process does not either have a rigorous conceptual structure to regulate the issue. The concept entails conscious activity beneath than as in a reified fact at surface. Adversarial trial process had even an unconscious activity within its statement over the years. There was thus a historical specificity to the deemed adversarial trial process at some earlier

point of time. Later the meaning of the concept changed such that there is different construction of the adversarial process in the current context. The divergence of opinion in the HOL case can be explained to an extent of this change of meaning and even the purpose in present development. Where there was earlier a rigid application of the concept, originally, a measure of flexibility has set in. What was being said in what was said then as adversarial process, historically, later acquires different meaning. The idea develops. The adversarial structure itself loses its strict form with the changes. Partiality and prejudice of old, considerably loses their potency for reinforcement of the adversarial concept in current development. Thus partiality of police inbuilt within the adversarial trial process is now confronted with the integrity impartiality and dispassionateness of the police effort in their day to day investigation tasks which come before court for adjudication. Partiality and ineligibility of police for jury service is inconsistent with regular accepted police duty at an earlier point of the trial process, investigation. In fact one of the opinions (39) in this case adverts to this matter specifically.

Ineligibility of police and lawyers to serve on the jury on a general basis has been a long established principle. That principle applied on a general basis of ineligibility of classes of persons for jury service by reason of their occupation. Over the years that reason wore thin. Participation of these persons in the trial process, in the manner adversarial trial since proceeding, did not necessarily constitute partisanship and prejudice in their professional role. The concept grew that lawyers' contribution was as 'officers of court'. The function of the lawyer is described in a different light to that which has long prevailed. ''A barrister is acting as an officer of the court, to see justice done, and is not merely acting in his client's interests alone; an advocate must not mislead court and must present the issues and the law relating to them fairly and honestly to the court, albeit by making the strongest case for the client''[52].

[52] Rondel v Worsley [1969] 1 AC 191.

This statement is a far cry from the old voice in the mists of their origins. A principle of general ineligibility is substantially dislodged from the structural flow of judicial thought which has developed considerably. There is no occupational disqualification, nor idea of irremediably partisanship in action, neither an inbuilt prejudice in the exercise. Such departure of principle has long sustained the system, nourished the process to meet higher objectives.

The real content of adversarial process and rules of formulation are not pre-determined. Firstly the concept takes on somewhat different forms with different effect over time. The idea of adversarial process itself emerges from different planes or surfaces. Projection of adversarial trial is at different levels, the court, jury, prosecution, defence, even defendant and the victim. Each see adversarial trial from different planes and perspectives. The common law origin of the concept had its pertinence from early times. Pronouncement of their content was for long from the judicial plane. The perspective is that of an informed observer. But that plane of projection shifted often. The informed observer was himself differently construed, as the opinions in this case reflect, to even think further than he did before.

There was little to voice from the occupational groups as the lawyers and police in the process then. Adversarial trial process as a concept took a strict and rigid form, in time, that all else was measured through that standard. Application of that rule was confronted later with problems of determination in different contexts of risk and prejudice and unfair trial. The unraveling of the content and form of the adversarial trial process proceeded in the wake of the continued changes. The integrity of the single concept and its strict application was growing problematic. The different lines of judicial determination in the several cases reflect the changes. Legislation had to intervene in this uncertainty. Even following the new legislation the concept was unsettled as the divergent opinions in the HOL case reflect. These determinations do not provide a coherent concept of adversarial process as a firm legal concept. Shift of meaning is evident.

Politics of metaphor

Judicial writing is replete with the use of metaphors as 'brother officer' (26) an expression not in polemic advancement of the concept, but rather in politic conveyance of the idea of an otherness, judicious and expedient. The further expression "of the police service, [as] a tribute to its greatest strength, that officers belong to a disciplined force, bound to each other by strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition" (24) adds to advance 'brother officer'. These descriptions help to reinforce police ineligibility to jury service on a general base by reason of that perceived police role in the adversarial process of trial. Want of impartiality of police to serve as juror follows this tone of description. Exclusion of police for jury service is the pointed purpose of such description. There is little space thus to consider police role in the adversarial system on a different basis; that all police action is not partial in general determination through this adversarial system, that convictions are duly entered on impartial police action, they do not figure within this particular equation of considerations. In effect the positive attributes of the police, described above, acquire a taint or stain in the context of jury service. The metaphor in judicial determination and statement of opinion is not mere figure of speech, of descriptive effect. Rather the allegory is constitutive to posit police as a body, undifferentiated, cast firmly on one side of the adversarial divide.

Evaluation

An evaluation in summary of the proceeding lines of thought of jury service is useful. There are two strands of opinion, the first view and the second view, through judicial determination of the issue of jury service.

In the first view the requirement that justice must 'manifestly and undoubtedly' be seen to be done has a specific meaning. Presence of police and lawyers of the jury panel offends the principle of fair trial and verdict. Occupationally these groups are

ineligible by reason of their professions' commitment to one side of the adversarial process, in this view. Ineligibility is patent. In the other view 'manifest and undoubted' appearance is latent, not ex facie. There is no general ineligibility, only particular cases, for particular reasons, are 'manifest and undoubted' instances when justice would not seem to be done.

Parliamentary legislation may have cleared the air. But in the first view the effect of legislation is acceded to "not without unease"(25). The second view endorses that admittance of particular exceptions "will drive a coach and horse through Parliament's legislation and will go far to reverse its reform of the law" (43). Bias and risk of prejudice remains the concerns even with the reform of law. Interpretation of risk from prejudice as an occupational hazard is fraught with indefiniteness in the first view, unresolved by effect of the new law. Therefore the innumerable variations and nuances of meaning of bias bear testimony to the lack of clarity. Expressions as likelihood of bias, real possibility of bias, unconscious bias continue to weigh in judicial opinions in the first view. Further the situational relationship of defendant and police or lawyer jurors in the case need to be examined to determine bias and prejudice 'manifestly and undoubtedly' seen at trial. The second strand of opinion is generally untrammeled by vicissitudes of graded meaning and variable situation in the context of the determination.

Unfair trial is the concern. Unfair trial flows from a jury not fairly constituted. The defendant then does not get fair trial. Even the guilty are entitled to fair trial. This is asserted in the first view. A consequence is that all evidence and proof of wrongdoing can be set aside later on that point of law of unfairly constituted jury. Unfair trial is the crux of the problem. Fair trial through due adversarial process can be vitiated by the presence of groups of persons in the jury harmful to the interests of the defendant. These groups are aligned on one side of the trial in the adversarial mind frame. Unfair trial is then possible and must be guarded against. That is the view from the first line of opinion.

The second view sees it different. Minor issues are little relevant. The trial is the larger issue. "A final decision in any given case about the fairness of the trial where unfairness consisting of bias is alleged can only be made on the examination of the facts of the trial as a whole after its conclusion, the standard approach of the European Court of Human Rights to claims that defendants have not received a fair trial" (69) Particular allegations fall within the perspective of the whole trial.

In making assessment of these two lines of judicial opinion some further comment is warranted. Appeals against conviction are made invariably after conviction has been entered, after full trial, with proof beyond reasonable doubt. Challenge is not on the evidence, but on a point of law which may avail where evidence would not. Appeal is upheld, in the first view, on grounds that even the guilty are entitled to fair trial. The whole evidential weight of the wrongdoing can be set aside later on a point of law. The second view avoids that problem when the trial is considered as a whole. Unfair trial is from partial and prejudiced jury. An untoward consequence from considering the point of unfair trial without the whole case, as it were, can result. The allegedly partial and prejudiced jury comprising police or lawyers did return verdicts of not guilty at jury trial apart from the guilty verdicts entered by that same jury. One of the cases in appeal in the HOL case, noted earlier, had this result at the criminal trial by jury, of the one jury, allegedly partial, returning both guilty and not guilty verdicts. That fact had not been considered, in the line of the first view, nor mentioned (3) in the resumé' of the case. A further awkward prospect is that statutory law can open the door to continued litigation on the various grounds discussed above, when parliamentary legislation would have served the unity of law and unifying precedent.

Expert Evidence

This section under this title 'Expert Evidence' is added to project the limited space in judicial determination for concept of police as expert, for recognition of his testimony as expert evidence. The Law Commission Consultation Paper No 190 titled 'The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales affords means by which the idea of expert in police action can be discussed. The prospects of projection of the concept of an expert in a police officer, an expertise in the police action, a status accorded to the police officer in law are much less than were possible under the preceding discussion. The matter of an expertise in police action emerges in shadowy outline through judicial opinion on probable cause and trial by jury. Allusion to such special characteristics in police action is then made only incidentally. An idea to that effect does emerge through inferentially. Previous studies by the author have been on this line, of a distinctive nature in police action, vide end note. The three aspects of probable cause, jury trial and expert testimony adopted in the current inquiry, project the matter in three different planes. The idea of expert police action through subjects of probable cause and trial jury is projected from a positive perspective while that under expert testimony is presented in a more negative prospect.

The relevance of expert in police action is therefore indirect, if at all. The analysis of expert police action in the area of probable cause and jury trial is of a more direct in that judicial review of

police action adverts to the matter more pointedly. Reference to such specific nature of police action is then sometimes direct, sometimes inferential, sometimes incidental, in all three fields. The idea of expert nature of police action is therefore not yet clearly formulated. It is useful then at the outset to draw attention to the incidental references in the preceding analysis.

One instance describes police action as 'an act of judgment formed in the light of the particular situation'[53]– *Brinegar* . Else where it said, 'the process allows officers to draw on their own experiences and specialised training to make inferences from and deductions about the cumulative information available' and the need to 'provide law enforcement officers the tools to reach the correct decision beforehand' – *Arvizu* 534 US 266 (decision). In the same case *Arvizu* it was remarked that [Officer's] 'assessment of the reactions of respondent and his passengers was entitled to some weight'. In *Ornelas*[54] the observation was that 'likewise, a police officer views the facts through the lens of his police experience and expertise'. The *Pringle* case, cited in the Bringar case is a telling illustration of inter-subjectivity between the officer and the three occupants of the vehicle. Dominion and control by all the occupants over the contraband found in the automobile is based on the inter-subjective interaction enacted out at the search, though such issue does not figure in the judicial determination and opinion. They point to an element specific in police action. Mention of such features under the subject of jury trial is even less, since there is no direct review of police action under that theme. Only by inference are the positive aspects of police action projected when the question of eligibility of police officers to serve on jury reflected. On the other hand the bases for police ineligibility for jury service are featured more prominently.

Even as these prospects emerge for adoption of a concept of unique nature of police action the contrasting position above does

[53] Brinegar v U.S. 338 US 160, 176.
[54] Ornelas op cit 699.

not elucidate the unique aspect in the action. Instead the opposing position is stated only in loose negative terms. And simple good faith on the part of the arresting officer is not enough.... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects,' only in the discretion of the police quoting *Beck*[55] . Good faith is reasonable. Good faith is nothing if unreasonable. Simple good faith and subjective good faith are even contradictions in terms. An expert nature of police action, an expertise exercised and so recognized in judicial opinion can only arise from these comments extrapolated from the judgments. They find mention only as they occur. Such features are not systematically advanced in the arguments.

Certain comments are made therefore through the lines of inquiry taken in the Consultation Paper referred to above. Paragraph reference is in brackets, following the numerical arrangement in the Paper. Itemized are: Scope of the Paper; The Problem; The Common Law; Call for Reform; Proposals for Reform; Conclusions.

1. Scope of the Paper

The scope of this paper is limited to that area of expert opinion being 'part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience' at [1.2-(2)]. This description sits well with the popular notion of science. Expert opinion and reliable testimony is then equated with that notion of science. The 'gate keeping' solution serves to keep out any other body of knowledge or experience from admissible evidence. Pseudo-science and questionable practices are appropriately kept out in this way. The exercise of sound judgment and skill as expertise is excluded in the scope adopted. Police expertise as identified above does not

[55] Beck v. Ohio, 379 U.S. 89 (1964).

figure within the adopted scope of the problem of expert evidence The gate keeping remedy sits snuggly with the limited scope of the idea of the conventional expert and his science. 'Gate-keeping', problematic as it is with the usual idea of science and expert, is much less apposite to determine expertise and testimony of police action.

This projection for science then does not account for exercise of sound judgment [1.2 (1)] and skill exercised by persons expert in their field in specific situations, in respect of which their evidence is of an expert nature. Such skilled action so testified to, is itself a matter of expertise the law requires. Therefore the full notion of expert and expertise, comprising knowledge and skill, and evidence offered thereby is excluded from the reckoning, by the limited scope of the paper. The 'gate keeping' proposition, such as given, is not quite adequate where court has to determine reliability in respect of a skill and expertise outside the experience and knowledge of judge or jury[56]. Police expertise is also outside the experience and knowledge of judge or jury.

The scope of the paper limits the range of the problem, for its specific purpose. But the limits are set further. The amplitude of scope in the *Bonython* decision is reduced. The scope of the Paper is limited to one section of the *Bonython* formulation, that which deals with a body of knowledge 'sufficiently organized and recognized' [1.2 (2)]. Expertise in police action is not of an organized body of knowledge to satisfy this criterion. But police expertise is easily accommodated in the third rule of the Bonython test [1.2 (3)] which recognizes valued opinion based on experience. The extrapolation of the second rule of the *Bonython* formula alone has the further consequence of differentiating expert from expertise, the person from the action, and drawing the expert out of his specific context. The separation is artificial. In fact there is a poverty of analysis in the artificial differentiation of expert from expertise.

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[56] Turner [1975] QB 834,841

2. The Problem

The problem addressed in the Consultation Paper is, briefly, that expert evidence is admitted too readily resulting in wrongful convictions. A number of such cases in which wrongful conviction were entered are cited at [2.13 to 2.19]. Specifically, basing the conviction on that single strand of expert evidence, as it appears, has led to these problems. It is difficult to comment on this aspect with the material at hand. Instead some speculation is indulged in. Conviction based on the single item of expert evidence is fraught with danger in adjudication. Unless there was some other compelling circumstantial evidence to support the item of expert evidence, a firm determination is not warranted. Secondly the expert opinion is not compelling by itself. Even a fingerprint is conclusive only after other circumstances support. Truth depends on a totality of circumstances than on a single premise. Admissibility and reliability of the expert evidence by itself in these cases do not appear to have been the problematic. Manner of reception may have been the problem.

Complexity of the evidence which jury cannot unravel and so will defer is one problem. Easy admissibility of such evidence precedes the problem for the jury. Determination of reliability at the threshold is also recognized as a difficulty. Such is the configuration of the problem outlined in the Paper. Assessment at adjudication may then have been the problem, than when initially determining reliability. Here too for want of full particulars no firm comments can be offered. There is a question whether the infirmities at the base of the case were sufficiently projected. Had such thresholds for reliability and admissibility been recognized, it is possible that much less would have gone untoward. A large percentage of cases, perhaps, went through without mishap of wrongful convictions. The operating laws and rules were the same all through. There was then no call for remedy. This may be an overstatement on the other side of the matter. It is possible that the problem lies somewhere in between.

Gate keeping statutory provisions are themselves not the answer. The parallel is with the celebrated miscarriage of justice cases, like the Guildford Four, etc., which warranted corrective measures. Miscarriage of justice in these cases was attributed to police misconduct. In these cases there has been elaborate criminal procedure, at various levels of adjudication. There was no problem of jury being misled by expert evidence. Neither was it an instance of easy reliability in the admissibility of evidence. The prescription for remedy there took the form of statutory procedural rules, PACE Law, proposed by the Phillips Commission. These new rules did not stay further miscarriages of justice. The Runciman Commission followed. The problem then was the effectiveness of the new statutory rules and guidelines. On the impact of statutory prescription in PACE Law on police action Saunders and Young conclude that the PACE provisions have not been of great inhibitory effect[57]. Miscarriages continued. Both 'gate keeping' proposals and the PACE law are statutory expedients offered as remedy to cure certain problems. Statutory measures to substitute for the common law do not bring on their desired effect. The two situations may not be entirely parallel, yet merits consideration.

3. The Common Law and calls for Reform

The common law principles to determine relevance and reliability are clear as they are given. The ordinary tests of relevance and reliability [3.1] are sufficient. The ordinary test will need to contend with both well established fields, as well as others, to determine relevance. In particular cases, only, of scientific evidence, further tests to establish scientific criteria may be necessary. There is then no reason to provide for special tests to cover ordinary tests long in force.

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[57] Andrew Sanders and Richard Young, in 'Criminal Justice' 1994 (hereafter S and Y), Butterworths London, UK p 64.

The need for expert (scientific) witnesses to furnish court with scientific criteria [3.3] is self evident. The words science and expert are in conventional terms not problematic. These means will help to keep out pseudo-science. Where however the expert exercises skill and judgment in his action, the admissibility and reliability needs to be determined differently. Such skilled judgment and action does not fall within the conventional category of science. Neither would it fall within the non-scientific or pseudo-scientific categories in the classification. Often such skill and judgment fails recognition against statutory provisions. Thus the judgment of the Police Officer to turn away some potential demonstrators for exigent reasons was faulted as exercised in violation of rights of these persons in the *Laporte*[58] case. But in the *Austin* and *Saxby*[59] case the calculated action of the Police was upheld. Expertise did not hold with the former case, but was affirmed in the latter case of *Austin*. The common law held good. The difference in the adjudication of the two cases may be pointer to effect of the statutory law on the common law, even of statutory guidelines on conventional skill and judgment exercised by persons exclusively of a special category. The statutory rights served a gate keeping function to substitute for the hitherto prevailing common law provisions. These two cases are discussed in the Book[60] authored by this writer, vide end note too. These comments are offered in the light of those related issues. Specifically, the issues are the expert nature of police decision, the expertise entailed, the capacity for decision and the manner in which the skill and judgment figure in such decision. The common law principles recognize there are no closed categories of evidence in this direction, recognized [3.6] judicially.

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58 LaPorte v. Chief Constable of Gloucestershire [2006] UK House of Lords 13th November

59 [2007] EWCA Civ 989 of 5th Octorber 2007.

60 De Silva Frank in 'Police Decision in Action' – A Profile in Legal Review Stamford Lake (Pvt) Ltd 366 High Level Road Pannipitiya Sri Lanka 2009; www.lakehousebookshop .com

The problem as stated [3.4] is in little judicial guidance for admissibility of expert evidence. Failure of decision for admissibility is, on the face of it, not general. The problem of considering reliability is confronted only in 'new' cases, of new brand of science [3.5] as in the cases of *Gilfoyle* (No 2)[61] and *Frye*[62]. Prescription of a general remedy to cover particular instances is inappropriate. Such approach to prescribe can distort the process of determining reliability, when the statutory list of guidelines will displace the 'ordinary tests' long held. Secondly, the effectiveness of statutory prescription is in question. Thirdly, the guidelines proposed for judicial guidance are unavoidably of a general nature. Ultimately the need is for the effective application of these principles in actual adjudication. Against these cautionary considerations it is necessary to recognize that statutory hurdles can deflect the search for this critical element, with much debate and litigation on the guidelines.

Methodology and hypotheses are pertinent to new brands of science, not established. With police decision and action there is a distinctive methodology incurred, in assessing the exercise of judgment, prudence and sagacity, the hallmark of a police expert. These methods are deployed in a flash in conflict situations. There is however no plain recognition in conventional opinion of this aspect of police action.

Deference of jury to expert evidence is a problem recognized. But use of the word deference is in its negative connotation, of submitting and compliance with another's view. The caution expressed [4.27 to 4.39] is from the negative aspect of deference; that 'the trial judge simply defers to the view of the relevant expert …. when determining whether scientific evidence should be admitted' (4.28). There is on the other hand the positive aspect of deference which indicates regard and respect, than submission. There is

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[61] [2001] 2 Cr App R 5 (57) UK.
[62] Frye v United States 293 F 1013 (1923).

some judicial pronouncement on this line which may be helpful. The Chevron[63] case in the US is to this point, though the context is different. The context was that between administrative and constitutional and judicial interpretation. Portions of the decision are extrapolated to make the point: "….we defer to the agency's interpretation, if it is reasonable…[that] interpretation….need not be the only reasonable or the most reasonable….[that]…[we] do not simply impose [our] our own construction…(p843 of that judgment)". The tenor of these remarks encourages deference in a positive mode to the opinion and interpretation of another outside the judiciary. Therefore deference can be positively extended as appropriate with not the need for statutory barrier. Gate keeping and other limiting provisions (*Daubert*, rule 702 of the US Federal Rules of Evidence, and even the *Frye* test) are pertinent only in their particular aspect, than as a basis for general statutory provision.

Deference to experienced based expertise is given in other contexts too. These are crisis situations in which split second decision is taken on an expert assessment of the raveling context. There are quite a few cases[64] which recognize this specific feature to give deference to the expert nature of decisions taken.

4. Proposals for Reform

Proposals for reform are inexpedient to the extent that the problem of expert evidence is limited in concept. The problem appears to be in some instances of 'novel' science in the face of which the common law has faltered. It is observed that courts are "left with no choice but to muddle through …eliciting such guidance ….in equivocal and inconsistent pronouncements of

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[63] Chevron USA Inc. v. Natural Resources Defence Council Inc. 467 U.S. 837 (1984).

[64] Munoz v Union City 120 Cal. App. 4th 1077 section 36, Court of Appeal of California, 23rd July 2004; Adam v City of Fremont (1998) 68 Cal App. 4th 243.

the Court of Appeal" [4.8]. The questions arise whether the law itself was inadequate. The Paper does not make clear why the present common law is an unsatisfactory basis for determining admissibility of expert evidence [4.10]. A structured basis for such determination [4.14] will be pertinent to the few cases of wrongful conviction, but may not be appropriate generally.

In any event the statutory provisions recommended for reform [6.10] do not read much different to the common law. Neither is it clear that the matters referred to a [6.14 to 6.16], of specific notice to adopt scientific techniques and means to their ascertainment, did not engage the judges on the problematic cases.

Gate-keeping is a metaphor. As in many other usage of metaphor there is the problem described as politics of metaphor. Phrases and language used in legal writings, as elsewhere, use metaphors for clarification. Politics intervenes than polemics. Scientific and non-scientific is one example of metaphors used. These metaphors do not clarify but insinuate other dimensions of binary opposites which favour one to the implied exclusion of the other. Gate keeping is contrasted with easy admissibility in binary opposition, keeping the other outside the gate. The term gate keeping depends for its identity on excluding the other. Deference as the term is used reinforces gate keeping. The idea of gate keeping does not reflect reality but helps to constitute it. Metaphor is then not just a figure of speech, but their use structures and influences how the idea of expert is to be conceived. The expectation is that the term gate keeping will promote certain kinds of action and exclude the practicability of others. There is a strong political influence on the discourse through the use of the metaphor. Within these metaphors are 'inscribed' binary oppositions, like scientific and non-scientific, within and without the gate, expert and charlatan, etc. In such cases the first term is privileged. Gate keeping seeks primacy. The statutory law – common law division is held up as in binary opposition in the same mode. Shortcomings within the common law termed miscarriages are served up to reinforce the call for statutory remedies.

Proposals for reform are therefore heavily weighted to serve in one direction.

Summary

The problem at its base is that there is no definition of expert. There is in fact no definition in law of an expert. Instead various aspects and disciplines are drawn into the concept of expert. Law describes the experts, does not define. In other words the concept of expert is not settled. The law then needs to take into cognizance the different aspects which enter into the determination of expert. The connotation of expert is then inductively construed, as it arises. This process is inevitable. The concept of expert is instead deductively applied as in the Consultation Paper, as a settled idea, with little discussion as to the content of the term expert.

An expert is a person having special knowledge or skill. There is then an expertise of action in the expert, an aspect barely differentiated in legal writings. Expertise distinguishes the expert from a normal witness, apart from other qualifications. Expert evidence given in courts is ex post facto, the event. Expert opinion is formed later. To this extent the differentiation is clear. But expertise also entails special skill and judgment, faculties brought into play in the very event, in the heat of the instant. For example medical personnel carry the conventional nature of expert, but through experience acquire a skill and judgment in action not readily given to regular scientific characterization.

Thus decisions are taken by doctors on the medical state through a process of intuition and judgment, on the moment, responsibly. Often medical negligence determinations fail to take this intuitive aspect into account. Police action figures comparably. Police expertise is displayed particularly in conflict situations, when judgment, skill and expertise are drawn into the action, in the instant. Such expertise is long acquired, as inborn. Rarely is such innate characteristic in police action given due account at later judicial review. The quality of expertise is then

composite. Acquired qualification and developed skill, both, equally, inform the idea of expert. The connotation of expert as concept is then both deep and wide. This evidence is termed 'experience-based expertise'. The problem, at hand, is then one of seeking differentiation of categories when the matter is genetically one. Prescriptions can then be problematic in them selves. The *Bonython* formulation is complete in this respect. Its breakdown to the separate parts is fraught with difficulties.

Experienced-based expert evidence has another hurdle to clear. Their admission is inhibited. Such evidence "has not been the focus of attention, in a non-forensic context" [4.66]. This brings in another classification of expert evidence, compounding the simple concept. Listing of the non-forensic types [6.34] does little to define the limits, leaving police evidence and perhaps others that is expert based aside. In fact it is recognized there are no closed categories [3.6], which fact may be complicated further by inarticulate concerns of 'non-scientific' of 'non-forensic' etc. Add to this are ideas of 'less complex areas of specialized knowledge' [2.3] and others which 'depend on the complexity of the field' [2.4]. The mix is considerable. These do not help to dispel the 'aura of infallibility' [2.10, 11], nor clear how such aura may have pervaded in the cases which miscarried [2.13 to 19]. In short, all manner of complications arise when the approach to the problem of defining expert is of a limited nature.

The categorization into scientific and non-scientific of the field covered by experts is also limited in perspective. Such classification obscures the specific seat of the problem.

Expertise in action as a component of expert falls between two stools in this arrangement.

The seat of the problem is false science. Gate keeping is eminently suitable to keep out false science. Expert evidence in its fullest sense will recognize police expertise in police action appropriately in context.

Conclusion

The problematic nature of the issues outlined above under the subjects titled probable cause, eligibility for jury service and for identification of the nature of expert evidence, is the continuing feature through the analysis. Review and recognition of police action in its essential nature, the expertise in its execution and the endorsement of the principle in judicial review is the problematic in issue which emerges in the analysis. The difficulties encountered in the accommodation of the specific nature of police action at legal review and judicial determinations come into view through this angle of analysis of the above issues involved.

Basically there are two contending aspects which underlie this difficulty. On the side of legal determination the principle of rationality operates. Rationality is in this sense technical and scientific. The means of determining rationality in legal determination makes for efficient decision. The exercise is impersonal. The whole structure of law is built on this basis. Law seeks mastery over the social environment in this way. Technical rationality is the means. But in this rational and technical process applied in legal determination ends and values become increasingly problematic to determine. The technical application of the principles of probable cause and eligibility for jury service illustrate the difficulty. The wide ranging differences of opinion recounted above through many of the cases discussed reflect this difficulty. At the centre of the various legal determinations is the matter of

police action or such as it is recognized in law. The essence of police action does not engage the determinations. Police action is taken instead at face value, not a problematic concept in itself. Judicial determination varies to the extent variation of idea of such concept of police action.

One effect of the rise of technical or instrumental rationality is the process of reification which results in some disenchantment with the results. The sharp differences of judicial opinion and the diverging lines of their endeavour illustrate the disillusion with the ultimate reified concept. Another effect is that such variation of the determined principles does not offer the police clear guidelines for action. At the same time such diverging opinion does not actively promote the unity of law and precedent. Failure is of convergence of these divergences.

Power is another dimension in this analysis which underlies the problem. Rationalization is synonymous with institutionalization of the process leading to a form of domination, even of a political nature. Domination is rational as it leads to legitimating the process. The institutionalized growth of the rational process seals domination. Unless the process adapts itself, problems set in. The difficulties of legal determination and their disparate result are symptomatic of these negative developments. In truth a contest of power underlines the disparity. The question of power of the police and the power of the magistrate to make a seizure and conduct a search than a judge has to authorize was unreservedly posed by Justice Douglas in the *Terry* case discussed above. "To give the police greater power than a magistrate is to take a long step down the totalitarian path" the Judge said. Judicial opinion positioned considerably against the eligibility of police to serve on the jury in the UK, even following express Parliamentary legislation which removed the ineligibility clause, is yet another display of the contest for power. The struggle is beneath the veneer of rationality. Contest is inevitable when the principle is carried beyond a point when rationality and practicality fails the legal determination. Power inhibits. The Terry stop adjustment of the constitutional

principle of probable cause in the Fourth Amendment in the US has then the power – rational dimension to its expression. Politics underlying the metaphors used in this discourse, cited above, are yet other examples of the underlying power dimension to judicial determination in some cases.

The claims for police action and police decision can be recognized only through this underlying substratum on which judicial opinion and legal writings would wade over.

Epilogue

There is much tension beneath the surface of the criminal justice system, from want of a binding overall objective. There is much less of coherence of system and concert of action for such objective. Power and domination exerts beneath the veneer of rationality. The underlying problems surfaces once again in the UK. In the UK the Police are to be empowered with dealing with careless driving as a fixed penalty offence. The Magistrates Association has said it is a "certainty" that the officers will misuse powers because they cannot be "relied on"[65] to handle them appropriately. An argument from the side of the Magistrates says that the offence of careless driving is a subjective matter and any judgment of how serious that is should be made in the court room. On the side of the Government and Police the practicality of the proposal is manifest. Resolution between the two contentions is possible through the principles identified by the House of Lords in the case of *Albert*[66]. At base is the act of a civilian, the act of a police officer as citizen, police not more empowered than a civilian. Capacity for action, in this case to apprehend breach of peace, is common to both police officer and citizen, in the words of Lord Diplock. Capacity to apprehend careless driving, inebriated conduct, amenability to cautioning and more are the subject of

[65] The Telegraph per Tom Whitehead The Telegraph Group 2009.
[66] Lavin v Albert [1982] AC 546; [1981] 3 All ER 878.

perceptive decision by police and civilian alike. Differentiation of the police from the civilian, that one cannot be relied on unlike the other, that the police will certainly misuse powers which the civilian would not, would have been in due perspective had the Magistrates Association considered this opinion of the HOL before their pronouncement.

Police have for long submitted their 'subjective' observations and determinations by way of detections and investigations. Magistrates have greatly relied on police evidence of their subjective component of evidence. Higher courts do the same at judicial determination. Judicial opinion in the UK and in the US reflects this endorsement of police testimony in the many fields of legal determination. Differences of judicial opinion on the matter of police observation prevail nevertheless. The preceding account makes clear. There was no outright rejection of police version or denial of the special capacity of police to draw on such observations on the street and make inferences.

The problem as expressed by the Magistrates Association is that the proposal will make the police the 'prosecutor, judge and jury deciding on guilt and then sentencing the offence'. The problem is out of court disposal. Police practice of cautioning or not entering prosecution in a number of cases which has long prevailed has not evoked similar comment from Magistrates. Neither has the matter of out of court settlement commented by the House of Lords in the *Jones*[67] case been considered by the Magistrates. The HOL specified that the police should decide they have evidence to charge, that the offender admits guilt, that police would take the public interest principles into account (paras 5, 6 of the report) in these decisions out of court. Misuse of powers did not stay the decision of their Lordships.

[67] Jones v Whalley [2006] UKHL 41.

The problem of the respective roles of the police and the courts continues to take its toll on the vitality of the entire criminal justice system. The UK White Paper on 'Justice for All'[68] reflects the tension underlying the whole process which upon review called for rebalance of the system. Tension is across the divide. The same problem was encountered in other areas of the law and of the system, in the UK and US, as 'probable cause' and 'jury trail' shows. Power and domination prevail over rationality, legal or technical, beneath much legal discourse. This divide is structural divide; the ultimate fact lurks underneath. On one side of the structural divide the problem is then one of target for offences. Across the divide the problem is practicality on the highway, than in the court.

[68] July 2002 CM 5563.

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FOREWORD

Probable cause, Jury service and Expert testimony constitute three lenses through which policing function, police action and police decision can be viewed. Judicial review of police action from a rights perspective offers one view. Police action in this perspective is executive and administrative action, subject to judicial review from that angle of police action. Judicial review of police action has in certain respects been problematic, in various jurisdictions. Judicial review did not in the main reflect an action of police, specific in incidence, distinctive in character and expert in nature in given circumstances. Occasionally however the particular feature of police action emerged through judicial review in passing, as it were. There was no systematic concept of police decision in action which engaged such review. This was the theme of an earlier inquiry by the author [i]. There is similar review of police action that takes place in legal discussion under the titles of Probable cause, Jury Service and Expert testimony. Police decision and action features prominently in the course of these judicial determinations and opinion.

A common theme is inherent through all these fields of inquiry, the adequacy of review when the particular distinctive and special characteristic of police action is not taken into account. These aspects of law of probable cause, jury service and expert testimony, inevitably review police action relevant to that field of inquiry. These subjects are then one mirror through which police action can be reflected in its outline. There is further an evaluation and assessment of police action through such view. Consequently these fields of the law act as prisms which upon review reflect the scatter of issues broken down from the broad subject.

The following essays are a critique of the legal reasoning underlying each of the subjects, Probable cause, Jury Service and Expert Evidence. The contrary opinions expressed are greatly helpful as they reflect on each other in elucidation. Evaluation of these different opinions prompts the suggestion that their divergent course can be brought together on a single principle. At the same time the conflict of issues can be reconciled somewhat on a single theme. Police

action is the subject at the base of these three fields of inquiry. Review of police action through the discourse in these three areas of the law contends against the connotation of police action, conventionally or otherwise understood. Through the critical review of the law under these three subjects a concept of police action is advanced, police action distinctive with unique characteristics. The theme of police action is common to these fields of inquiry and explains why these three separate topics are brought together in one essay.

The matter as presented may at the same time have their several respective appeals.

Frank de Silva

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