

THE LEGAL STATUS OF
THE GOVERNMENTAL EMPLOYEE

A COMPARATIVE STUDY

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CHAPTER I - Introduction

In recent years much attention has been devoted to the legal problems arising out of the ever increasing range of governmental activities: problems of delegated legislation, administrative jurisdiction and the limitation of administrative discretion generally. The difficulty in maintaining a reasonable balance between the needs of the administration and the legal security of the individual has been aptly described by Professor Friedmann as "the cardinal problem of administrative law."

For the public lawyer an increasingly important aspect of this problem concerns the legal status of those employed by the various instrumentalities of government. The extension of the role of government has brought an ever-growing number of people into an intimate legal relationship with the state as their employer; in central government, the public corporations and local government, the multitude of officials and employees pose a wide variety of questions all of which involve the delicate and difficult task of limiting the legal and political freedom of the individual, because of the nature of his employment.

It cannot be denied that man in society has duties and obligations which limit his individual liberty; that

certain types of employment carry additional restrictions on personal freedom seems equally undeniable. But public administration is most exacting in the limitations it imposes on its servants; and the conduct, both public and private, of many officials, occupying posts of relatively humble status, is subject to numerous restrictions.

"There is," the Judicial Committee of the Privy Council recently stated, "a fundamental distinction between the domestic relationship of servant and master and that of the holder of a public office and the state which he is said to serve."¹ This "fundamental distinction" manifests itself in a great variety of legal restrictions and limitations on the conduct of governmental employees relating to: tenure of office, right to salary, superannuation or compensation terms, capacity to contract and rights to inventions as well as to political liberties like the freedom to associate in trade unions, to strike and to participate in the activities of a political party.

¹Attorney-General for New South Wales v. Perpetual Trustee Co., Ltd. [1955] A.C. 457 at 489. Cf: "These people [governmental employees] ... occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not private purpose." Norwalk Teachers' Association v. Board of Education of the City of Norwalk 138, Conn. 269 (1951) 276.

With regard to tenure of office the main disability relates to the protections, if any, possessed by the governmental employee against arbitrary dismissal. In the United Kingdom and the Commonwealth this question has arisen most acutely in connection with servants of the Crown to whom the rule of "dismissal at pleasure" has been said to be applicable even although there may be in existence some kind of agreement to the contrary.¹ The obvious injustice of this rule has been the subject of much discussion in recent years but so far no completely satisfactory answer appears to have been given.² In the United Kingdom moreover, it is only in comparatively recent times that it has been possible for a local government employee to be employed on terms other than at the pleasure of the employing council.³

¹See: De Dohsé v. The Queen (1886) 3 T.L.R. 114; Dunn v. The Queen [1896] 1 Q.B. 116; Gould v. Stuart [1896] A.C. 575, at p. 577; Denning v. Secretary of State for India (1920) 37 T.L.R. 138; Kynaston v. Attorney-General (1933) 49 T.L.R. 300; The Commonwealth v. Quince (1944) 68 C.L.R. 227, at pp. 241, 242; The Commonwealth v. Welsh (1947) 74 C.L.R. 245; Allpike v. The Commonwealth (1948) 77 C.L.R. 62.

²See, for example: J.D.B. Mitchell, The Contracts of Public Authorities, G. Bell & Sons, (1954); I.M.L. Richardson, "Incidents of the Crown-servant relationship," Canadian Bar Review, Vol. XXXIII, April, 1955, p.424; B. Beinart "The Legal Relationship between the Government and its Employees," Butterworth's South African Law Review, (1955)p.21.

³Local Government Act 1933, S. 121 (1).

For some time, too there was considerable doubt as to whether a servant of the Crown had any right to salary¹ and while this doubt has not entirely disappeared, there are signs that the courts would now admit such a right.² But assignability of the salary of a Crown servant is still specifically prohibited by statute.³

The Superannuation rights of government servants are safeguarded by statute in Australia; in Britain superannuation is also governed by Act of Parliament, but for the civil servant it remains a condition of service to which no legal right exists.⁴

¹Mulvenna v. The Admiralty [1926] S.C. 842; Lucas v. Lucas and the High Commissioner for India [1943] P. 68.

²See the remarks of Lord GODDARD C.J. in Commissioners of Inland Revenue v. Hambrook [1956] 1 ALL E.R. 807 at 811 where his Lordship repeated the opinion he expressed in the case of Terrell v. Secretary of State for the Colonies [1953] 2 Q.B. 482 that a civil servant "could recover his salary for the time during which he has served."

³Crown Proceedings Act, 1947 s. 27 (1)(a).

⁴In numerous decisions this has been held to be the correct interpretation of s. 30 of the Superannuation Act of 1834 taken together with s.2 of the Act of 1859; Edmunds v. Attorney-General (1878) 47 L.J. Ch.45; Cooper v. R. (1880) 14 Ch. D. 311; Yorke v. R. [1915] 1 K.B. 852; Re Transferred Civil Servants (Ireland) Compensation [1929] A.C. 242; Nixon v. Attorney-General [1931] A.C. 184

In a wide variety of minor matters, also, the governmental employee is circumscribed in his private actions in a way rarely encountered in private employment. The Crown, for example, exercises strict supervision over inventions made by its servants; this is not surprising in cases where the inventor has made use of official information and where the invention may be of interest to his particular department. But the Treasury has made it clear that:

"the fundamental principle is that ownership of an invention made by a servant of the Crown vests in the Crown. Where, however, the invention is alien to the inventor's duties the inventor may be allowed ex gratia complete freedom of commercial exploitation..."¹

A Crown servant's capacity to contract is also affected by his employment. The conditions under which he may make a contract with the government are strictly regulated² and restrictions are imposed on his right to purchase government stores.³ This limitation is also found in the conditions of service of local government

¹Treasury Circular, June, 1955. And this is subject as a rule to a royalty-free licence in favour of the Crown; see D.H.N. Johnson, "Encouraging Inventions by Government Employees," 13 M.L.R. (1950) p. 442 et. seq.

²Treasury Circular, 27th May, 1924; and see W.A. Robson in British Government since 1918, Lord Campion (Ed.) Allen & Unwin (1951) p. 102.

³A civil servant is forbidden to purchase any surplus government stores if he intends to resell them: Treasury Circular, 11th November, 1946.

employees. Acts of Parliament and numerous judicial decisions aim at insuring that local government officials have no personal interest in the contracts made by the local authority which employs them.¹

For the governmental employee in the United Kingdom and Australia the tradition of trade unionism and freedom to participate in collective agreements is now well established.² In the United Kingdom this has been achieved almost entirely by "extra-legal" means except for some provisions contained in a few of the Acts establishing certain statutory corporations.³ In Australia, on the other hand, the place of trade unionism in governmental employment is recognised by the existence of a highly developed statutory system of conciliation and arbitration.⁴

¹See, Municipal Corporations Act, 1835, s.28; Municipal Corporations Act, 1882, s.12; Local Government Act, 1933, s.123, and also, Edwards v. Salmon (1889) 21 Q.B.D.534; Nutton v. Wilson (188) 22 Q.B.D.744; Barnacle v. Clark [1900]Q.B.279.

²Although only comparatively recently in the case of British local government servants. See infra, Chap. IV.

³This is, of course, in keeping with British industrial relations generally in the development of which the law has played a minor role. See, infra pp. 22, 23

⁴For example: Public Service Arbitration Act 1920-57; Conciliation and Arbitration Act, 1904-57. In the United States, although freedom to associate seems generally to be accepted, there are still a few states which have legislated to prohibit associations of governmental employees. See S.D. Spero: Government as Employer, Remson Press, New York (1948); C.S. Rhyne: Labor Unions and Municipal Employee Law, National Institute of Municipal Law Officers, Washington (1946); H. Eliot Kaplan: "Legal Aspects of Public Employee Relations," 10 Public Personnel Review, (1949), p. 109.

But if it is clear that the question of the right to associate has been answered in the affirmative for government employees in the United Kingdom and Australia, it is equally clear that the use of the strike weapon is forbidden, at any rate to servants of the Crown. In Australia the prohibition is a statutory one;¹ in Britain it exists by the tacit understanding which was explained by the then Attorney-General during the debate on the second reading of the Trade Disputes and Trade Unions Act of 1946:

"The 1927 Act did not forbid civilservants to strike, and nothing that we propose to do now will make it any more legal than it is today for civil servants to take strike action ... I take this opportunity of making it quite clear that this Government like any Government as employer, would feel itself perfectly free to take any disciplinary action that any strike situation that might develop demanded."²

It is, however, with regard to his political activities that the governmental employee is most restricted. The reconciling of the political freedom of the individual employee with the need to maintain the integrity and impartiality of governmental service is an important problem in present day public law. In the United Kindom, as in Australia, questions of the political activities of governmental employees have not come before the courts as

¹Cf. Public Service Act 1922-57 sec. 66.

²^{Ch. Sené} H.C. Debates (1946) Vol. 419 Col. 212-3

has been common in the United States,¹ and the matter is regulated by statute and intra-service regulations and by the rules laid down by various local authorities and public corporations. These restrictions cover a wide field of political activity both national and local; for the Crown

¹In America the Hatch Act is a powerful prohibition against participation in politics by the government employee and decisions like Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 91 L.Ed. 799 (1947) and United Public Workers v. Mitchell 330 U.S. 75, 91 L.Ed. 509 (1947) have left no doubt as to the wide scope of the restrictions. In the former case the extension of the provisions of the Hatch Act to State and local government employees whose principle activity was partly financed by Federal funds was held to be constitutional. In the latter case it was observed (at pp. 94-5) that "... the rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus, we have the measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments." It is interesting to contrast the Mitchell Case with the narrow interpretation in Ex parte Curtis 106 U.S. 371 (1882). Nor do State employees appear to fare much better as seems clear from two recent cases dealing with the application of the due-process clause of the fourteenth amendment, to the firing of State public employees. The Supreme Court upheld the State's right to dismiss a public employee on the basis of his refusal to answer any relevant question (in the cases mentioned, the questions related to Communist Party membership) and held that the State courts' construction that a refusal to answer was encompassed by the terms "incompetency" in one case and "Trustworthiness and reliability" in the other was constitutional. See: Lerner v. Casey 357 U.S. 468 (1958) and Beilan v. Board of Public Education 357 U.S. 399 (1958). From these decisions it seems apparent that questions relating to political belief are likely to be held relevant to "job fitness" and that dismissal for failure to answer would not be deemed arbitrary even in the case of employees protected by statute. And see, Garner v. Board of Public Works 341 U.S. 716 (1951).

servant, they affect not only adoption as a Parliamentary candidate, but such activities as holding office in a political party organisation, speaking in public on matters of political controversy and canvassing on behalf of a candidate.¹

The most recent aspect of government employment to receive attention concerns the "loyalty" of the employee and the security of the state to which he belongs. Since World War II this has become a major problem of the greatest legal significance in the United States where the topic has occupied the courts on many occasions.²

In the United Kingdom and Australia the problems involved in testing the loyalty of governmental employees have been dealt with by administrative action and no cases

¹Treasury Circular, July 1954; in Australia no comparable directions have been issued by the Public Service Board although, in a training handbook, conduct in keeping with the above mentioned provisions is strongly recommended. In fact the governmental employee in Australia and New Zealand enjoys an unusually high degree of political freedom; since 1936 there has been no restriction on the political activities of the latter other than that of resignation on election to Parliament. Leave of absence to contest an election is a right as is his return to appointment in the event of his being unsuccessful. See, New Zealand Political Disabilities Removal Act, 1936; P. Campbell: "Politicians, Public Servants and the People in New Zealand," Political Studies, Vol. III No. 3 and Vol. IV No. 1.

²Bailey v. Richardson 34 U.S. 918 (1951); Washington v. McGrath 341 U.S. 923 (1951); Garner v. Los Angeles Board 341 U.S. 716 (1951); Adler v. Board 342 U.S. 485 (1952); Fitzgerald v. Philadelphia 376 Pa. 379 (1954).

have come before the courts. Nevertheless, these "security-loyalty" cases are of vital significance for the public lawyer and raise important questions regarding adequate safeguards for the employee, the classes of official to be included and the type of tribunal to be used in these investigations.¹ Not the least important aspect of these cases is that they make new demands not only upon the employee himself, but upon members of his family, who may find their political affiliations the subject of investigation by the government.²

It is obvious from the foregoing that the employment relationship of the government employee differs from that of the private employee in that the government as an employer is rarely limited by the ordinary law of master

¹Cf. the recent "statement of the Conference of Privy Councillors on Security," Cmd. 9715.

²"The Conference recommended that an individual who is living with a wife or husband who is a Communistic or Communist sympathiser may, for that reason alone, have to be moved from secret work"
ibid para. 15.

and servant.¹

This peculiarly restricted legal position is the

¹Nor, in the United States, even by the "fundamental rights" guaranteed to all citizens by the Constitution. Holmes' famous apophthegm has set the tone for judicial discussions of the status of governmental employees: "the petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" (McAuliffe v. Mayor of New Bedford 155 Mass. 216, 220 N.E. 517 (1892)). Governmental employment is "a privilege revocable by the sovereignty at will." (Crenshaw v. U.S. 134 U.S. 99, 108 (1890)). This has important constitutional consequences for governmental employees. When the government has extended a privilege, i.e. something to which one is not entitled as of right under the Constitution, that privilege may be withdrawn without complying with the procedural requirements of the Due Process Clause (Weinstein v. U.S. 74 F. Supp. 554 (1947)). Furthermore, the privilege can be arbitrarily taken away without notice or hearing and thus in the absence of a clear statutory remedy the party concerned will be totally without recourse (U.S. v. O'Shaughnessy 338 U.S. 536 (1950)). "Governmental employment is not 'property' ... nor a 'contract' ... nor 'liberty' ... in terms, the due process clause does not apply to the holding of a government office." (Bailey v. Richardson 182 F. 2d. 46 (1950) affirmed in 341 U.S. 918 (1951)). Cf. M. Bontecou: The Federal Loyalty-Security Program, Cornell University Press, (1932) quoting at p.206 the first Civil Service Loyalty Review Board: "No person has an inherent or constitutional right to public employment; public employment is a privilege, not a right." See also Professor A. Dotson: "The Emerging Doctrine of Privilege in Public Employment," Public Administration Review, Vol.XV Spring 1955, p.77. The case of Wiemann v. Updegraff 344 U.S. 183 (1952) seemed to temper the harshness of the 'privilege' doctrine (see especially the opinions of CLARK and BLACK J.J.) But more recent cases like Lerner v. Casey 357 U.S. 468 (1958) and Beilan v. Board of Public Education 357 U.S. 399 (1958) indicate that the Wiemann decision offers very limited protection to the government employee. See, supra p. 8 n.1.

Sub-Committee of the Finance Committee of the General Assembly of the United Nations, Records of the 20th and 21st Assemblies 1945, annex 23, p. 45 at p. 262. Quoted, L.C.Green: (1934) 7 Current Legal Problems, p. 292.

hallmark of governmental employees in most modern states¹ and, moreover, is accepted as right and proper by many of those employees themselves.² And, in this century, international co-operation has added further to the list of officials to whom the tenets of private employment are alleged to be inapplicable.³

¹See The Legal Status of Staffs of Postal, Telegraph and Telephone Services, (1951) a report prepared for the Postal, Telegraph and Telephone International, Berne. A survey of twelve European countries compiled from a comprehensive questionnaire, this report provides valuable information on the legal restrictions imposed on the employees of the governments concerned.

²Discussing the possibility of introducing "benefits in kind" into the British Civil Service the Priestley Commission commented: "it was the general view of our witnesses that it was not possible to go further in relaxing the present Civil Service rules. Civil servants were under Ministers; payments were made out of voted moneys; civil servants had to do their business in the light of a good deal of publicity and regard must be had to public opinion ... differences between the Civil Service and industry had to be accepted." Report of the Royal Commission on the Civil Service, 1953-55, Cmd. 9613 p. 87, para. 373.

³"... we think it necessary for the proper discharge of the functions of a world organisation of States, that it should possess a power, if necessary to set aside the vested rights of private individuals employed in its administration. Only an excessively static legal view would justify the conclusion that the League was fettered in its own administrative organisation by the rules of the private law of contract applicable to the employees of a trading or commercial undertaking." Sub-Committee of the Finance Committee of the General Assembly of the United Nations, Records of the 20th and 21st Assemblies 1946, annex 23 p. 45 at p. 262. Quoted, L.C.Green: (1954) 7 Current Legal Problems, p. 202.

It is clear that in certain circumstances the private interests of governmental employees will have to be subordinated to the superior interests of the community for whom the whole system of government exists. But to accept this requires not only the existence of adequate safeguards for the maintenance of efficient administration - it requires also adequate guarantees of just treatment for the government employee.

Inevitably, therefore, the question becomes more insistent: what is the justification for imposing upon a large section of the population conditions of employment markedly different from those of the rest of the working community?

"The most universal public relation by which men are connected together," says Blackstone, "is that of government; namely, as governors and governed, or in other words, as magistrates and people."¹ Because of the importance to

¹Comm. Bk. 1, II, 146.

These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State in behalf of all. See also: *The Queen v. Clarke* [1954] A.L.R. 312; *Barford v. The King* [1949] A.L.R. 311 at 320.

the community of the activities of government servants, it is generally agreed that special conditions ought to be imposed upon them "in the public interest."

A clear recognition of the interest of the community in governmental employees is contained in an early thirteenth century statute by which it was ordained that the inhabitants of every shire should have the right to elect their own sheriffs, "that the commons might choose such as would not be a burthen to them."¹ Many early cases illustrate the rules governing the grant of public offices and the notion of public interest is clearly behind much of the judicial reasoning.²

It is easy to see this public interest in terms of the need to maintain the administrative efficiency of

¹28 Edw. I c. 13; see also 12 Ric. II c.2. which decreed that no man be appointed to office "that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient."

²See: Mitchell, op.cit. pp. 32, 33; also Dunn v. The Queen]1896[1 Q.B. 116 at 119; De Dohsé v. The Queen (1886) 3 T.L.R. 114; Kynaston v. Attorney-General (1933) 49 T.L.R. 300 at 301. Cf. Butler v. Pennsylvania 10. Howe 402 (1850) at 416 where, discussing the distinction between private and public employment, it was stated: "the contracts designed to be protected by the tenth section of the first article [of the Constitution] are contracts by which perfect rights, certain definite fixed private rights ... are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all." See also: The Queen v. Clarke [1954] A.L.R. 312; Bertrand v. The King [1949] A.L.R. 311 at 320.

²Mitchel op. cit. p. 17.

government.¹ One aspect of the need to ensure the efficient functioning of government is illustrated in the rules relating to contracts made by public authorities:

"in the last resort the law permits a governmental agency to fulfil the fundamental purposes for which it was created, even though so doing may involve interference with the vested contractual rights which an individual may have against that agency." 2

Thus, while the legal security of the individual is of great importance, the public interest requires at the same time the effective performance of governmental purposes. The pre-eminence of private contractual rights therefore must often be weighed against the danger of unduly inhibiting governmental action.

It is true that, just as in its dealings with the general public the government cannot realistically be confined within the rules of private law, so as an employer the government cannot relinquish its inalienable duty to govern effectively. In the last resort, therefore, unilateral administrative action may have to be used to solve many problems arising from the employer-employee relationship -

¹See e.g. Lewis v. Weston-super-Mare (1888) 40 Ch.D. 55 at 62, 67; Vine v. National Dock Labour Board [1956] 3 All E.R. 939 esp. Lord COHEN at 942. And cf. United Public Workers v. Mitchell 330 U.S. 75 91 L.Ed. 509, (1947), at 570; "for the regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service!"

²Mitchell op. cit. p. 17.

problems which, in the sphere of private employment, could safely be left to the processes of ordinary collective bargaining.¹ For the governmental servant, therefore, public interest in the efficiency of government will often necessitate the imposition of limitations and restrictions (as well as privileges) on his conduct, both private and public.

But, thus stated, the principle is too wide. The test of the efficiency of government requires further analysis before it can be used as a practical yardstick; and moreover, the test of "public interest" itself needs elucidation if it is to be of real assistance.

Whether or not public interest should always be treated as superior to private interest is, of course, a matter of political predilection and is a question to which an infinite variety of answers can be given; indeed, any particular answer will be applicable only to the particular circumstances in which the question of public interest has arisen.

Certainly, public interest is not coincidental with government interest² which may, in many cases, be little more than a form of private interest and may even be used to

¹There is a suggestion of this in the distinction drawn in the British Civil Service between conditions of service which are "arbitrable" and those which are not.

²Cf. Glasgow Corporation v. Central Land Board, 1956 S.L.T. 41, Lord RADCLIFFE, at p.49: "the interests of Government ... do not exhaust the public interest."

serve a private interest.¹ And again, legal issues may arise not between "public" and "private" interests, but between different public interests. This can happen, for example, in a dispute between a local authority and a central government department or, in a federal system of government, between the federal government and a state.

The test of public interest is, therefore, a vague one and of little value unless regard is had to the particular circumstances in which it arises; it is certainly not sufficient justification for the wholesale application of restrictions to governmental employees, as seems to have been too readily assumed.²

And further, it is clear that the test of public interest cannot be confined to governmental employment only. Many types of employment are subject to restriction and regulation in the public interest. Doctors, lawyers, chimney sweeps and butchers to mention only a few.³ True,

¹See: Repatriation Commission v. Kirkland (1923) 32 C.L.R. 1; Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property [1954] A.C. 584. Also G. Sawyer: "Shield of the Crown Revisited," M.U.L.R. Vol. 1, No. 2 (1957) p. 137 et seq.

²It is difficult to see, for example, how the public interest is safeguarded by the decision in Mulvenna v. The Admiralty 1926 S.C. 842

³See, e.g. Mullan v. Robertson, 1955 J.C. p.

the degree of public interest involved in the activities of governmental official is greater with regard to many more employees than is the case with any single branch of outside private employment. The size of the modern administrative machine and its ever-expanding interest in the affairs of the subject means that problems of the protection of the public interest will arise much more frequently and often, though not always, more acutely than in the field of private employment.¹

But, it is suggested, the matter is one of degree only. One cannot justify the restrictions imposed on governmental servants merely on the basis that they are governmental employees; the test is not whether the occupation is governmental or private² but whether the duties involved in

¹See Report of the Special Committee of the Association of the Bar of New York - The Federal Loyalty-Security Program, Dodd, Mead & Co. (1956) at pp.63 et.seq. where the application of the programme to private employees is discussed.

²Indeed, it is well-nigh impossible to define governmental employment. It does not seem to be synonymous with public employment (see Bater v. Great Western Railway Co. [1922] 2 A.C. 1, at 27); nor is it enough to say that it is employment which has governmental purposes, for this takes us no further (see Griffith: "Public Corporations as Crown Servants," 9 Univ. of Toronto L.J. (1952) p. 169); neither can we define governmental employment by reference to the use of public funds since many individuals and bodies which would not be considered governmental utilise public funds - doctors under the National Health Service and Universities for example. The only solution seems to be to say that governmental employment in this context is employment by either a ministerial department, a local authority or a statutory corporation; and this is only partially satisfactory.

the occupation are such that the public interest requires protection in their exercise. Many non-governmental occupations will require greater restriction and regulation than many governmental offices. And within the sphere of governmental employment itself the degree of restriction will vary in relation to the duties to be performed.

The duties of the office or appointment are the paramount consideration; by this means alone can one assess with any degree of accuracy the nature of the public interest involved; and the factors to be considered in ascertaining that public interest will vary in turn with the different conditions of service to which the particular restriction or regulation is being applied.¹

To accept this suggestion offers certain advantages: it avoids the anachronistic difficulties which arise from the theories about Crown prerogative and sovereignty which have bedevilled the law relating to Crown servants and places the restrictions imposed on governmental employees on an understandable and acceptable basis; distinctions can be drawn between different groups of employees and different conditions of service, thus avoiding the unjust application of "blanket" restrictions irrespective of grade

¹See The Queen v. Clarke [1954] A.L.R. 312 for an example of how important is the consideration of the duties performed by a governmental official in ascertaining the presence or otherwise of public interest.

or the duties performed. With regard to the basic principles governing tenure of office, salary and superannuation, for example, uniformity of practice seems both desirable and possible. Any approach to problems of private conduct, political activities and "security," however, seems less than fair if it treats alike the industrial employee in the government arms factory and the permanent head of a major department of state.¹

¹This, however, appears to be the approach of the United States courts. In the United Public Workers v. Mitchell case, the Supreme Court held that the provisions of the Hatch Political Activities Act were applicable to a metal roller in the Federal Mint. For the point of view of the British courts see Mulvenna v. The Admiralty 1926 S.C. 842 in which no distinction was drawn between industrial and non-industrial civil servants as regards the assignment of pay, and Commissioners of Inland Revenue v. Hambrook [1956] 1 All E.R. 807, in which GODDARD L.C.J. stated, at 810, 811: "An established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty and I can see no ground on which different rules of law in respect of his employment can be applied according to the grade or position he may occupy. They apply to the junior clerical officer as they do to a Permanent Secretary ...". Contrast "The personnel security programs would extend under this recommendation to all positions whose occupants might endanger national security and to no others. By thus narrowing the scope of the programs to the areas where it is really needed, we would both increase the efficiency of the programs and remove an unnecessary burden on positive security and on employees ... The access to information which would make a position sensitive might be either authorized access or opportunity for unauthorized access. So the position of a secretary or a janitor who had opportunity for access to the files of the Joint Chiefs of Staff would be classified as sensitive ... sensitiveness would be by position and not by agency." Federal Loyalty-Security Program, pp. 141-2. The decision in Cole v. Young 315 U.S. 536 (1956) suggests that in future distinctions will be made although the scope of the decision is possibly rather limited. See R. Brown: Loyalty and Security (1958) Yale University Press, p.24.

No study of constitutional law would be regarded as complete if it omitted discussion of the political conventions; international lawyers find it equally impossible to ignore the realities of international politics. Yet, British lawyers, with few exceptions, have paid scant attention to the practice of public administration in the field of governmental employment.¹ This approach seems lacking in realism.

An analysis of the position of the governmental employee vis-à-vis his employer must take into account, not only the strictly legal elements of that relationship, as expressed in statutes and judicial decisions, but also the practice and custom of the public service. To ignore or underestimate the latter is to run the danger of reaching conclusions at once unreal and misleading.

Any legal examination of the employment relationship of the government servant must, therefore, include within its scope the all-important systems of collective bargaining

¹Significant exceptions are Sir Ivor Jennings and Professor W.A. Robson. In contrast, American lawyers have shown no reticence whatever about using public administration references to supplement legal discussion of public employment. See, for example, Col.L.R., Vol.47, No.7 pp.1161 ff. Nor have American courts. Cf. United Public Workers v. Mitchell 330 U.S. 75 at 97 and 121.

and codes of internal conduct which govern, so comprehensively, conditions of service. Failure to do this gives rise to two serious consequences: the position of the public employee is made to appear much worse than is really the case (and hence much of the suggested legal reform may be unnecessary and even undesirable¹) and the effectiveness and importance of the internal regulatory codes is gravely underestimated.

The problem here is, of course, a common one. Legal discussion inevitably lays stress on the abnormal and legal principles become of paramount importance when things go wrong. The lawyer, therefore, is most concerned with the provision of legal protection obtained in the ordinary courts of law - because things do go wrong and, if the protection of the law is lacking or defective, the results can be unfortunate for the individual.² This concern with legal principles and judicial protection, however, must not blind the legal observer to the fact that things may not be so bad as they appear; and, furthermore, the absence of legal provisions either in statutes or case-law may be evidence of a healthy state of affairs. The parallel in

¹See, infra Chap. IV

²Cf. the cases cited supra at p. 3 n.1.

industrial relations is obvious.¹

Further legal interventions may be, therefore, to a large extent unnecessary, since the need for greater protection for the government servant can be seriously exaggerated. Another factor, moreover, which makes such intervention even more unnecessary, is that the comprehensive systems of internal rules and regulations governing conditions of employment throughout the public service, themselves form in a very real sense, legal patterns to which the conduct of employees and employers must conform. The problems posed by any attempt to define "law" are too well-known to be repeated² but it is submitted that a body of rules governing conduct, backed by accepted sanctions and containing provisions for development, could, not inappropriately, be termed "law," although the rules may not be justiciable in an ordinary court.³

¹Cf. O. Kahn-Freund in The System of Industrial Relations in Great Britain Flanders & Clegg (eds.) Blackwell (1954), p. 43: "The first duty of a lawyer about to discuss the legal framework of industrial relations is to warn his readers not to overestimate its importance ... there exists something like an inverse correlation between the practical significance of legal sanctions and the degree to which industrial relations have reached a state of maturity."

²Cf. H. Kantorowicz: The Definition of Law, C.U.P. (1958)

³See, infra, Chap. IV especially p. 84 for further discussion of this point.

In governmental employment neither employer nor employee appears to pay much attention to such legal concepts as "contractual right," "implied term" and "enforceability;" the emphasis is on negotiation and discussion as a means of reaching a modus operandi which will maintain the effectiveness of the administration and at the same time meet the just demands of the employee.¹

The governmental employee is, by no means, as rightless as his legal position (as defined by statute and the common law) would suggest. Nor is he lacking in protection for his rights. The extent of those rights and more particularly the adequacy of their protection, may give cause for concern to the administrative lawyer but he must, nevertheless, be wary of posing solutions to legal problems which in practice may not exist. Formal, legal solutions - offering, for example, statutory or contractual rights justiciable in the ordinary courts - may satisfy a laudable desire to afford maximum protection to the employee. As suggested, however, they may be largely unnecessary, and, further, they may introduce into the employment relationship too rigid a structure with consequent disadvantages, some of which should

¹Cf. The Constitution of the National Whitley Council, Clause 11: "... The objects of the National Council shall be to secure the greatest measure of co-operation between the State in its capacity as employer, and the general body of Civil Servants in matters affecting the Civil Service, with a view to increased efficiency in the public service combined with the well-being of those employed..."

become apparent later in this study.

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The problems arising in the field of governmental employment appear in every modern state. In what follows, comparisons from Australian experience are used to illustrate these problems and the ways in which they can be approached. The choice of Australia for this purpose has certain advantages.

First, there is, as in Britain, a legal background of common law principles and a political system which combines a parliamentary executive and ministerial responsibility. The problems arising, therefore, can be appreciated readily by lawyers in the two countries.

Second, the federal constitution of Australia raises problems the solutions to which cut across many of the accepted notions of the lawyer accustomed to a unitary form of government.¹

Third, the federal system of Australia has, for the purposes of this study, two advantages over that of the United States; it is smaller and younger and therefore lends

¹See, for example, the discussion of the "transferred officers' rights" cases in Chapter VIII, infra.

itself more readily to fairly complete analysis. And in Australia, unlike in the United States, the common law is applied as a common source of juristic authority in the High Court and in the courts of the States,¹ thus offering some chance of a reasonably uniform approach.

Lastly, the problems of governmental employment in both Britain and Australia, although alike in many respects, have been approached in quite different ways especially with regard to civil servants and the employees of local authorities. Statutory regulation, for example, plays a much more important role in Australia than is the case in the United Kingdom, a fact which enables some important conclusions to be drawn especially on the subject of granting legal rights in government employment.

¹See Chief Justice Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation," 31 A.L.J. (1957) p. 240 ff. But contrast the views expressed by Professor Zelman Cowen in 7 Res Judicata (Melbourne) (1955) pp. 29, 30.

PART ONE - THE UNITED KINGDOM

... of contract in the governmental employ
... his employment conditions: tenure,
salary and conditions of work. These have arisen legal
problems of a high importance. In recent years these
problems have been solved to a great extent, but nevertheless
there remains a number of questions to which the public
legislative may hope to give some useful answers.

CHAPTER II - Basic conditions of service

With regard to tenure of office the civil servant still
remains legally "a tenant at will" of the Crown, liable to
be dismissed "at pleasure" without the possibility of legal
redress.¹ The local government employee has greater legal
protection against arbitrary dismissal; although basically
he is employed at the pleasure of his local authority, it is
statutorily provided that he may rely upon a formal contract
of service which can provide for a requisite period of
notice and stipulated grounds for dismissal among other

¹ Terrell v. Secretary of State for the Colonies [1953]
2 Q.B.482 and the cases there cited. And see supra p.3, n.1

Of primary interest to the governmental employee are the basic elements in his employment conditions: tenure, salary and superannuation, and from these have arisen legal problems of no little importance. In recent years these problems have been solved to a great extent, but nevertheless there remains a number of questions to which the public lawyer may hope to provide some useful answers.

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With regard to tenure of office the civil servant still remains legally "a tenant at will" of the Crown, liable to be dismissed "at pleasure" without the possibility of legal redress.¹ The local government employee has greater legal protection against arbitrary dismissal; although basically he is employed at the pleasure of his local authority, it is statutorily provided that he may rely upon a formal contract of service which can provide for a requisite period of notice and stipulated grounds for dismissal, among other

² Cf. Flanders & Clegg (eds.) *op. cit.* p. 240

¹ Terrell v. Secretary of State for the Colonies [1953] 2 Q.B.482 and the cases there cited. And see supra p.3, n.1.

things.¹

At first glance it might appear that the legal position of the employee of the statutory corporation is most akin to that of the private employee in that many of these bodies are engaged in activities of a commercial or industrial nature and, indeed, have in many cases taken over these functions from private enterprise.² There are, however, in this connection a number of factors to which some consideration must be given.

The relationship between an employee and the statutory corporation employing him will generally be one of servant and master based on contractual rights and obligations. There may be occasions, however, when that relationship is not so straightforward and when it partakes more of status than of contract. The contrast between Vine v. National Dock Labour Board³ and Barber v. Manchester Regional Hospital Board⁴ makes this clear.

¹Local Government Act, 1933, s.121 (1). It should be observed that this section does no more than make valid certain contractual provisions which by the decision in Brown v. Dagenham U.D.C. [1929] 1 K.B. 737 were hitherto invalid. The section does not affect the common law right of the local authority, like any employer, to dismiss a servant summarily on any grounds recognised by the common law as justifying summary dismissal, even in the face of a contractual provision for notice. See, J.H.Warren: The Local Government Service, Allen & Unwin (1952) p. 111.

²Cf. Flanders & Clegg (eds.) op. cit. p. 240

³[1957] A.C. 488

⁴[1958] 1 All E.R. 322

In both cases the nature of the relationship of the plaintiff to his employer came under consideration by the court in ascertaining what would be the appropriate remedy for wrongful dismissal. The plaintiff in the Vine Case was a dock worker employed by the defendants under a scheme embodied in the schedule to the Dock Workers (Regulation of Employment) Order 1947 which was made under the Dock Workers (Regulation of Employment) Act, 1946.¹ The ground on which he averred wrongful dismissal was that the local dock labour board had no power under the scheme to delegate their disciplinary powers (including that of dismissal) to a disciplinary committee. The House of Lords, upholding the finding of the Court of Appeal (and also the judgement of ORMEROD J. at first instance) then dealt with the plaintiff's claim for a declaration that his dismissal was void. Such a declaration had been granted by ORMEROD J. but refused by the Court of Appeal (JENKINS L.J. dissenting).²

Holding that the plaintiff was entitled to his declaration their Lordships were unanimously of the same opinion as JENKINS L.J. in the Court of Appeal that the relationship of the plaintiff to the employing Board was different from that of the ordinary servant and master case.

¹sec.2, 500; 508; 508.

²[1956] 1 Q.B. 658. J. that for the purposes of the conditions of service under consideration, no distinction could be drawn between whole-time and part-time employees.

The scheme gave him a status and the remedy (impossible in the contract of service) was that his dismissal was declared a nullity. He had never, legally, left the employment of the Board.¹

In Barber's Case the plaintiff alleged wrongful dismissal on the ground that the proper procedure for terminating his appointment had not been followed. A part-time² consultant, the plaintiff's employment was ended by the Board without his being given the opportunity to appeal to the Minister of Health, as provided by his conditions of service. BARRY J. held that this right of appeal had been duly incorporated into the terms and conditions of the plaintiff's service with the Board and that, therefore, the plaintiff had been wrongfully dismissed.

The question of remedy arose and on the basis of the Vine Case the plaintiff claimed a declaration that his appointment had never been validly determined and was, in fact, a nullity. The terms and conditions of service agreed between the Minister of Health and the medical profession included the provision for appeal to the Minister. Counsel for the plaintiff argued that the proper procedure had never been completed and therefore the termination was never effective.

¹Cf. at 500; 506; 508.

²It was held by BARRY J. that for the purposes of the conditions of service under consideration, no distinction could be drawn between whole-time and part-time employees.

Nevertheless BARRY J. felt that the Vine Case was distinguishable:

"There the plaintiff was working under a code which had statutory powers ... Here, despite the strong statutory flavour attaching to the plaintiff's contract ... it was an ordinary contract between master and servant and nothing more." ¹

Presumably, had the learned judge found that the element of statutory regulation was stronger than was the case, he would have been willing to hold that the plaintiff's relationship to the hospital board was one of status and the remedy re-instatement as in Vine's Case. On this basis, the extent to which statute or statutory regulation govern the tenure of office of an employee of a public authority, will determine whether or not his employment relationship is one of status or contract.²

Moreover, where the relationship between a public corporation and an employee is clearly a contractual one of

¹at 331. As recently as April, 1959, this case featured in a question in the House of Lords, a leader in "The Times" and subsequent correspondence in the columns of that newspaper. (See "The Times," 5 April, 1959). In demanding reinstatement, the noble Lords, the leader-writer and most of the correspondents seemed to pay little attention to the long-established common law rule that a decree of specific performance will not be granted in respect of contracts of service.

²Another aspect of the Vine Case which appeared to weigh heavily with both the House of Lords and JENKINS L.J. in the Court of Appeal was that the plaintiff by being dismissed was effectively denied from performing his life's occupation at all. See, for example [1956] 1 Q.B. at 676 and [1957] A.C. at 500; 507-9.

³ibid. p. 67.

⁴infra p 36

master and servant, a possible complication may arise where the corporation concerned is itself a servant or agent of the Crown. This seems to make the employee, in turn, a Crown servant and therefore subject to the rule of dismissal at pleasure.¹ In such circumstances De Keyser's Case² could operate to oust the rule if it is based on prerogative as has been alleged³; as has been strongly urged⁴, however, the prerogative does not appear to be the basis of the "at pleasure" rule and the rule could therefore apply to employees of Crown Corporations. Furthermore, it is possible that a statutory provision authorising the appointment of such servants as the Minister or Board "shall think fit" - common in public corporation statutes - might involve dismissal at pleasure because of the supposed rule against fettering a discretionary power.⁵ Something more must be said of the members of the boards of the corporations⁶, but meantime, it is pertinent to consider whether or not any justification can be advanced for the existence of the "at pleasure" rule.

¹Cf. Griffith loc. cit. p. 193; G.H.Treitel: "Crown Proceedings" [1957] Public Law pp. 329-335. Unless, presumably, the enabling statute provided otherwise.

²Attorney-General v. De Keyser's Royal Hotel [1920] A.C.508

³Cf. GROVE J. in Grant v. Secretary of State for India (1877) 2 C.P.D. 445 at 453

⁴Mitchell, op. cit. pp. 32-40.

⁵ibid. p. 67.

⁶infra p. 36

The basis for the dismissal at pleasure rule has been justified on the ground of public interest with reference to both the Crown servant¹ and the local government employee.² But it is manifest that the rule was intended to protect the public interest under conditions very different from those prevailing in modern governmental service.

There may have been a period in the history of the Civil Service when the right of the Crown to dismiss at pleasure was indispensable to the efficient operation of the service in the public interest³ but the legal rule is now a needless anachronism and if proof were needed of how inconsistent today with the public interest the rule is, it is to be found in the practice of the service which lays so much emphasis on security of tenure.⁴

¹Cf. Dunn v. The Queen [1896] 1 Q.B. 116 e.g. and Richardson, loc. cit. p. 429: "... it is generally in the public interest that civil servants should be dismissible at pleasure."

²Nicholson v. Whitstable U.D.C. (1925) 89 J.P. 480 at 508: "The urban authority had not ... any power to enter into a contract of employment ... under which they were deprived of that power which in the public interest the statute expressly conferred upon them of removing at pleasure." Cf. also FRY J. in Donahoo v. Local Government Board (1882) 46 L.T. (N.S.) 300 at 301.

³See Moses: The Civil Service of Great Britain, p. 27ff; Logan, loc. cit. p. 255.

⁴See infra p. 50

So too with local government employment. Prior to the Industrial Revolution it was still no part of the conception of local administration that there should be permanent whole-time salaried staffs. The unit of local government, parish manor borough or county was an organ not of government but of obligation implying compulsory unpaid service on the part of every "respectable male resident."¹ Side by side with this gratuitous service there existed some offices like the clerk of the peace, holding office for life and being remunerated by fees.

But such a system of local administration was ill-adapted to the rapidly changing conditions in eighteenth and nineteenth century Britain and these ideas of office gradually yielded, albeit slowly and incompletely, to the principle of paid service by experts. The need for greater administrative efficiency in the interests of the public was everywhere apparent.² The lack of control over the unpaid office holder or the holder of the freehold office made it impossible

¹Webbs: History of Local Government, Vol. IV p. 353;
Maitland Constitutional History of England, p. 43.

²Webbs, op. cit., Vol. IV, pp.453/4. In Wright v. Marquis of Zetland [1908] 1 K.B. 63 counsel for the plaintiff alleged that s. 22 of the Endowed Schools Act of 1869 (which section provided for the "dismissal at pleasure" of teachers) was introduced to put an end to the serious objections which had arisen hitherto because masters had held their appointments for life. This allegation is borne out by the pre-ambule to the Act. Cf. also the numerous Scottish cases like Brown v. Heritors of Kilberry, dealing with the control of school masters as a public service.

to execute satisfactorily the countless new duties being imposed upon local governing bodies. So, with the passing of the Poor Law Amendment Act of 1834 and the Municipal Corporations Act of 1835, the foundation of the principle of a salaried bureaucracy holding office at pleasure was well laid.¹

But if tenure at pleasure had been introduced to prevent the earlier abuses of office the gradual development in the twentieth century of the concept of a career service bureaucracy has made the old rule completely out of keeping with the times. In the twentieth century a permanent staff of experts imbued with a sense of public service was required; such a group could be built up only on a more certain foundation than that which had hitherto existed. Tenure at pleasure is, in these conditions, inimical to the public interest. This is, in fact, recognised in practice by both the civil service and local authorities. This gap between law and practice will be discussed more fully in a later chapter; suffice it to say, meantime, that even sympathetic critics of the public service have asked whether security of tenure, both central and local, has gone too far.² Further-

¹See Poor Law Amendment Act 1834 s.IX; Municipal Corporations Act 1835 s.LVIII.

²See W.Robson (Ed.): The British Civil Servant (1937) p.21; H. Finer: The British Civil Service (1937) p.99; Laski's introduction to J.P.W.Mallalieu: Passed to You Please (1942); H.R.G.Greaves: The Civil Service in the Changing State (1947) pp.46-66; G.D.H.Cole: Essays in Social Theory (1950) pp.224-243; H. Finer: English Local Government, 2nd Ed. (1945) p.268.

more, it is now commonplace to find public corporations statutorily enjoined to pursue "good employer" policies which is scarcely consistent with a dismissal at pleasure rule.¹

Before leaving the subject of tenure, it is necessary to say something of the tenure of office enjoyed by members of the boards of public corporations. As distinct from the employees of these corporations, the appointment, tenure and dismissal of the members of the boards concerned are expressly dealt with in the enabling statutes. This suggests some important distinction between board members and other staff, the validity of which requires examination, in view of its implications for a general theory of public employment.

It is sometimes suggested that this distinction exists because public interest plays a more important part in the case of the members of statutory boards than in the case of employees of the boards.² It is not difficult to envisage circumstances in which a Minister might feel it advisable

¹Cf. Flanders & Clegg, op.cit. p.239. A statutory body, unlike an ordinary private employer, must act bona fide in terminating a servant's employment (the onus of proof being on the party alleging bad faith). See: Short v. Poole Corporation [1926] Ch.66 at 90,91; Fennell v. East Ham Corporation [1926] Ch.641; Price v. Rhondda U.D.C. [1923] 2 Ch. 372 at 389; Barber v. Manchester Regional Hospital Board [1958] 1 All.E.R.322 at 329, 330.

²Cf. Mitchell, op.cit. p. 67: "It seems that a distinction should be drawn here between the members and directing staffs of the boards on the one hand and other employees on the other. As to the former, public interest may well require a wide power of dismissal, as to the latter, it could not. Indeed this distinction seems to be recognised in the Acts in the provisions regulating membership of the boards."

to remove a member of a corporation with whom he may have to work in close collaboration in an atmosphere of mutual confidence. Nor is it difficult to visualise occasions arising when a particular member might have to go, whereⁿ, for example, relations with his colleagues on the board become strained.

Nevertheless, it is submitted that such circumstances could be met by the ordinary law of master and servant. Due notice given to terminate the appointment is all that would be required. Where such notice would be inconvenient to the Crown or the Minister, or where a fixed term has been prematurely terminated, proper compensation could be made without detriment to the public interest. Where the duties of a particular board or board member required the existence of special terms of office and tenure, these could be provided in the appropriate contract - the instrument of appointment. This is recognised in present practice¹ and has been applied even to servants of a Crown corporation.²

Furthermore, the argument that the degree of ease of dismissal can be related to the degree of public interest involved, may be a plausible one but it is hardly supported by the evidence of some of the more important statutes.

¹See, Agriculture Act, 1947, sec.68 and Ninth Schedule, para.5.

²Cf. Forestry Act 1945, sec.1.(1) by which the chairman and commissioners are each appointed "by Her Majesty by warrant under the sign manual" and "shall hold and vacate office in accordance with the terms under which he is appointed." This provision would presumably prevent the operation of the normal "at pleasure" rule.

Broadly, the provisions governing tenure, laid down in the enabling statutes, range from those which make the office of the board member dependent solely on the pleasure of the Crown¹ to those conferring a fixed term of years statutorily guaranteed.² Between these extremes lie various types of statutory provision: providing for tenure in accordance with the instrument of appointment, with a power reserved to the Minister to dismiss "if he is satisfied" that certain circumstances exist³; giving the Minister power to appoint but silent as to tenure⁴; providing that tenure is to be governed by the instrument of appointment alone⁵; in which it is laid down that the tenure shall be governed by Ministerial regulations, subject to their being laid before Parliament and, possibly, annulled;⁶ giving a fixed term of

¹Cf. Television Act 1954, sec.1 (4); a copy of the notice of dismissal is to be laid before Parliament.

²Cf. Bank of England Act 1946, Second Schedule.

³Cf. Air Corporations Act 1949, sec.2. and First Schedule, para. 5; New Towns Act 1946, sec. 2(1) and Second Schedule, para. 5.

⁴Cf. Agriculture Act 1947, sec.73 and Ninth Schedule, para.15. This could, but does not necessarily, imply a power to dismiss at pleasure, see, Smyth v. Latham (1833) 9 Bing.692.

⁵Cf. Agriculture Act 1947, sec. 68. and Ninth Schedule, para.5; Atomic Energy Authority Act 1954, sec. 1 (2)(4).

⁶Cf. Electricity Act, 1957, ss.2, 3, Electricity Act 1947, sec. 3(7); Gas Act 1948 sec. 5(8); sec.73.

years with a reservation to a Minister to dismiss in certain specified circumstances.¹

To find any rationale, at any rate, based on public interest, appears to be impossible. Members of the Race-course Betting Control Board are liable to dismissal at pleasure² while the members of the Atomic Energy Authority with functions of outstanding national importance have the full benefit of their contracts as laid down in the terms of their appointment.³ The chairman and members of the Independent Television Authority can be dismissed at any time by the Postmaster-General, but their counterparts in the Gas and Electricity Councils have the protection of regulations which may be examined in Parliament.

Furthermore, the history of the Electricity Acts suggests that wide powers of dismissal are no more necessary in the case of members of the boards of public corporations than in the case of other governmental employees. In 1919 Electricity Commissioners were appointed by the Board of Trade, two "on such terms as the Board of Trade might fix," other three "during His Majesty's pleasure."⁴ Seven years

¹Cf. Agriculture Act 1947, sec. 73, and Ninth Schedule, para.14.

²Racecourse Betting Act 1928, sec. 2(5).

³Atomic Energy Authority Act 1954, sec.1(4): "every member of the Authority shall hold and vacate his office in accordance with the terms of his appointment." They are also eligible for re-appointment and may resign at any time on giving notice to the Lord President of the Council.

⁴Electricity (Supply) Act 1919, sec. 1(2).

later a Central Electricity Board was established, the chairman and members of which were to hold office for a fixed term of between five and ten years "as the Minister may determine before appointment."¹

In 1947 the Electricity Commission was dissolved, the Central Electricity Board abolished and ^a new Central Electricity Authority was established, together with Area Boards.² Express provision was made for compensation to be paid to members of the now defunct authorities - including those who held office at pleasure.³ The same Act provided that members of the new Authority and Area Boards would be appointed by the Minister who would make regulations governing inter alia appointment, tenure and vacation of office.⁴ These provisions are maintained in the latest statute creating a Central Electricity Generating Board, appointing an Electricity Council and abolishing the Central Electricity Authority.⁵

The history of this legislation seems to indicate fairly clearly that the attitude towards tenure of office in the public service has changed. The arbitrary powers of dismissal contained in the earlier statute has given way

¹Members of the board of a public corporation, in a sense, constitute the corporation. It is the shareholders and not the board which constitute the corporation. Cf. W. Friedmann: Law and Social Change in Contemporary Britain, pp. 10-11.

²Electricity Act 1947, ss. 3; 14(11); 58.

³ibid. sec. 55(2).

⁴ibid. sec. 3(7).

⁵Electricity Act 1957.

to more acceptable form of Ministerial control - yet the public purposes and interest involved are much the same as they were.

Indeed, examination of the appointment, tenure and dismissal of members of the boards of public corporations strongly suggests nothing more than a combination of historical accident and fortuitous circumstance in the drafting of the relevant statutory provisions. Nor is this difficult to understand.

The law surrounding the relationship of members of public corporations to the Crown, to the appropriate Minister or to the corporation itself is but little developed. That they possess fiduciary duties, for example, is not difficult to accept, but they are not analogous to the directors of ordinary public companies.¹ It is possibly this lack of relevant rules of common law or equity that has made it necessary to make express provision for tenure of office which is almost invariably included in statutes setting up public corporations.² The circumstances in which these provisions are variously applied, however, cannot sustain

¹Members of the board of a public corporation, in a sense, constitute the corporation; it is the shareholders and not the directors who constitute an ordinary company. Cf. W. Friedmann: Law and Social Change in Contemporary Britain, Stevens (1951), pp. 203-4.

²See, Twenty-first Report of the Joint Committee on Public Accounts (Australian Aluminium Production Commission), Part I, Government Printer, Canberra (1955) pp.86-7.

an argument that wide powers of dismissal may be required on grounds of public interest.

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Although the right of the civil servant to his salary is not yet completely beyond doubt, there have been recent judicial pronouncements which suggest that a legal claim to salary would no longer be denied by the courts.¹ In local government and in the case of employees of the public corporations the matter is doubtless governed by the ordinary law of master and servant.² But the civil servant's salary is still subject to some legal disability. By statute, he is forbidden to assign it³; nor could it, until recently, be attached.⁴

¹See, supra, p. 4 n. 2

²The possibility of denial of a right to salary could, presumably, exist in the case of the servants of those statutory corporations which are servants or agents of the Crown.

³Crown Proceedings Act 1947 sec. 27 (1)(a).

⁴A recent statute, conferring additional powers on English courts to enforce maintenance and other orders relating to women and children, specifically applies the provisions relating to the attachment of earnings to earnings paid by the Crown. See, Maintenance Orders Act 1958 sec. 14.

This peculiarity of civil service salaries has been based on considerations of public interest, but as has been well demonstrated by Dr. Logan, the circumstances which gave rise to the limitations on assignment and attachment have long since disappeared and can no longer be adequately supported on grounds of public interest.¹ It is certainly arguable that circumstances may arise in which it might be desirable to prevent assignment of salary in the interests of an employee's family, but whatever the merits of this argument, there appears to be no good reason why it should be applied to the civil servant as such and not to other employees.

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The governmental employee for long had a great advantage over his counterpart in private enterprise in that this employment invariably carries with it a beneficial superannuation scheme of some kind. And if it is true that in the last decade or so private enterprise has closed this gap considerably, nevertheless governmental schemes

¹Logan, loc. cit. p. 258.

usually provide better benefits (at least at the lower levels) and are backed by government guarantee.

In the Civil Service, superannuation is governed by the Superannuation Acts 1834-1950; in local government by the Local Government (Superannuation) Acts of 1937 and 1939; and in the public corporations and other quasi-governmental bodies by the various statutes applicable to them.¹ The legal basis of these pensions, therefore, is a statutory one. But the civil servant's superannuation scheme differs from the others in one legally important respect - under the Superannuation Acts 1834 - 1950 the civil servant has no legally enforceable right to his pension which is payable entirely at the discretion of the Treasury.²

This contrasts strongly with the superannuation provisions for local government servants whose claims are readily enforceable³ and with the provisions applicable to

¹See, for example, Fire Service Act 1947 ss. 26-28; Police Pensions Acts of 1921 and 1948; Electricity Act 1947 sec. 54; Probation Officers (Superannuation) Act 1947.

²See supra p. 4, n.5.

³Contrast s. 30 of the Superannuation Act 1834 with s.8 of the Local Government (Superannuation) Act of 1937; also s. 10 of the latter Act with s.8 of the Superannuation Act 1949 as to return of contributions.

⁴See: Atomic Energy Authority Act, 1954, First Schedule, para. 7(3).

employees of other public services¹ and clearly some justification must be found for this distinction.

On the basis of the "dismissal" cases, it is tempting to suggest that the basis of the distinction is public interest. That is, the degree of public interest which has operated to deny rights of tenure to the civil servant is equally great with regard to his superannuation provisions; in the case of the local government employee, on the other hand, the influence of the public interest is much weaker and, therefore, legal rights have been given.²

But this argument cannot be sustained and indeed can be quickly refuted; the public interest in the employee of the Atomic Energy Authority is certainly no less than in the case of the clerk in the Estate Duty Office. Nevertheless, the former has an enforceable legal claim to his pension denied to the latter.³

Nor does it by any means follow that the lack of legal rights in the civil servant's pension scheme is a necessary

¹See: Electricity (Pension Scheme) Regulations 1948 s.1. 1948 No.226; S.1. 1948 No.2172 and Firemen's Pension Scheme Order 1948, S.1. 1948 No.604 as amended by S.1. 1948 No.1094; Airways Corporations (General Staff Pensions) Regulations 1948, S.1. 1948 No.2361 as amended by S.1. 1950 No.2056, S.1. 1951 No.527.

²Cf. Mitchell, op.cit., pp.67-68. It need hardly be mentioned that Professor Mitchell was not, of course, approving of this peculiar application of the idea of public interest.

³See: Atomic Energy Authority Act, 1954, First Schedule, para. 7(3).

concomitant of its non-contributory nature, in which it differs from other governmental superannuation schemes. It is at least arguable that a legal right to pension should be given to the civil servant on the ground that the pension is in fact deferred pay earned by the civil servant during his service and therefore as much a "contributory" pension as any other.

This argument was raised by counsel for the respondent in Considine v. McInerney¹ but was rejected by the House of Lords.² It is true that in this case the attitude of the Treasury was never brought but nor was the case for "deferred pay" properly argued; to this extent, therefore, the case is by no means conclusive. It appears unlikely, however, that any evidence which could have been advanced in support of the deferred pay argument would have found much favour with their Lordships. Indeed, having regard to the terms of the Superannuation Acts themselves one could not justify on legal grounds any legally enforceable right to super-

¹[1916] 2 A.C. 162. In this case the question was whether or not a pension payed under the Superannuation Acts 1834-1909 should be taken into account in assessing the amount of weekly benefit payed under the Workmen's Compensation Act 1906. If the superannuation allowance had been a payment earned by the workment in respect of past services (i.e. deferred pay) it would have been disregarded for the purposes of Workmen's Compensation Act benefits; this was the view taken by the Court of Appeal in Ireland ([1916] 2 I.R. 193) but rejected by the House of Lords.

²See especially at 171, 172, 173 and 181.

annuation on the basis of deferred pay.¹

It is difficult, therefore, to see how the civil servant's superannuation allowance could, in any legal sense, be regarded as deferred pay. And, even in the economic and practical sense, this argument has not found unqualified support. The deferred pay argument was debated before the Priestley Commission and most strongly urged by the Union of Post Office Workers whose representatives asserted that it should be paid in the event of retirement, at any time, from the service?²

The Treasury, on the other hand, maintained that a civil servant agreed to serve subject to certain conditions, one of which was that he would not leave the service before the minimum retiring age. Fulfilment of these conditions was a sine qua non of the grant of superannuation.³

¹Moreover, the method of assessing the amount of the pension payable at the end of the civil servant's service makes almost impossible any strict calculation on the basis of deferred pay. See Superannuation Act 1859, s.2.

²Royal Commission on the Civil Service 1953-55, Minutes of Evidence, 11th day, p.469, paras. 138-146.

³ibid. Minutes of Evidence, 17th day, pp.811-814. For an interesting analogy in contract cf. Lord DENNING in Kelly v. Lombard Banking Ltd. [1958] 3 All E.R. 713 and 715: "It is true that [the option to purchase] is subject to conditions... Nevertheless [it] is an existing right as from the moment of signing the contract and the payment of the money. So he has got what he paid for. He has to fulfil the conditions in order to exercise the option, but he has paid for an option which he has got."

The majority of the Commissioners considered that the Treasury view was the correct one; the minority had "some sympathy with the moral claim to some form of benefit." The matter is certainly not free from doubt.¹ In any case, however, the absence of a legal right to a civil service pension does not depend upon its non-contributory nature.

Underlying the legal anomaly in the civil servant's pension scheme is the desire to maintain as high a degree of stability as possible in civil service employment. The whole tenor of the service is that it is a life-time career and resignations before retiral age should be exceptional and not frequent.²

From the inception of comprehensive pension schemes within the civil service one of the main principles has been to allow as great a discretion as possible to the Treasury in the interests of complete and effective control over employees.³ And this principle is still emphasised in the

¹See, for example, : Royal Commission on Superannuation Acts 1857, Parliamentary Papers 1857 (session 2) XXIV at p.225; Richardson, loc.cit. p. 456 n.118; 15 Public Administration Review (1955) p.149; Superannuation in the Civil Service, International Institute of Administrative Science, (1955) p.9.

²Cf. Priestley Commission, Cmd. 9613, para. 98.

³See e.g. the debates on the Committee stages of the Superannuation Acts of 1834 and 1859 respectively: Hansard Debates, 3rd series Vol.23 (1834) Cols.874-5; Vol.153 (1859) Cols. 355-6; 376. Cf. E. Cohen: The Growth of the British Civil Service, Allen & Unwin (1941) p.63.

service today.¹

Under Section 4 of the Superannuation Act of 1914, for example, in cases where a transfer to other public employment is approved by the Treasury as being "in the widest sense in the public interest"² a contingent right to a Civil Service pension (based on length of service at the date of transfer) is granted to the transferred civil servant. If, however, a civil servant proposes to transfer to private or commercial employment, the "discretionary" nature of the pension scheme becomes an important weapon in the hands of the Crown.

"... a great many civil servants do acquire various skills of various kinds at the expense of their employer. Some of those skills are not particularly valuable except in the service of the State, but others are. It does not seem to us to be wrong that the Superannuation Scheme should be so designed that the possessors of those skills, when they have acquired them, cannot withdraw

¹In the local government service, on the other hand, a comprehensive superannuation scheme was achieved only after a long struggle between the National Association of Local Government Officers and the local authorities. Local government employment was not then a "service" in the way that it is today and therefore as a protection against the vagaries of the various employing councils, the local government superannuation scheme was of necessity a legally enforceable one. See: Warren op. cit., pp.64-65.

²Royal Commission on Civil Service, 1953-55, Minutes of Evidence, 17th day, p.794, para.8. The wide range of employment which has been approved includes: Universities in the United Kingdom and the Commonwealth; N.A.T.O.; U.N.Agencies; Singapore City Council; Royal Canadian Navy.

them except at a loss to themselves; and if ... pension rights were to be regarded as ... something to which they had a right in all circumstances - that would not in fact be the position."¹

It seems, therefore, that it has been the desire to maintain the civil service as a career service in the public interest, that has been largely responsible for the denial of a statutory right to pension. Acceptance of this, it is submitted, clearly demonstrates that the case for thus singling out the Crown servant is not a strong one - it is certainly not demanded by the nature of the employer, nor, it might be added, by the nature of the employment. Control and stability could still be safeguarded by making superannuation a legal right from retiring age or somewhat earlier.² That it is regarded

¹ibid. p. 811, Q.2574. Cf. Superannuation Act 1834, sec.20. See also: "C'est qu'en effet, il n'appartient pas à l'organisation d'un système équitable de retraite de stimuler le recrutement des fonctionnaires. Son rôle, très différent, n'en est pas moins indispensable à une saine organisation administrative: il doit être la garantie la plus valable de la stabilité des personnels." Guide pour l'établissement d'un statut du personnel des administrations civiles de l'Etat. (1951); compiled under the direction of M. Roger Gregoire for the International Institute of Administrative Sciences.

²Cf., Superannuation Act, 1949 s. 34 which provides that a civil servant between the age of fifty years and retiring age (sixty years normally) whose employment is terminated in the interests of efficiency or at his own request may be granted the same retiring allowances as if he had retired on medical grounds.

³Indeed to say that they are all the one 'career service' is somewhat much more accurate. See infra Chap.V

as a right is obviously the view of the Treasury.¹

Public interest in governmental service today demands security for the employee and continuity of employment. This is now recognised as being as important in local government and in the statutory corporations as it is in the civil service. They are all service for the public benefit; they are all "career services."² There seems no sound reason to give a legally enforceable right in one branch of the public service and deny it in another. *
* now proposed to examine some other conditions of service which raise important and controversial questions of no little difficulty to which attention must be drawn in a legal study of this subject *

Thus, the concept of tenure "at pleasure," the remaining legal disabilities associated with civil service salaries and the denial to the civil servant of

¹See Mitchell op. cit. p. 52, n.1. It is significant that in the debates on the 1834 and 1859 Superannuation Acts even where many of the arguments against the scheme could have been countered by a reference to the fact that no legal right to pension existed, this point was never mentioned. See e.g. Hansard Debs. 3rd Ser. Vol.153, Cols. 365; 380-1. This lends much weight to the view that s.30 of the 1834 Act was not thought of as a denial of right to the civil servant but as a means of ensuring that ultimate control would be with the Treasury.

²Indeed to say that they are all the one 'career service' is nowadays much more accurate. See infra Chap.V



a legally enforceable right to his pension are difficult to justify on grounds of public interest. Furthermore, they are scarcely in keeping with present day ideas of "good employer" policies in which the government ought to give a lead. Retention of such peculiarities serves only to suggest some basic distinction between civil service employment and other employment, both public and private. A distinction which it is hoped this survey will demonstrate to be untenable.

It is now proposed to examine some other conditions of service which raise important and controversial questions of no little difficulty to which attention must be drawn in a legal study of this kind.

Such a situation is exemplified by the "Laurier" test case, where a government employee would be treated as if he were an employee in private enterprise in respect of the terms of service discussed in the next chapter. The activities now to be examined are not so straightforward as they appear, not the usual elements in the context of employment, but a wide range of conduct, some of which, normally, would not be within the ordinary employer-employee relationship.

CHAPTER III - Civil liberties

Should governmental employees be free to form employee associations and organisations? Should the governmental employee be forbidden to strike against his employing authority? Should restrictions be imposed upon the political liberties of the government servant to

¹M. René Manckiewicz suggests that the right to strike is inseparable from the right to associate: "The Right to Strike of French Civil Servants," *A.J.I.L.*, Vol. 5, No. 1, Winter 1955, p. 91. This is questionable; the formation of associations gives coherence and expression to the demands of different groups of employees thus making negotiations between employer and employee easier and more effective. The strike is but one aspect of employment relations - and in governmental employment usually the least important. This is borne out by the history of civil service and local government unionism. Cf. M. Waline: *Traité Élémentaire de Droit Administratif*, 5th ed. Sirey (1953) at p. 370: "[le] droit syndical ... est essentiellement distinct du droit de grève et peut se concevoir sans lui."

Public interest as determined by the "duties" test does not demand that the governmental employee should be treated differently from his counterpart in private enterprise in respect of the conditions of service discussed in the last chapter. The questions now to be examined are not so straightforward; they concern, not the usual fundamental elements in the contract of employment, but a wide range of conduct, some of which, normally, would not be within the ordinary employer-employee relationship.

Should governmental employees have the freedom to form employee associations and organisations? Ought the governmental employee to be forbidden to strike against his employing authority?¹ Should restrictions be imposed upon the political liberties of the government servant to

¹M. René Manckiewicz suggests that the right to strike is inseparable from the right to associate: "The Right to Strike of French Civil Servants," A.J.I.L., Vol.4, No.1, Winter 1955, p.91. This is questionable; the formation of associations gives coherence and expression to the demands of different groups of employees thus making negotiations between employer and employee easier and more effective. The strike is but one aspect of employment relations - and in governmental employment usually the least important. This is borne out by the history of civil service and local government unionism. Cf. M. Waline: Traité Élémentaire de Droit Administratif, 6th ed. Sirey (1953) at p.370: "[le] droit syndical ... est essentiellement distinct du droit de grève et peut se concevoir sans lui."

prevent his playing an active part in the affairs of a political party? To what extent should governmental employment carry with it a prohibition on the holding of political views considered to be contrary to those of the system of government under which the employee lives?

These questions obviously raise problems entirely different from those concerning tenure of office, salary and superannuation. They raise important and often fundamental political controversies. The protection of the public interest becomes for that reason more vital; but for the same reason the test of public interest encounters more complex difficulties in its application.

One fact should be emphasised at once. These questions of association, strike and political conduct raise important political controversies not because they concern governmental employment but because the questions themselves are fraught with political implications. This would be so even in respect of their application to private employment.¹ It is misleading to approach such questions as though they could always be answered in fundamentally different ways according to whether the employment relationship in question was a governmental or a private enterprise

¹As, of course, was so in the nineteenth century with regard to the right of workers to form organisations. See: e.g. Webbs: Industrial Democracy, Vol. II (1897) passim.

one. This important point will be resumed later in this chapter.

*

In the United Kingdom, civil service trade unionism and collective bargaining developed rapidly in the nineteenth century. While much of this development was the concern of the government, the latter was reluctant to regard its relationship to its employees as in any way similar to that existing between private employers and employees. Conditions of service were regarded as administrative matters to be regulated solely at the discretion of the government. Employees were discouraged from association and any form of agitation¹; and to take part in trade union activity, if not illegal, was punishable by dismissal.

During the third quarter of the nineteenth and the early years of the twentieth century, however, changes took place which paved the way for rapid developments, and

¹Although they were permitted to address "memorials" to ministers, through departmental channels. See, Flanders and Clegg op. cit. pp.235-6; Cohen op.cit. p. 140 ff.

by the end of the First World War the service was provided with a complete system of collective bargaining similar in many respects to that prevailing in private industry.¹ Now the civil servant has the right to organise and indeed is actively encouraged to join his particular staff association. In the sphere of local government, too, ideas of association and collective bargaining were repugnant to nineteenth century thought. Local authorities were left to manage their staff relations in their own way and, as in the civil service, employment conditions were thought of as best settled by unilateral administrative action.² It was not until the twentieth century and particularly after 1918 that local government staff associations (especially NALGO) began to play an important role in negotiating adequate conditions of service.³

¹On the Whitley system see: L.D. White: Whitley Councils in the British Civil Service (1932); E.N. Gladden: Civil Service Staff Relationships (1943); H.M. Treasury: Staff Relations in the Civil Service (1955).

²See the Fabian tract by Professor W.A. Robson: From Patronage to Proficiency in the Public Service (1922).

³Warren, op.cit. pp.68-69. The value of this local government trade unionism was underlined in the Report of the Royal Commission on Local Government, 1923-1929 Cmd 3213 and in the report of the Hadow Departmental Committee, Cmd 3213. The task of local government trade unionism was of course rendered much more difficult than in the case of the civil service by the number and heterogeneity of the employing councils with which associations had to negotiate.

For many of the public corporations the problem of whether or not to permit their employees to associate did not arise; these corporations merely succeeded to the system of trade unions and collective bargaining which had existed in the private firms that the corporations superseded.¹ The new public corporations established since 1945 are, by statute, obliged to enter into consultation with the appropriate unions and establish collective bargaining machinery.²

The right of the governmental employee in the United Kingdom to associate in a trade union or professional organisation is thus well established. Moreover, this is so even in the case of the Police and Fire Services which are subject, in so many respects, to a semi-military type of discipline.³

¹As, for example, in the case of the London Passenger Transport Board. See London Passenger Transport Act 1933 s.67. The undertakings of the L.P.T.B. were transferred to the London Transport Executive in 1947 by the Transport Act 1947 s. 12 (1).

²Infra p. 109

³See: Police Act 1919, s.1. and the First Schedule which together provide for the establishing of a Police Federation, "for the purpose of enabling the members of the police forces ... to consider and bring to the notice of the police authorities and the Secretary of State all the matters affecting their welfare and efficiency ...;" Fire Services Act, 1947, ss.17(1)(2), 18(2) and Fire Services (Conditions of Service) Regulations 1954, S.1. 1954, No.1158.

*

The freedom to take strike action is, however, in a different category. In this respect the governmental employee is sometimes restricted in a way unknown in private enterprise.¹ In the civil service the convention with regard to strike action has already been mentioned²; in local government the attitude is the same - any attempts by the staffs to coerce their employing councils are viewed with disfavour and the penalty of dismissal is always available.³

This attitude to the strike is common in governmental employment and countries as diverse in their political

¹Cf. "The right of workmen to strike is an essential element in the principle of collective bargaining" per Lord WRIGHT in Crofter Harris Tweed Co. v. Veitch [1942] A.C. 435 at 463. And see Conspiracy and Protection of Property Act 1875 s. 17 which repealed older statutes restricting the freedom to strike.

²Supra p.7.

³See: Gibbon and Bell: History of the London County Council 1889-1939, Macmillan (1939) pp.219/220.

Warren, op. cit. p.113.

background as France¹, the United States², Canada³ and Australia⁴ insist upon the right of governments to forbid strike action to their employees.

Three reasons are usually advanced for this restriction on governmental employees: that a strike of such employees represents an infringement of the sovereign power of the state and an attack on its authority⁵; that it may interrupt essential public utility services⁶; and - in the case, for example, of police and fire services - such strikes

¹Cf. A. de Laubadère: Traité élémentaire de droit administratif, Paris (1953) p. 655 et seq.; J. Rivero: "Les Grèves d'aout 1953," Droit Social 1953, p.517.

²See, for example, Taft-Harley Act 1947; Carlin-Wadlin Act 1947. The latter, New York, Act on which the Federal legislation was modelled is particularly severe in its penalties.

³Cf. R. Mankiewicz: "Les Services Publics au Canada et le Droit de Grève," La Revue du Barreau de Québec, Vo.17, No.4 (1957) p. 186.

⁴Cf. Commonwealth Public Service Act 1922-57, sec.66.

⁵See, for example, Parliamentary Debates, Vo.207 (1927) Cols 71ff. for opinions expressed by Members of Parliament on the sympathies shewn by certain Civil Service Staff Associations during the General Strike of 1926. The result of these debates was the provisions in the Trade Disputes and Trade Union Act 1927 barring civil servants from affiliation with any organisation not exclusively composed of servants of the Crown. These provisions were repealed by the Trade Disputes and Trade Union Act of 1946.

⁶See: C.E., 20 October 1937, Dalloz 1938. III. 49; C.E. 18 April 1947, Sirey 1948. III. 33; Cf. Sperø, op.cit. Ch.2; Warren, op. cit. p.133.

might endanger public safety.¹

The argument that a strike of civil servants comes nearer insurrection than a strike of, say, shop assistants, is, on the face of it, an attractive one. The former as employees of the state appear to be rebelling against proper governmental authority; the latter are merely bargaining with a private individual or organisation and in no way upsetting the legal order.

But this confuses the governmental servant's obligations to the state as a citizen, with those which he has as an employee vis-à-vis his employer. The government - be it a central authority vaguely designated the Crown, a local authority or a public corporation - can insist on fulfilment of obligations of the governmental employee as a subject in the same way as it can demand such conduct of any citizen. As an employer, however, the government cannot invoke - without further grounds such as the interruption of essential services or the jeopardising of public life and property -

¹This is the reasoning behind such provisions as: Metropolitan Police Act, 1839 ss. 14, 15; City of London Police Act, 1839 ss. 15, 17; Town Police Clauses Act, 1847 ss. 10, 16, which relate to the neglect of and withdrawal from performance of duty by policemen. Also Fire Services (Discipline) Regulations 1948 S.I. 1948 No. 545 and Schedule. See: W.S.Carpenter, The Unfinished Business of Civil Service Reform, Princeton University Press (1952) p.68.

the concept of sovereignty in its employment relations.¹

In any case, the concept of sovereignty is, in this connection, an unacceptable one. No single theory of sovereignty is likely to meet general acceptance nor is it possible to say with any degree of accuracy where sovereignty lies in the modern democratic state.² Moreover, even if "sovereignty" in this context be considered no more than "lawful authority," it is still a misconception to regard a strike by the governmental employee as a violation of that authority. The public employee who strikes is, as would be any private employee, engaged in a conflict with his employers. The conflict is evidence of a breakdown in employment relations - it is, in no real sense, a refusal to obey lawful authority; nor is it analogous, in any way, to a breakdown of the authority of the state over its

¹This distinction between a governmental body acting on the one hand as an employer, and, on the other, as an instrument of government, is illustrated by Mitchell op.cit. p.17: "Thus, for example, in England the relationship of an Area Gas Board to its employees should be regulated by the ordinary principles of master and servant, whereas, in fixing charges ... it is possible that the board should be regarded as exercising a governmental function with the freedom that that necessarily entails."

²For a discussion of the possible application of theories of sovereignty to government contracts, see J.D.B. Mitchell: "A general theory of public contracts," 63 Juridical Review (1951) p.60. And see infra Chap. IX pp.

subjects.¹

Furthermore, the rapid expansion of state activity in the twentieth century makes the sovereignty argument an impossible one to maintain. As has been already said, the limits of governmental employment are becoming more difficult to define and, in these circumstances, it is impracticable to extend the notion of the state as a "sovereign employer" any further.²

¹A parallel is the position with regard to execution against the state. The argument that to permit such execution would be inconsistent with sovereignty is hardly a convincing one. Even the more substantial objection that interference with government property could hamper the performance of public duties is subject to qualification, in that it should not be impossible to allow execution against specified property of an unimportant nature - a practice for which there would be ample French precedents. Cf. H. Street: Governmental Liability, C.U.P. (1953) pp.182/183.

²Indeed this is recognised in the autonomy in industrial relations given to the public corporations. No attempt has there been made to invoke the doctrine of sovereignty as is apparent from the statement by the then Minister of Labour during the rail strike of 1955: "All that I have been saying about the role of Government in these questions of industrial relations really applies as much to nationalised industries as to private industries ... I believe it would be dangerous to remove these questions of industrial relations from settlement within the nationalised industries. I am afraid that they might then become only the subject of Government direction and might well become party political issues, and that I should deplore." Parliamentary Debates (1955) Vol.542 Cols 1519-1520.

It is suggested, therefore, that no arguments for forbidding governmental employees to strike can be justified simply on the ground that the state is an employer whose relationship with its servants is governed by legal rules fundamentally different from those of the ordinary law of master and servant.

Modern industrial communities are complex, highly organised structures made up of social groups each of which is dependent upon and may be importantly affected by the actions of other groups. In such a society many services are such that their interruption or breakdown can cause inconvenience, distress and, in some cases, danger to the general public. The maintenance of these essential services is generally considered to be the responsibility of the government and those involved in the provision of such services may expect to be restricted or limited in their employment relations, particularly with regard to the right to strike.

Many of these vital services are run by governmental instrumentalities: public utilities like electricity, gas, water and transport; health and welfare services; and the provision of pensions and allowances of various kinds. In these cases there may be a case for imposing a ban on any kind of action which would interfere with the running of such services. There are, however, many other

³Flanders and Clegg, *op. cit.* pp. 46-47.

services in the community, not performed by governmental employees, which are as essential and as vital as those just mentioned, in which even a short interruption would be inimical to the public interest. A strike of milkmen, doctors or refuse collectors, for example, could cause as grave inconvenience and danger to the community as a strike of local government clerks or executive officers in the civil service.

The justification, therefore, for any prohibition, legal or conventional, on strike action should be tested not by reference to whether the employment concerned is governmental but to whether the duties performed are vital to the public interest. This is recognised by such statutes as the Conspiracy and Protection of Property Act of 1875¹ and the Electricity (Supply) Act of 1919² where the motive for the application of criminal sanctions to those responsible for interrupting public utilities is the protection of vital public interests.³ The history of labour relations in all modern countries provides abundant evidence of governmental intervention in employment disputes and partly by private companies. In South Australia where the effect on the public welfare is likely to be corporation while the gas industry is in the hands of a private company.

¹See: ss.4 and 5. These provisions were invoked against strike leaders in the nationalised gas industry in 1950.

²Cf. sec. 31.

³Flanders and Clegg, op. cit. pp.46-47.

substantial and this is so whether or not the employees concerned are governmental.¹

The fallacy of distinguishing in this respect the governmental from the private employee is well illustrated by the cases where certain services are supplied by both public and private enterprise.² Would a strike in the private enterprise section of the industry be any less detrimental to the public interest than a strike of the governmental employees³? This is, of course, an important reason why in the United Kingdom the employees of public corporations must be free of statutory prohibitions on strikes; the restrictions of normal civil service departments could destroy the freedom in staff relations which

¹Cf. Emergency Powers Act 1920 used during the coal strike of 1921 and the General Strike of 1926; C.E., 28 October 1949, Sirey 1950. III. 50, by means of which the French government was able to prevent a strike of bakers; see also Wilson v. New (1917) 243 U.S. 332.

²As, for example, in the electricity industry before nationalisation when the generating system or grid was operated by the Central Electricity Board (a public corporation), the distributing stations being owned, partly by local authorities and partly by private companies. In South Australia at present the electricity industry is run by a public corporation while the gas industry is in the hands of a private company.

³See Spero, op.cit. p.6. for an amusing extract taken from the 1928 Presidential election campaign. Herbert Hoover was opposing government liquor stores favoured by his opponent Governor Alfred Smith and alleged that to make members of the liquor trade into governmental employees "must limit them in the liberty to bargain for their own wages, for no governmental employee can strike against his government and thus against the whole people."

is alleged to be one of the administrative advantages of the public corporation¹ - and would be impossible to justify on the ground of public interest.²

It is tempting to suggest that a solution to this problem could be found by drawing a distinction between directing and executive staffs and others³; a right to strike could be allowed to the latter but denied to the former. But the grade or authority of the servant is not necessarily a criterion of the effect on the public interest of the withdrawal of his services. The only test which can fairly be applied is the nature of the service provided and this will often bear no relation to the rank or status of the employee concerned. It may well be infinitely more inconvenient to the public should the orderlies in a municipal hospital come out on strike than if the entire administrative staff did so. The distinction, if one need be drawn, is not between senior staff and others but between

¹See: W.Friedmann (Ed.) The Public Corporation, Carswell (1954) p.12.

²This transfer of employees from private to public enterprise raises particularly difficult problems in France. See: "Le statut du personnel des entreprises nationalisées comparé au statut des agents de la fonction publique," Revue de Droit Public, Vol. LXXII, No.3, p.501.

³This is, of course, the solution used with regard to political activities and "security" cases, see infra p.69 And cf. Mitchell op.cit. pp.68 and 241 where he suggests a distinction between directing staffs of public corporations and others. See also Revue Administrative, (1950) p.371 et seq.

those who are performing immediately essential services and those who are not.¹

Finally, can it be argued that a prohibition on strike action should be imposed on employees of organisations like the police and fire services since interruption of these services could well lead to danger for persons and property? The case here is a much stronger one. The maintenance of internal order and protection of property are traditional governmental functions² and the employees engaged in these tasks must be subject to more stringent regulations to ensure continuous performance of their duties.³ This is the reason behind the even greater restrictions imposed on the members of the armed forces. The duties performed by these governmental servants are important governmental functions, but it is again emphasised that it is the nature of these duties that is the paramount consideration and not the fact that they are governmental.

A wholesale ban, legal or conventional, on strikes in the government service is, in principle, unsound. It is

¹See, for example: Great Western Railway Co. v. Bater [1922] 2 A.C. 1 at 34.

²Though, of course, the fire-righting services were, in the nineteenth century run by assurance companies as a private protective measure.

³It is possibly arguable that a strike of policemen or firemen need not occasion any greater danger to public safety than a strike of electricity workers on whom large hospitals may rely for their supplies of power. On balance, however, the immediate effect of the former would be much less desirable.

based on untenable reasoning and is unfair in that it implies a distinction not only between manual workers and directing, executive and clerical staffs, but between "white-collar" staffs in different arms of the government service. This distinction is in neither case based on a valid consideration of public interest but upon a mixture of historical accident and anachronistic political thinking.

It must be observed at once that the practical effect of the ban on strikes in the public service, presents no real problem in the United Kingdom. With minor exceptions, the strike threat has never assumed dangerous or even inconvenient proportions in the ranks of non-manual staffs. Discussion of the topic has not, however, been superfluous. Enough has been said to shew that the public attitude, towards even the possibility of strikes in governmental employment, has been one of intolerance. Closer examination of the nature of the problem suggests that this attitude has been coloured by much unreasonable thinking.

Because of the existence of well-organised systems of rules and regulations, promulgated after proper consultation and negotiation (of which systems, more shortly) strikes in the public service have been virtually unknown. Such strikes, no less than those in private employment, are to be discouraged. They are a symptom of a breakdown in employer-employee relations. If strikes in government employment 1950, Art.2. The excepted classes are industrial employees and certain minor and manipulative grades. See Art.1 (2)(b)(c).

ever became a possibility in any real sense, the solution would lie not in an unjustifiable ban on striking but in continuous vigilance to ensure that staff-official relations were properly organised and managed.

*

The civil servant suffers certain disabilities with regard to his political conduct. In the words of the Masterman Report:

"The political neutrality of the Civil Service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the Service."¹

Thus, no civil servant (unless belonging to an excepted group) may issue an address to electors or in any other manner publicly announce himself as a candidate or prospective candidate for election to Parliament unless he has retired or resigned from the service.² As has been

¹Report of the Committee on the Political Activities of Civil Servants, Cmd. 7718 (1949) p. 30 para 1.

²Servants of the Crown (Parliamentary Candidature) Order, 1950, Art.2. The excepted classes are industrial employees and certain minor and manipulative grades. See Art.1 (2)(b)(c).

already mentioned,¹ apart from prohibiting adoption as a Parliamentary candidate, such restrictions on conduct cover a wide variety of political activity.

There are no legal prohibitions (but obvious practical difficulties would arise) on employees of a local authority being, at the same time, Members of Parliament, with the anachronistic and anomalous exception relating to employees of County Councils.² As to participation in party politics, while nothing has been laid down in legislation or in cases, "the prevailing sentiment and practice" seems to be that councils expect their salaried staffs - particularly senior officials - to refrain from open participation in matters of political controversy.³

Nor in the public corporations are there statutory restrictions on political activities, although possibly the employees of those corporations that are servants of the Crown would come within the prohibition imposed by the Servants of the Crown (Parliamentary Candidature) Order.

¹ Supra p. 8, 9. A recent British example is that of a T.R.C. producer removed from his position, intimating his

² Local Government Act, 1888, s. 83 (13) which provides that paid officials in the permanent full-time employment of a County Council are not eligible to serve in Parliament. See new House of Commons Disqualification Act 1951, Sched IV (1)

³ See, Warren op. cit. pp. 120-1. Some respect for traditional practices. Thus in order not to imperil sources of information, decisions have sometimes to be taken without revealing full details of the supporting evidence." Statement of the Conference of Privy Councillors on Security, Cmd. 9713 p. 4 para 6

The duties of an employee of a public corporation will obviously have a bearing on whether or not some form of political restriction will be imposed.¹

The political conduct of the government servant comes under even closer scrutiny in what have come to be called "loyalty-security" cases. In the present state of world politics the freedom of the individual servant can clash with the interests of national security and in resolving such conflicts it may often be impossible to adhere to long-established constitutional traditions.²

In this sphere of the political activities of the employee, governmental employment seems truly sui generis: the government by its very nature is inextricably bound up with the activities which it is sought to limit.

¹As in the case of the employee of the East Kilbride New Town Corporation who was dismissed because her political activities would have been incompatible with her duties which involved door-to-door interviews for a social survey. See Parliamentary Debates (1956) Vols 560-1 Cols 1522-3 in South Australia, employees of the Municipal Tramways Trust (a State Corporation) are prohibited from being candidates in local government elections because of the close relationship between the Trust and local authorities. A recent British example is that of a B.B.C. talks' producer removed from his position^{on} intimating his intention to be a candidate at a general election. See The Times, 9 February, 1959.

²"The Conference recognise that some of the measures to which the State is driven to take to protect its security are, in some respect alien to our traditional practices. Thus in order not to imperil sources of information, decisions have sometimes to be taken without revealing full details of the supporting evidence." Statement of the Conference of Privy Councillors on Security, Cmd. 9715 p.4 para. 16

Restrictions on political liberty are required by the need to maintain the confidence of the public and politicians in the advice tendered by government servants or by the even greater need to safeguard the security of the state by protecting vital information. Here, above all, it seems that it is to the nature of the employer and not the duties of the employee that one must look to find justification for restrictions imposed. Duty and employer seem inseparable; and in this field, particularly, one appears clearly to be a function of the other.

A little reflection, nevertheless, shews that this is at least open to question. Indeed, if it were true, no distinction could be drawn between different duties and different classes of employee where all come under the same employer. An employer may have certain functions (and the employees therefore have particular duties) which require an unusual degree of regulation - statutory or otherwise; with regard to other functions and employees, however, no such control may be necessary. Shipping companies and the seamen they employ are - because of the duties involved - subject to the stringent regulations of Merchant Shipping legislation. The other staffs of the same companies, on the otherhand, are no different from ordinary commercial employees - yet the employer is the same.

And, for example, by the distinction which appears to be drawn in the B.B.C. between "restricted" and "unrestricted" staff, those in the latter group being employees who do not come into contact with the public in broadcasts or otherwise. See The Times, 9 February 1959.

Many duties are not a function of the employer who performs them, nor inseparable from that employer, in any real sense; many tasks could be carried out by either public or private enterprise or both.¹ Clearly those tasks are only a function of the employer or inseparable from him in the sense that at a given time they are in fact being performed by the given employer. The nature of that employer - in particular, whether governmental or not - seems irrelevant. It is the nature of the tasks performed which are of vital importance.

Thus, in respect of the public employees concerned, the government, because of its functions, may be compelled to impose very stringent standards on the political conduct of these employees. It is clear, however, from the practice of the public service that the test applied is related to the duties to be performed by the employee. This is recognised, for example, by the civil service practice of distinguishing between staffs, obviously totally unconnected with policy and those who are, or might be.²

Furthermore, it is not only in governmental employment that political conduct may have to be restricted. Security

¹See, supra p. 65 n.2

²And, for example, by the distinction which appears to be drawn in the B.B.C. between "restricted" and "unrestricted" staff, those in the latter group being employees who do not come into contact with the public in broadcasts or otherwise. See The Times, 9 February 1959.

restrictions, for instance, may have to be applied to a wide range of private employees.

Many of the activities in which a present day government engages make it highly dependent upon the operations of private contractors - mail delivery, manufacture of scientific instruments and industrial research, for example.¹ This at once poses the difficult question of how far a security system should cast its net - the occupations are legion in which some real danger to the safety of the realm could arise because of the activities of "subversive persons" (a term impossible to define with any degree of accuracy). It may be that in the United States the system has been carried to extremes² or that in the United Kingdom it is not comprehensive enough. This

¹Cf. Official Secrets Act, 1920 s.5. which compels the registration and police supervision of persons "carrying on the business of receiving postal packets."

²"... there are Federal personnel security programs which cover nearly six million civilian employees of government and industry ... They apply to the more than two million Federal civilian employees, to over three million employees of private industry, and to Americans employed by international organisations." Federal Loyalty-Security Program, p.ix. These figures do not include some three and a half million State and local government employees, a large proportion of whom come under some kind of "loyalty" check. Cf. the Lang case in which an assistant solicitor in Imperial Chemical Industries Ltd. was compelled to leave his employment because of the nature of certain contracts undertaken by the Company. See infra p.76

problem lies outside the scope of this study but the test here suggested of public interest measured in terms of the servant's duties serves to emphasise the paramount importance of the tasks undertaken by the employee. From the information available¹ this, indeed, seems to be the practice followed and "blanket" restrictions are not applied.

*

In the development of the conditions of service dealt with in the last chapter, statute law and judicial decisions have played a role, which, if not large, was not entirely unimportant. The conditions of employment just discussed, however, have developed virtually free from legislative or judicial interference.² These conditions, therefore, have been left almost entirely to the laws of the service to which reference was briefly made in a previous chapter.³ It is in this connection

¹See: Conference of Privy Councillors on Security, Cmd.9715 passim.

²Except for examples like those already mentioned, e.g. the Official Secrets Acts 1911 and 1920; Conspiracy and protection of Property Act 1875; Servants of the Crown (Parliamentary Candidature) Order 1950.

³Ch. I, p.23

that the need for the protection of statute and the ordinary courts might be thought to arise most acutely.

True, from statements made in Parliament about the case of Mr. Lang, it seems that the procedure at present adopted with regard to security cases leaves much to be desired from the point of view of protection for the individual.¹ The order of events according to a recent critic is "first, judgement without hearing, then hearing, then reconsideration of judgement."² This might indicate that the internal legal patterns form an insufficient safeguard and that perhaps the further protection of legislation and ordinary courts is required.

It is not difficult to see, however, that it is not the absence of "lawyer's law" that is responsible for the problems of protection that arise regarding the political activities of government employees. In the United States the rights of public employees have regularly come before the courts. Both judicial decisions and government legislation have demonstrated that certain functions of government necessitate restrictions on the liberty of those responsible for executing these functions, whether directly as public employees or indirectly as employees of government contractors.³ The highly developed systems of

¹Parliamentary Debates ^{5th series} (1956) Vol. 554 Cols. 766-770

²[1956] Public Law p. 195.

³See, supra pp. 8-12

employment relations in the public service are no less effective in this sphere as elsewhere. The effectiveness of this system, in the civil service for example, has not escaped comment¹ and a proper understanding of its true significance is essential in any analysis of public employment. It is to this internal legal system we now turn.

CHAPTER IV - Law, reality and collective agreements.

¹Cf. Flanders and Clegg, op. cit. pp.237-8: "... the Whitley system compares favourably with arrangements concerning wages and conditions in some other countries. In the U.S.A. the doctrine of the sovereign legislation employer is accepted by many states and still largely determines the behaviour of Congress in these matters. Such a doctrine makes lobbying the only effective weapon of civil servants. British civil servants have lobbied successfully in the past, but since they have obtained an effective system of collective bargaining they have made little use of this slow and uncertain method."

Law and reality are often in conflict. In the sphere of industrial law, for example, "the law still reflects a state of affairs which has long ceased to be the norm of practical life"¹ and continues to emphasise the "contract of employment" between the individual employer and employee. No notice is taken of the "collective agreement," which, in fact, is the mainspring of British industrial relations.

The constitutional lawyer is, however, more than usually familiar with what Lord President COOPER called, "the conflict between academic logic and political reality,"² and this conflict is nowhere more striking than in present-day governmental employment.

From the relevant judicial decisions it seems that the civil servant is a homunculus without rights and subject

¹Flanders & Clegg, op.cit., p.50. See, with regard to commercial law, 29 Columbia L.R. p.121; Dicey: Law and Opinion, p.368, n.1. and DEVLIN J. "Commercial Law and Practice," 14 M.L.R. (1951) p.249. Indeed, the law of equity may be said to have originated in the gap between common law and reality. See, Ashburner: Principles of Equity, 2nd ed. p.21.

²McCormick v. Lord Advocate, 1953 S.C. 396 at 412. The obvious parallel is the famous apophthegm of Lord Sankey L.C. discussing the possibility of the repeal of the Statute of Westminster: "...Indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard Section 4 of the Statute. But that is theory and has no relation to realities." British Coal Corporation v. The King [1935] A.C. 500 at 520.

to disabilities affecting tenure, salary, superannuation and the like, to a degree unknown in private employment. But "that is theory and has no relation to realities."

Tenure of office in the civil service is more secure than in most private employment and this security is implicit in the salary structure, promotion system and superannuation rules to which the civil servant is subject.¹ Similarly, the right to salary, although still resting on doubtful legal foundations, is left in no doubt whatever by the practice of the service.² So, too, superannuation, if not a legal right, is never denied in practice, where the conditions of its award have been fulfilled.³

Indeed, a study of the employment relationship of the British civil servant serves to emphasise the inadequacy of

¹Cf. Report of Royal Commission on the Civil Service, 1929-31 (Tomlin) Cmd.3909 para.305; Report of Priestley Commission Cmd.9613 paras. 98 and 701; [1958] Public Law p.32 et.seq.

²The Treasury pledged, in 1925, that the government would give effect to awards of the Civil Service Arbitration Court a guarantee which continues in respect of the Civil Service Arbitration Tribunal which replaced the Court in 1936. The pledge was made "subject to the over-riding authority of Parliament," a qualification stated to be necessary "to preserve the constitutional supremacy of Parliament and the possibility of a government defeat there"; but it was agreed "that the government will not itself propose to Parliament, the rejection of an award once made." Treasury Circular 14 March, 1925.

³See, supra p.51

any analysis of that relationship based solely on the legal position as found in statutes and judicial decisions. The rights, obligations and sanctions imposed by the internal patterns of administrative regulation are of greater practical importance.

By Treasury regulations the civil servant is subject to detailed control of his conduct, private as well as public.¹ Failure to obey these rules may result in severe disciplinary action varying from a reprimand to summary dismissal; on the other hand, they provide him with a readily ascertainable code of conduct containing guarantees of reasonable treatment.

The courts, on a number of occasions, have expressed opinions on the legal effect of these rules insofar as they could be considered to confer rights enforceable in ordinary courts of law. In Shenton v. Smith² the Privy Council had to consider the argument that certain Colonial office regulations formed part of a contract between the respondent and the Crown:

"As for the regulations ... they are merely directions given by the Crown to the Governments of the Crown Colonies for general guidance... they do not constitute a contract between the Crown and its servants."³

¹Order in Council, 3 August 1956, by Article 6 gives the Treasury power "to make regulations, or give instructions, for controlling the conduct of Her Majesty's Home Civil Service, and providing for the classification, remuneration and other conditions of service of all persons employed therein, whether permanent or temporary."

²[1895] A.C. 229

³Lord HOBHOUSE at 235.

Too much weight cannot be given to this statement as the point was not necessary for the decision which was based on the ground that servants of the Crown hold office "during pleasure;" it seems clear, however, that even had this not been so, their Lordships would not have considered the regulations as anything but "directions for general guidance" and in no sense, of a contractual nature.¹

The later case of Rodwell v. Thomas² is of greater importance. It deals with modern conditions, and in particular with the terms of National Whitley Council collective agreements. TUCKER J. dealing with the merits of the argument that the recommendations of a Whitley Council joint committee, incorporated in a Treasury circular, were part of the contract, stated:

"It is well-known that it has been found convenient to settle questions relating to conditions of employment through the medium of a representative body such as the joint committee, but I am at a loss to understand how every matter which is disposed of by give and take in that way can be said to be incorporated into a civil servant's contract of employment..."³

¹And see Venkata Rao v. Secretary of State for India [1937] A.C.248 at 256-7.

²[1944] K.B. 596.

³Contrast this with Littlejohn v. L.C.C. [1938] 1 K.B. 78 and R. v. Industrial Disputes Tribunal ex parte Portland U.D.C. [1953] 3 All E.R. 18. See infra pp.100-103

With respect, the fact that certain conditions of service were "disposed of by give and take" in the joint committee was not the real point at issue which was whether the subsequent incorporation of these committee recommendations into an official Treasury circular made them recognised conditions of employment.¹

The courts therefore are clearly of the opinion (although the Sutton Case suggests that such an opinion may be erroneous) that Treasury regulations, of such comprehensive importance in practice, have no contractual force. This, in turn, has led to a certain amount of distortion in discussion of the legal position of the civil servant and, it is submitted, an undue emphasis on the need for the protection of the ordinary courts.

With regard to tenure of office, for example, it has

¹ Contrast Sutton v. Attorney-General (1923) 39 T.L.R. 294 where the terms of Post Office circulars were held by the House of Lords to constitute "a contract between the Postmaster-General and the individual person who ... accepts the terms of the general offer..." It may be argued that Sutton's Case concerned merely an immediate inducement to take a certain step (i.e. to volunteer for the Army in the knowledge that one would not suffer financially) and that these circulars were fundamentally different from an offer of terms for a life-long career as in the case of normal Treasury regulations. The writer submits that this distinction does not affect the question of how far regulations (be they long-term or short-term) can be legally enforced which was the point at issue in Sutton. See: [1958] Public Law, p.32 at 43ff.

been alleged that:

"The Crown practice [of dismissal at pleasure] is contrary to public policy because it tends to deceive employees about their rights and it deprives them of that sense of security essential for the best performance of their duties." ¹

It must be observed, however, that the term "Crown practice" is obviously a misnomer in view of what has been said above, and, furthermore, every new entrant to the civil service is told:

"Every civil servant, established as well as temporary, holds his or her appointment at the pleasure of the Crown, which means that the Crown may dismiss him or her at any moment, without notice and without compensation. That is the legal position; but naturally the Crown does not act in that way without having an extremely good cause for doing so, and it is only if you should be guilty of really serious misconduct that you need be afraid of summary dismissal." ²

This would appear to be a reasonable explanation of the true position and can scarcely be described as tending to deceive employees about their rights. It is not, of course, suggested that legal critics of the present form of regulating civil service conditions are unaware that the making an appearance with some regularity, particularly in

¹Street, loc. cit. p.115; cf. also, Beinart, loc. cit. pp.42-3; Richardson, loc. cit. pp. 429-430.

²Handbook for the new Civil Servant, H.M. Treasury, 7th ed. (1955) pp.26-7.

³See: Cohen, op. cit. pp.140-1.

practice of the service mitigates the strictly legal position. It is submitted, however, that such critics have been unduly concerned with judicial protection against the risk that Treasury control may cease to be governed by present standards. But the need for judicial protection is true, in any important sense, only so far as the system of staff-official negotiations and collective agreements leaves the employee in a disadvantageous bargaining position.

The earliest means by which a civil servant could make representations to the Treasury about his salary and general conditions of employment was by individual memorial to the head of his department which was then transmitted to the Treasury. The practice then grew up of submitting collective memorials about particular grievances.

The creation of clerical grades common to a number of different departments stimulated combination and an association of clerks was formed in the 1880's which negotiated with the Treasury from a position of some strength.¹

In the late nineteenth century staff associations were making an appearance with some regularity, particularly in the Post Office and in the Admiralty; by 1891 there were no less than nineteen of these associations. Finally, in 1906 the then Postmaster-General announced that he was

side officials are part of the general administrative arrangements of the service.

¹See: Cohen, op. cit. pp.140-1.

prepared to recognise any properly constituted association and to receive representations through a suitable representative. Somewhat similar steps were taken by other departments and there seems no doubt that by 1914 the right of civil servants to negotiate through their associations was recognised throughout the service.

Conditions of employment today, therefore, are the subject of intensive discussions between representatives of the "staff" and "official" sides of the service. This may be either through the medium of the Whitley system (where the interests of more than one class or homogeneous group of classes of civil servants are involved) or between a particular department and an association recognised as representing a class of civil servants within that department. Thus the civil servant has a great advantage over the ordinary industrial or commercial employee. Legally and in strict constitutional theory the civil servant's employer is the "Crown;" as a matter of political reality the Crown in this respect is the appropriate Treasury and departmental establishment officers. These officers are, of course, no other than senior civil servants working under the same conditions of service as all the other civil servants and having wide experience of service problems. The "staff" side officials are part of the general administrative arrangements of the service.

Conditions of employment are settled, therefore, not by bargaining with an employer whose interests and sympathies may be diametrically opposed to those of the employee, but by negotiations with other civil servants working in close co-operation in departmental administration.¹

It is unrealistic, therefore, to discuss the Crown-servant relationship as though there was, on the one hand, an omnipotent legal entity called the Crown, armed with an unassailable battery of prerogatives and discretionary powers and, on the other hand, an inadequately protected individual servant liable to have his rights abused in an arbitrary manner without hope of legal redress. The factual condition of the civil servant and the legal position as expressed in judicial opinion are completely at variance and too much emphasis appears to have been given to the latter. If the administrative lawyer has any doubts about the true position of the civil servant in relation to the Crown

¹This does not mean that disagreements do not arise. There are often sharp differences of opinion between the staff and official sides, especially on salary matters; but, as a general rule, the residue of cases where agreement cannot be amicably reached and in which resort must be had to arbitration is small. There is one reform, however, which is overdue. The Civil Service Arbitration Tribunal suffers severe limitations on its jurisdiction. It can consider grades only below a certain salary figure and certain conditions of service are not arbitrable (see p.16 supra). These limits are defined by the Treasury under the existing system. It is suggested that the Tribunal itself should decide whether or not a claim falls within its competence. Cf. J.Callaghan Whitleyism Fabian Research Series No.159 (1953) p.36.

they must be dispelled to a large extent by the recent demonstration of the attitudes of the staff and official sides of the service when the subject of making minor adjustments in superannuation benefits without legislation was being canvassed before the Priestley Commission.

The representatives of the civil service staff associations pointed out that the powers of the Treasury with regard to superannuation were considerably more circumscribed - because of the statutory framework - than their powers in respect of pay, hours and leave. The staff association suggested that the Treasury should be given wider powers over superannuation, powers more in line with those wielded over the other conditions of service. In other words, the staff association were asking that the Treasury be given greater powers of discretion.¹

With the reasons given by the staff association for their request we are not here concerned; nor need we concern ourselves with the fact that the Treasury declined the offer of greater discretionary powers on the grounds that "the Government would be well advised to consider very carefully how far it should go in asking Parliament to confer powers to make minor adjustments in the particular

¹Abid. Treasury evidence, 17th day, p.805. See also for the theory that civil servants continually seek additional

¹Royal Commission on the Civil Service, 1953-55, Minutes of Evidence, 10th day, p.425; 17th day, p.805.

²See, Rehnart, loc. cit. p.43.

matters to which that new legislation relates." ¹

What seems clear, at any rate, is that the civil servant considers that the treatment he will receive from the Treasury is unlikely to require additional legal safeguards. If there is any immediate need for further protection and guarantees to be given to the civil servant he appears to be unaware of them.

It has been suggested that to talk of the law and practice of the civil service in the same way as the lex et consuetudo of Parliament is to be "more executive-minded than the executive."² If by this is meant that the civil servant should be placed in an intolerable legal position should civil service "law" alone be his only protection, it is difficult to agree with such an assertion.

True, civil service rules and regulations are "binding in honour" only. That is, the "rights" and "duties" which they are intended to yield are not rights and duties in the strictly legal sense of being enforceable in the ordinary courts of law. Any sanction which attaches to a breach of the regulations will be an administrative one imposed within the framework of intra-service discipline.

distinct and apart from the general rule of law.

¹ibid. Treasury evidence, 17th day, Q.2685. So much for the theory that civil servants continually seek additional powers involving delegated legislation!

²See, Beinart, loc. cit. p.43.

It is unrealistic, however, to regard the rules of the civil service as other than a proper system of law, no less effective within the service than that made by Parliament in statutes or the common law of the law courts.¹ Professor Robson has clearly stated the significance of the law of the civil service:

"The fact that there is very little legislation or case law dealing with the civil service does not necessarily mean that there is no law and practice of the civil service. There is such a thing as customary administrative law; and I contend that there is a considerable body of customary administrative law and practice regulating the civil service. By this I mean a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned. Such a pattern of conduct can give rise to rights and duties which are effectively recognised and observed by the administrative authorities

¹There is also the 'negative' aspect of these rules to be considered. They are binding only on the civil servant and not directly on anyone outside the service. But 'negatively' everyone is under a legal duty not to interfere with the rights and obligations they confer. Cf. Allen: Law in the Making, 5th ed. p.519: "All valid autonomic legislation, however restricted its positive scope, may be said to have this negative and by no means unimportant meaning for the whole body of citizens; and it therefore cannot be regarded as something altogether distinct and apart from the general rule of law."

²Cf. Flanders and Slegg, op.cit. pp.55-61. As is pointed out by Professor Kahn-Freund, this distinction is well-known to German and French legal literature, although its significance appears to have been underestimated here.

concerned even though they are not enforceable in the courts of law."¹

Assuming that a civil service "collective agreement" has been made and is thereafter incorporated in the manual of regulations called Estacode, what are its effects? It creates certain obligations between the parties to it; but, further, it establishes a code of conduct for the civil service generally. In other words, there is a distinction to be drawn between the "contractual" effects of the agreement and the "normative" or "legislative" effects.²

It is this latter, "legislative," aspect of the collective agreement which is of the greater practical importance. The rules and regulations formulated by Orders in Council, Treasury Minutes and the various other types

¹British Government since 1918, Lord Campion (ed.) p.97. Professor Robson also quotes, at p.98, Ernst Freund's statement that "voluntary and long continued administrative practice has many of the characteristics of law and, under favourable conditions, inherent guaranties of fairness may approach those which are generally associated with the courts of justice." Cf. E.C.S. Wade's Appendix to Dicey's Law of the Constitution, p.530: "... there are rules contained in Orders in Council and Treasury warrants and minutes which provide the effective law of the Civil Service." And see also Jennings, Law and the Constitution, 3rd ed. at p.179: "... there is a 'law and practice of the civil service' as there is a law and practice of Parliament."

²Cf. Flanders and Clegg, op.cit. pp.55-61. As is pointed out by Professor Kahn-Freund, this distinction is well-known to German and French legal literature, although its significance appears to have been underestimated here.

of civil service enactments already mentioned together constitute a law of the civil service which is obeyed by both employer and employee. This code of norms governs the employment of the civil servant and confers rights and obligations on both the servant and the employer.¹

... imposing similar duties and obligations ...¹ But the main ... * Local government service has, in fact, been ... although the courts of law have ...

While it is still far from true to talk of a local government civil service, in the sense of a homogeneous body with nationally uniform conditions of employment, there has been, in the twentieth century - and especially since the end of World War II - a growing uniformity in conditions of service of local employees generally. Many large authorities operate a highly developed system of "establishments" which takes much the same form as that of the central civil service; most of the smaller authorities adhere fairly closely to standard terms of employment. This is evidenced by the growing number of officers who transfer from one local authority to another, which would be unlikely

¹Cf. DENNING L.J. in Bonsor v. Musicians' Union [1954] Ch.479, where at 485-6 he indicated that in respect of the rules of trade associations it is often unrealistic to talk of contract as the rules are "more in the nature of a legislative code."

unless conditions of employment (particularly with regard to salary and superannuation) were fairly uniform over a wide area.

This uniformity, to a large extent, is the result of intervention by the national government by means of statutes of general application imposing similar duties and obligations on all local authorities.¹ But the main impetus towards a common local government service has, in fact, been extra-legal although the courts of law have materially assisted.

In law, the relationship between the local authority and the employee is governed by an ordinary contract of employment in which - but for the statutory exceptions mentioned below - the parties are free to determine the terms and conditions of employment within very wide limits. Before the first World War this was true in practice also. Local authorities made their own contracts with their employees and, except in the case of manual workers who were members of large trade unions capable of direct bargaining with the authority, the terms and conditions of service were rarely standard, even in the same local authority's service.

¹Cf. Local Government Act, 1933; Local Government Superannuation Act, 1937; Local Government Staffs (War Service) Act 1939.

K. McILROY: "The Negotiation of Wages and Conditions for Local Authority Employees in England and Wales" (1935) Vol. XXXIII Public Administration p. 150. And, 1942: "The political affiliation of the elected members of a council might play its part in deciding what terms the trade union could obtain."

Possibly the first World War demonstrated the value of fuller co-operation between master and servant; at any rate, between the years 1916-1918 there grew up the system of Whitleyism as a government sponsored scheme of employer-employee negotiation. Coupled with this was the development of bodies representative on the one hand of the local authorities and on the other of their employees. The County Councils Association, the Association of Municipal Corporations and the District Council Associations are examples of the former; N.A.L.G.O., the Local Government Clerks Association and the National Union of Public Employees of the latter.

But during the inter-war period the growth of organised negotiation and collective bargaining was slow, and individual local authorities continued to maintain their independence. Many of them refused to join their associations or take part in the Whitley machinery and they did not, therefore, consider themselves bound to accept the decisions arrived at by the negotiating bodies. Trade unions, anxious to get for their members the best possible terms, played one local authority off against another "even where a rate of wages had been negotiated by a Provincial Joint Council."¹ For local authority staffs the individually

¹M. McIntosh: "The Negotiation of Wages and Conditions for Local Authority Employees in England and Wales" (1955) Vol. XXXIII Public Administration p.150. And, ibid: "The political affiliation of the elected members of a council might play its part in deciding what terms the trade union could obtain."

determined contract was, therefore, still the prevailing arrangement.

The need for joint co-operation was vindicated by World War II and as in the case of private enterprise, the system of collective bargaining between local authorities and their employees' organisations received new impetus.¹ And in the strengthening of this system of joint negotiation the law was destined to play a not unimportant part.

In Field v. Borough of Poplar,² McCARDIE J. raised "the unusual and perhaps important" matter of the effect on the plaintiff's employment rights of his membership of N.A.L.G.O. The defendant council had contended that the plaintiff was "bound by the acts and views of the National Association of Local Government Officers" and the learned judge thought it necessary, therefore, to say something of that organisation. After briefly describing the aims and objectives of the association he came to the conclusion that neither the association nor any branch thereof had any authority "to alter the plaintiff's status, or to

¹ Contrast, however, Lord WRIGHT in the Salby case mentioned below. It would be strangely out of date to say that a
¹ See: The Elements of Local Government Establishment Work, Royal Institute of Public Administration (1951) p.53 ff. This impetus was probably due, in large measure, to the Conditions of Employment and National Arbitration Order 1940 (S.R. & O. 1940, No.1305) which was framed to strengthen the voluntary joint negotiating machinery which had been developing during the previous decade. If this Order was revoked and replaced by

² [1929] 1 K.B. 760.
... the Industrial Disputes Tribunal. This latter body has not been abolished. See para 10-49

ignore or override his statutory rights and privileges, or to reduce his salary without his consent, and in defiance of statutory provisions as to his employment and remuneration."

In the circumstances of the particular case this was a reasonable approach to the relationship between the employee and his trade union.¹ The consequences of thus limiting the power of the union to negotiate on behalf of the local government servant might nevertheless have had unfortunate repercussions. An employee's welfare was often dependent upon the implementing of terms of employment arrived at, not by individual arrangement, but by joint negotiating between the employing council and the staff association. Fortunately later judicial decisions have demonstrated a different attitude to the system of collective bargaining in local government employment.

The National Arbitration Tribunal had been established in 1940 (by S.R. & O. 1940, No. 1305)² and to this Court the Minister of Labour was empowered to refer any

¹Contrast, however, Lord WRIGHT in the Bolton case mentioned below. "It would be strangely out of date to hold that a trade union cannot act on behalf of its members in a trade dispute..." (at 189.) And see GODDARD L.J. (as he then was) in Evans v. National Union of Printing, Bookbinding and Paper Workers [1938] 4 All E.R. 51 at 54. Also Flanders and Clegg, op.cit. pp.52-65.

²See p.58 n.1. In 1951 this Order was revoked and replaced by the Industrial Disputes Order, S.I.1951, no.1376, the tribunal becoming the Industrial Disputes Tribunal. This latter body has now been abolished. See post p.99

industrial dispute reported to him, the decisions of the tribunal being binding upon both employers and employees. In NALGO v. Bolton Corporation,¹ the plaintiff union sought to use this tribunal to enforce its claims using as a test case the non-application by the defendants of the provisions of the Local Government Staffs (War Service) Act 1939.

By s.1(1)(2) of that Act a local authority "shall have the power" to make payments to employees (or their dependents) who have ceased to serve the local authority in order to undertake war service. The defendant corporation decided not to exercise this power and the trade union sought to have this refusal dealt with by the National Arbitration Tribunals as a "trade dispute." The House of Lords (reversing the judgment of the Court of Appeal)² held that a dispute as to the conditions of service of officers of a local authority was a "trade dispute" so as to bring it within the jurisdiction of the National Arbitration Tribunal. This decision opened the way to extensive and - from the point of view of the employee - outstandingly successful use of the arbitration machinery. Recommendations of the Whitley Councils could henceforth be made

¹[1943] A.C. 166.

²R. v. National Arbitration Tribunal. Ex parte Bolton Corporation [1941] 2 K.B. 405.

the subject of a "trade dispute" and could be brought before the Tribunal. The consequence of this was that local authorities who refused to adopt the recommendations were gradually compelled to fall into line with the majority who accepted them.¹

That this was a likely result of the decision seems to have been in the mind of Lord ATKIN when at 180 discussing the terms of s.1. of the Local Government Staffs (War Service) Act of 1939, he said:

"I cannot think that the legislature did not foresee that, once the power was given, claims would be made for assurances that it would be exercised, and that the claims would be made and settled by the usual processes of collective bargaining with which sensible masters and workmen are now familiar."

¹ It is important to notice that in the matter of wages a local authority would not necessarily be acting illegally if it paid more than the rates negotiated through the medium of the appropriate Joint Council. The Roberts v. Hopwood ([1925] A.C. 578) decision has been shown to be capable of bearing this interpretation - see In re Walker [1944] 1 K.B. 632 mentioned below. But even if the local authority were properly exercising its discretion in paying additional amounts over and above the national scales and their action could not be legally impugned by the District Auditor, the latter could conceivably refuse to certify the excess expenditure for grant purposes. The Report of the Establishment Committee of Birmingham City Council for 1954 reveals that the Corporation of Birmingham is having to meet entirely out of the rates certain wage increase payments which have been disallowed for grant purposes because "they are in excess of national standard rates of pay." See McIntosh, loc. cit. p.404. This obviously operates to maintain the uniform rates laid down by the Whitley councils and thus further standardise local authority conditions of service.

To appreciate the full impact of this decision on the movement towards a common, uniform local government service attention must be drawn to the formulation by the National Joint Council for Local Authorities Administrative, Professional, Technical and Clerical Services (National Joint Council) of a scheme of conditions of service designed to cover all local government employees in these four main classes. This scheme known generally as the Local Government Charter - was passed by the National Joint Council in 1946. It granted most of what the staff associations had been bargaining for over a long period: national scales of salaries, entry and promotion according to qualification and a comprehensive scheme of conditions generally.

Acceptance of this Charter by the National Joint Council did not mean, however, automatic adoption of its terms by all local authorities; many of these were outside the Whitley structure and many of those who were within it, resented strongly the abrogation of their authority which acceptance of the Charter involved. The Bolton decision, by giving local government employees access to the National Arbitration Tribunal (later, the Industrial Disputes Tribunal¹) made for widespread

¹Local government employees have apparently the same right of access to this body as to its predecessor - see R. v Industrial Disputes Tribunal ex parte Portland U.D.C. [1955] 3 All E.R. 18.

application of the terms of the Charter and for greater uniformity in the main conditions of local government employment throughout the country.¹

The case of In re Walker² concerned the right of a local authority to pay increased salaries to their employees by way of adding children's allowances where appropriate. In upholding the claim of the local authority to do so the court were compelled to consider "prevailing practices and conditions" in local government employment.³

The judgment of du PARQ L.J. at 651 illustrates a strikingly realistic approach:

"The practice of collective bargaining between associations of employers and workers has greatly developed in the present century. It is nowadays often impossible to regard the employment of each individual worker as the result of a separate bargain struck between master and servant. It is commonly

¹The importance of this tribunal to local government employees was evident from the strong objections raised by NALGO to the decision to abolish the Industrial Disputes Order of 1951 and thus end the system of compulsory arbitration and the Industrial Disputes Tribunal (see S.I. 1959 ~~S.I.~~ No. 1796). Indeed, so strong was the local government "lobby" in Parliament that a promise was extracted from the Minister of Labour that the "issues" part of the Order of 1951 will be retained in some form - this will still, therefore, make it possible to compel an employer to observe the terms and conditions recognised in his industry. See: Public Service, Vol.32, No.11, p.341 et seq.

²[1944] 1 K.B. 644.

³This was necessary if the House of Lords Decision in Roberts v. Hopwood ([1925] A.C.578) was to be overcome - See SCOTT L.J. at 648.

convenient and satisfactory to settle wages by means of negotiations and discussion between the representatives of employer and employed. In the case of local authorities it appears that it is customary to establish joint committees for this very purpose. The evidence shows that the salaries now in question were paid as a result of the recommendation of such a joint committee who thought it expedient to pay what are called "children's allowances" to the salaries of married men with children. In so doing the Birmingham Corporation, far from setting themselves up as model employers, are following the example of many of the joint stock banks and insurance companies. If a local authority were to be debarred from following a course which has commended itself to such profit-making employers, it is possible that they might be seriously hampered in their efforts to obtain the best services available and that the efficiency of local government would suffer accordingly."

The same realism was apparent in the decision in Littlejohn v. London County Council¹, a case concerning the application of "sick pay" regulations. The plaintiff was employed as a senior poor law officer by the Stepney Guardians until 1st April 1930 on which date, under the Local Government Act of 1929, he was transferred to the employment of the London County Council. The defendant council offered the plaintiff on his transfer a new contract, at a higher rate of pay and containing the proviso that employment with the council was subject to the council's standing orders and other rules and regulations. A

¹[1938] 1 K.B. 78.

summary of these orders was attached to the contract and under the heading "Sick Pay" appeared a clause stating that an employee unable to work on account of illness would be paid "Full pay for a reasonable period at the discretion of the appropriate sub-committee of the Public Assistance Committee."

By the Public Assistance Order 1930 the removal of a senior poor law officer was subject to the control of the Minister of Health; and article 162 (2) of that Order provided:

"The Council shall not, without the consent of the Minister, reduce the remuneration of a senior poor law officer."

It was admitted that the approval of the Minister had not been sought for the sick pay provisions of the council's standing orders and regulations.

The plaintiff was prevented by illness from performing his duties between December, 1933, and September, 1934, (when he retired on superannuation) and the council paid him full pay for eight months during this period and for the last two months of the period he was paid on half-pay. He sought to claim that (a) the standing orders and regulations were invalid in his case as they had not been brought to the notice of the Minister and (b) the reduction in his pay for the last two months of his service were contrary to the provisions of article 162(2) of the Public Assistance Order of 1930.

Delivering the judgment of the Court of Appeal, SCOTT L.J. did not think it necessary to comment on the first half of the plaintiff's allegations. On the point that the Minister's approval was necessary in order to pay the plaintiff at half his usual rate of pay, the learned judge commented:

"Getting sick pay rights he got a new advantage which was part of his remuneration ... We do not think that the application of the Sick Pay Rules on the lines of the present case ... is a reduction of his remuneration ... within the meaning of article 162. In our opinion the appellant was not only treated with kindness, but in strict accordance with his contract." ¹

It may be that the payment of half-pay, during a period of sickness, is not strictly "reduction" in the normal salary payable to the plaintiff, since whether sick pay is a right or not is by no means certain², but it is suggested that the Court of Appeal was, to some extent, induced to take the view it did because to have done otherwise would have been manifestly contrary to the policy behind the council's sick pay regulations. In this particular case the relevant trade unions had in previous years pressed the

¹ ibid. at 96. It is interesting to notice that in this case the party to a contract sought, when it became disadvantageous, to avoid it by pleading a statutory prohibition. Cf. Brown v. Dagenham U.D.C. [1929] 1 K.B. 737 where the same attempt was made by the employing council. On this practice see the strong remarks of KAY J. in Robarts v. London Corporation (1882) 46 L.T. 623 at 623 and 630. Also GODDARD L.C.J. in A.R. Wright and Sons Ltd. v. Romford Borough Council [1956] 3 W.L.R. 896.

² See infra, p.108 n.1

council for sick pay terms; at first these were granted to the extent that full pay would be paid for six months and then nothing further. The unions continued to agitate for better terms and the council made regulations providing for half-pay to be paid after the payment of full pay for a reasonable period.¹ The whole background to the sick pay regulations was, therefore, to be viewed in terms of advantage to the employee; as SCOTT L.J. put it: "To be employed on the terms of whole salary or dismissal is in the case of prolonged illness most disadvantageous to the servant."

This recognition by the courts of the role played by joint negotiation in the field of local government employment was also apparent in R. v. Industrial Disputes Tribunal ex parte Portland Urban District Council.² Here the Court of Appeal was asked to quash an order of prohibition granted by the Divisonal Court and prohibiting the Industrial Disputes Tribunal from dealing with a matter referred to it by the Minister of Labour and National Service on the application of N.A.L.G.O.

The facts were that an employee of the council was employed under a scheme of conditions of service to which the Union took exception. As a result of adjudication by
This point also arose in the Council discussions about the advisability of giving to civil servants, contractual enforceable rights. See para p. 249

¹See at 84.

²[1955] 3 All E.R. 18.

the Industrial Disputes Tribunal the council were instructed to employ the servant concerned under a different scheme of conditions, more advantageous to the employee. The local authority, as they were compelled to do, duly implemented the award but immediately got out of it by the simple expedient of terminating the servant's contract, re-advertising the appointment and subsequently re-appointing the same employee, specifically under the scheme of conditions originally objected to by the union. The union thereupon referred the matter to the Minister and asked that the Industrial Disputes Tribunal should adjudicate this new issue. The local authority took objection to this reference to the Tribunal and accordingly sought an order of prohibition which was granted by the Divisional Court. On appeal the order was refused.

The judgment of DENNING L.J. is revealing in that it clearly indicates that in the light of modern collective bargaining systems, there may well be circumstances in which the contract with the individual employee is less important than the repercussions such a contract might have on employment relations generally.¹

system of joint negotiation.

¹This point also arose in Whitley Council discussions about the advisability of giving to civil servants, contractual enforceable rights. See infra p. 248

"The first point is whether there was any controversy ... I think there clearly was. The action taken by the local authority was so provocative that no one could suppose that the trade union would acquiesce in it or remain silent under it. Mr. Carter [the employee] himself may have been content, so that there was no issue between Mr. Carter and the local authority; but there was clearly an issue between the trade union and the local authority." ¹

BIRKETT L.J. referred to the case as "really a battle between a local authority ... and a trade union" and discussing (at 24) the fact that not only the Industrial Disputes Tribunal, but previously, the Whitley Council had decided in favour of the union, he strongly disapproved of the local authority's action:

"I am bound to say that it does not seem to me to be consonant with the standards local authorities ought to set as employers to try to defeat the decision of the tribunal by this rather transparent device."

It is true that all the court had to do in the Portland case was to say whether or not there existed an "issue" which would come within the jurisdiction of the Tribunal, but the above statements illustrate the court's willingness to look further than the individual master and servant contract where necessary, in order to give effect to the system of joint negotiation.

¹ at 21. See Turner v. London County Council [1961] 2 All E.R. 32; Local Authorities' Methods of Appointment R.I.P.A. (1951) pp. 15/16.

² [1939] 1 Ch. 771.

Apart, therefore, from any particular terms in the contract applicable to a given appointment, and any relevant statutory provisions, there can be three other kinds of conditions of service to which the local government employee may be subject and to which - if they have been brought to the notice of the employee - the courts will give effect as terms of the contract. These are: conditions settle by the National Joint Council, those decided by a Provincial Joint Council and the rules, orders and regulations of a particular local authority.

It seems that individual notification of these conditions is not necessary (except, perhaps, in cases where they are of special importance, e.g. a proposal to reduce salary would presumably require the consent of the individual employee) and a general notice of the conditions applicable to the staff of a local authority would be sufficient.¹

In Compton v. West Ham Borough Council² it was held that regulations made by a local authority (providing that employees absent on account of illness should be paid for three months on full pay and thereafter on half-pay for another three months) would not be implied as terms of his

¹ See Farmer v. London County Council [1943] 2 All E.R. 32; and also: Local Authorities Letters of Appointment R.I.P.A. (1951) pp.15/16.

²[1939] 1 Ch. 771.

contract because they had not been communicated to the employee. The sick pay regulations had been agreed by the council in 1913 and at the instance of an employees' trade union had been altered to the advantage of council employees in 1922. The plaintiff's employment dated from October, 1934. In finding that these regulations could not be implied as a term of the plaintiff's contract,

CROSSMAN J. said:

"I find that the plaintiff when he was appointed in 1934 did not know of the sick pay regulations which had been adopted by the defendant council ... and there is no sufficient ground for implying as a term of the plaintiff's contract of employment the provisions as to sick pay which the defendant council had adopted."¹

This is in contrast with the decision in Littlejohn v. L.C.C.² mentioned above and it is submitted appears to be contrary to the normal practice in industrial relations; there can be no management in enterprise, public or private, without some code of discipline and by entering into a contract of employment the employee submits to the existing code of discipline, even though he may not have seen a copy of the rules.³ It is not only more realistic, but more in

the public interest, that where rules and regulations are made by a local authority - particularly after some measure

¹at 776

²[1938] 1 K.B. 78, see supra p. 100

³Kahn-Freund, op. cit. p.49.

of joint negotiation has taken place - they should be regarded as terms of the employment contracts made between that authority and its servant.¹ It is in this way that greater standardisation of conditions of employment is achieved; and without this standardisation it is fruitless even to attempt to make worthwhile improvements in the local government service.

The local government servant works under a contract of service; but to a greater or less degree according to the duties he performs, his contract is hedged around by a mass of statutory provisions, and by conditions of service laid down by negotiating bodies. From a heterogeneous collection of contracts local government employment has progressed to a highly developed system of standard form contracts, in which, however, the bargaining power of both parties is substantial.

¹Coal Industry Nationalisation Act 1946 s.46; Transport Act 1947 s.95; * Electricity Act 1957 s.12; Gas Act 1948 s.57; Overseas Resources Development Act 1948 s.8; Air Corporations Act 1943 s.20. For similar examples of pre-1945 corporations see: Port of London Act 1908 s.4(7); London Passenger Transport Act 1933, Part VI.

¹Fortunately the Compton case, on other grounds, will probably not be followed. It was assumed by the learned judge that on the authority of Marrison v. Bell [1939] 2 K.B. 187, an employee was entitled to full pay during sickness unless otherwise provided by an express or implied term. But now see O'Grady v. Saper [1940] 2 K.B. 469, where it is denied that Marrison v. Bell can be interpreted in that way.

In the statutes of the public corporations we frequently encounter the rare exceptions to the general rule that British industrial relations do not rest upon legal foundations. Many of these corporations, particularly those which administer the nationalised industries, have been statutorily obliged to enter into consultation with appropriate employee organisations in order to establish collective bargaining and negotiating machinery.¹

Most corporations have a Staff or Labour Department and the negotiating machinery in some cases is highly developed and complex.² Staff conditions of service follow the usual pattern and legal enforceability plays an almost insignificant role in their application.³ Even in semi-military services like the police and the fire service machinery exists for joint negotiation with respect

¹Coal Industry Nationalisation Act 1946 s.46; Transport Act 1947 s.95; Electricity Act 1957 s.12; Gas Act 1948 s.57; Overseas Resources Development Act 1948 s.8; Air Corporations Act 1949 s.20. For similar examples of pre-1945 corporations see: Port of London Act 1908 s.1(7); London Passenger Transport Act 1933, Part VI.

²See: Clegg & Chester: Wage Policy and the Health Service, Blackwells (1957) especially chapters 2 and 5; Clegg: Labour Relations in London Transport, Blackwells (1950) Ch.II.

³There are minor exceptions in respect of "fair wages" clauses - see, e.g. Civil Aviation Act 1949 s.15 and 11 M.L.R. (1948) p.269 and p. 429.

to conditions of service.¹

As in the case of the servants of local authorities the employees of public corporations work under contracts of service² which are standardised within each corporation by regulations establishing uniform conditions of service.³

¹ See supra p. 57 n.3 ; Fire Services Act 1947 s.17(1)(2) Conditions of service are considered, in so far as they affect chief officers, by the National Joint Council for Chief Officers of Local Authorities' Fire Brigades, the counterpart body for other firemen (not being auxiliaries) being the National Joint Council for Local Authorities' Fire Brigades. The Police Council was established in 1953, the constitution of which provided for arbitration at the request of either side.

² Again the point arises whether this would be so where the corporation was a Crown Servant. This seems however in practice to be unimportant. Cf. McClelland v. Northern Ireland Health Board [1957] 2 All E.R. 129 at 131. The Irish judge of first instance dismissed the plaintiff's action for wrongful dismissal on the ground that she was a civil servant holding office during the pleasure of the Crown. But this view was not argued nor was it at any time supported by the Board. It is submitted that this was not because of the difficulty of establishing that the Board was a Crown servant but because of the desire to avoid any suggestion that appointment should be terminable at pleasure. See the remarks of GODDARD L.C.J. at 134 to the effect that the Board's employment policy was influenced by civil service security of tenure.

³ See: Barnard v. National Dock Labour Board [1953] 2 Q.B. 18; These regulations may be statutory in form (as under the National Health Services Act, 1946, s.66) or merely internal departmental instructions (as in the case of the London Transport Executive); see Clegg op. cit. Ch. VI.

² Cf. Ex parte Fry [1954] 2 All E.R. 115 at 119, 121.

³ Cf. "In theory, the decisions of the conciliatory machinery, being incorporated in each man's contract, are enforceable in the courts, but the extent to which this is so and the manner in which it could be done have never been fully tested in the courts. In practice, disputes are almost invariably settled by reference to the conciliatory machinery itself..." Friedmann (ed.) Public Corporations, (1954), p.215.

Dock labourers provide an interesting exception to this contractual relationship. They are employed in the reserve pool of the National Dock Labour Board and are not subject to a contract of service; they have a status conferred upon them by the regulations made under the Dock Worker (Regulation of Employment) Act 1946 and like, therefore, the police and fire services, they work under a code of discipline involving a wide range of punishments and possessing a system of appeals.¹

Even, however, in those cases where the employee is subject to a comprehensive disciplinary code of this kind, the effectiveness of the code is based almost entirely on administrative sanctions and the law courts rarely have occasion to interfere.²

Employer-employee relations in the public corporations illustrate the same divergence between law and practice that was apparent in the case of the civil service and local government³ and which permeates the whole of British industrial

¹ See: Barnard v. National Dock Labour Board [1953] 2 Q.B. 18; Vine v. National Dock Labour Board [1957] 2 W.L.R. 106. In the latter case, see especially Lord KILMUIR, L.C., at 112 and Lord KEITH of AVONHOLM at 119.

² Cf. Ex parte Fry [1954] 2 All E.R. 118 at 119, 121.

³ Cf: "In theory, the decisions of the conciliation machinery, being incorporated in each man's contract, are enforceable in the courts, but the extent to which this is so and the manner in which it could be done have never been fully tested in the courts. In practice, disputes are almost invariably settled by reference to the conciliation machinery itself..." Friedmann (ed.) Public Corporations, Carswell, (1954) p.449.

relations. Cases which have any bearing on the relationship, rights and duties of the governmental employees are few; statutes, where they are not completely silent, leave conditions of service to be regulated by machinery and procedures essentially non-legal in nature.

*

Certain differences do exist between the forms of collective bargaining used in the different branches of the governmental service - the awards of the Civil Service Arbitration Tribunal are not legally enforceable, as were the awards of the Industrial Disputes Tribunal to which the employees of the local authorities and the public utilities had access; the Whitley machinery within the civil service is organised differently from that in local government reflecting the greater diversity of employers in the latter service; some employees, as has just been mentioned, are subject to a semi-military code of discipline rather more far-reaching than the usual employment regulations. As will be suggested in the next chapter, these differences are of little legal or practical significance and indeed the collective bargaining machinery throughout the public service contributes in no small way to the uniformity of conditions

therein existing. One important, and regrettable, limitation on the effectiveness of the system of collective bargaining within governmental employment deserves mention - the ministerial veto over agreements reached in the course of Whitley Council deliberations.

A particularly flagrant example of this occurred when, in 1957, the Minister of Health vetoed an agreement for a 3% increase for the administrative and clerical grades of the National Health Service made by the appropriate Whitley Council. The veto operated extremely unfairly since it did not constitute a dispute between the respective employer and employee organisations and could not, therefore, be taken to the Industrial Disputes Tribunal. The claim was, however, subsequently taken to the Industrial Court which awarded much higher increases than those which had already been turned down by the Minister.¹

The government in situations of this kind are attempting to fulfil three functions - employer, guardian of the national economic interest and arbitrator; these roles are incompatible, but the solution is clear. The government cannot cease to be an employer, nor can it avoid the

¹See, The Times, 16 August 1958, p.3; on the same page it was reported that the Home Secretary and the Secretary of State for Scotland had asked the National Joint Council for Chief Officers of Local Authorities' Fire Brigades to reconsider certain recommended pay rises on grounds of "the present financial and economic situation."

responsibility for the national economic interest. It can, however, transfer the functions of conciliation and arbitration to an independent tribunal and accept the findings of such a tribunal - or, if it is going to be compelled to vary them because of the overriding nature of the demands of public interest, then such variations must be applied to all employees and not to governmental servants alone.

It is not surprising, ~~therefore~~, that the government takes a vital interest in the wage negotiations of public employees, but it is well to bear in mind that direct governmental influence of such negotiations is apt to be governed as much by the attitude of a particular Minister or by the Cabinet mood of the moment or by fear of criticism from colleagues as by any acceptable general principle. The result may often be that the consequences of a decision fall arbitrarily on one group thus creating ill-will and distorting recognised patterns of employment conditions.

This is not to argue that the minister can, or should, abandon legal responsibility. It seems quite consistent with constitutional theory that vis-à-vis public servants, as employees, the minister should agree to be bound by the decisions of an arbitration body; ministerial intervention in such cases is no more appropriate than it is in respect

²See infra p. 154

of private employees.¹ The fact that it may be administratively and politically easier is obviously significant, but hardly an argument.²

The operation of collective bargaining in public employment relies to a great extent not on law but on voluntary agreements on which pledges that they will be respected have been given. The confidence of the staffs of government bodies of all kinds in reasonable negotiation can only be undermined if the government does not respect the system.

¹It might also be observed that many ministerial decisions are by no means final in that they are subject to review by a court of law; and in some cases a minister's decision can be exercised only with the approval of other persons. Cf. Tribunals v. Inquiries Act 1958 s.5. See p. 86 n. | supra for the practice of the Treasury in respect of awards of the Civil Service Arbitration Tribunal which maintains constitutional theory while ensuring that Ministerial interference is kept under control.

²See infra p. 256

all governments. It is for the benefit of the public interest and the effectiveness of that service as a consequence of the unity of all governmental employment. As has been explained in previous chapters this element of public interest is responsible for the presence of certain common features in the organization of service of the governmental service, such as the organized and professional department, a local authority or a public corporation. Governmental service is organized in a national service and a local service.

CHAPTER V - The unified bureaucracy

Governmental service is a unified bureaucracy with the following features.

There are, of course, variations on this. A number of differences exist with the private sector, in many respects, employment conditions in the different arms of government.

In local government services in the civil service, there are still many officials who need not give their whole time to the local authority. In many urban and rural districts, for example, the clerk is a part-time local official or solicitor; the medical officer, a private practitioner relying for the greater part of his income on his private practice and the treasurer is often a local banker. Such part-time

All governmental service is for the public benefit and the public interest in the effectiveness of that service is a characteristic common to all governmental employment. As has been apparent in previous chapters this element of public interest is responsible for the presence of certain common features in the conditions of service of the governmental servant, whether employed by a ministerial department, a local authority or a public corporation. Governmental service is becoming, to an ever-increasing extent, a national service in which uniformity and transferability are prominent features.

There are, of course, limitations on this. A number of differences exist that distinguish, in many respects, employment conditions in the different arms of government.

In local government, unlike in the civil service, there are still many officials who need not give their whole time to the local authority. In many urban and rural districts, for example, the clerk is a partner in a local firm of solicitors; the medical officer, a private practitioner relying for the greater part of his income on his practice and the treasurer is often a local banker. Such part-time

service may raise administrative problems¹ but it has been of little legal significance, except in connection with reckonability of service in assessing superannuation allowances or compensation for loss of office.²

There are, too, many differences in the composition of the staffs of the different branches of government service. The proportion of manual to non-manual workers is much higher in local government and in many public corporations (especially the nationalised industries) than it is in the civil service; the administrative class of the latter has no real counterpart in either of the other two services where for the highest executives the emphasis is on professional qualifications. Again these differences raise no problems for the lawyer. It might be argued that the distinction between manual and non-manual workers is a real one in the sense that more exacting standards of public interest operate with regard to the latter³ but, as has been suggested, this dichotomy pays too little attention to

¹See: Maud & Finer: Local Government in England and Wales Hutchison's H.U.L. 2nd Ed. (1953), pp.138/9.

²R. v. Local Government Board (1874) 43 L.J.Q.B. 49; Carpenter v. Bristol Corporation [1907] 2 K.B. 617. There are numerous examples of part-time employment on the boards of various public corporations.

³Cf. Mitchell op. cit. p.68.

the importance of the duties to be performed.¹ The manual worker may be, in certain circumstances, no less a subject of public interest than a senior executive or member of the board of a public corporation.² The minor local authority is less a matter of public interest than the Treasury, not because it contains a higher proportion of manual workers but because the duties of the latter obviously affect the welfare of the nation in a much wider manner.

Of greater significance is the heterogeneity of employers which is a major feature of local government. The local government "Charter" referred to above has been

¹See p.67 and n.1 supra. In the Bater case there mentioned Lord WRENBURY said at 34: "A man's employment does not become any more 'public' because it is sedentary or clerical and not physical or manual. As between an engine driver and a fourth-class clerk, the former certainly owes more duties to the public, whose lives he, in fact, has in his hands, than does the clerk who sits in an office and casts up accounts or conducts correspondence of checks returns." On the fact that manual workers usually have a wage and not a salary, see the remarks of Lord SUMNER at 28: "It is, however, a purely arbitrary distinction and so indefinite as to be really accidental. For economic purposes it is convenient to treat wage-earners as a class, and for political purposes the receipt of a salary is often supposed to involve a different point of view from that which attaches to the earning of wages, but the first term really refers more to the nature and conditions of the manual work done than to the remuneration paid for it and the second denotes social aspirations rather than any revenue category."

²The fact that the latter may often have more detailed terms of appointment is not necessarily a criterion of superior public interest! See supra p. 36-41

¹See: Warren, op. cit. Ch. IV.

drafted in purposely wide language¹ because of the difficulty of making comprehensive conditions of employment for a service so heterogeneous as local government. The detailed and precise regulations providing for the uniform conditions of employment of civil servants, police and firemen, for example, are in contrast to the scheme of the local government Charter because much of the field which the latter attempts to cover is impossible to standardise. The differences in size, area and functions of the different local authorities demand differences in organisation and staffing. Here again, however, this diversity, since it relates mainly to salary scales, rates and classification of appointments is of little legal significance.

100. These organisation and administrative differences are, however, more than offset by a number of factors which directly and indirectly are drawing together the different branches of government with consequent uniformity in conditions of service and transferability of staffs; the

¹See: Warren, op. cit. Ch.IV.

powers of surveillance and inspection exercised by the central government over a wide range of local authority activities; the growth of the new towns established by public corporations; the wholesale transfer of local government staffs under the social services and public utilities legislation of the post-World War II period; the imposition of statutory duties on certain local government officers and ministerial control over the conditions of service of others; the facilities for transfer afforded by the superannuation statutes; and, of major importance, the influence of collective bargaining and Whitley machinery assisted by powerful trade unions like N.A.L.G.O.

The increased central influence over local authorities by means of powers of review,¹ advisory services² and direct control³ has greatly increased since 1938. This power over local authorities may be deprecated⁴ or praised⁵

¹Cf. Education Act 1944 s.16.

²E.g. information circulars and memoranda issued by the Home Office to Children's Committees under the Children Act, 1948.

³Cf. Fire Services Act, 1947, s.21. *Though see now Fire Services Act 1959*

⁴See W.A. Robson: The Development of Local Government 3rd Ed. (1954) Allen & Unwin p.36 et. seq.

⁵Cf. J.S.Harris: British Government Inspection (1955) Praeger, N.Y., pp.7-11.

⁴Local Government and Central Government, p.246 and see p.1 on that page.

but it has had the important effect of imposing on local authorities a high degree of standardisation with regard to some of their more important functions. This is most obvious in the police and fire services¹ but under such statutes as the National Assistance Act, 1948, and the National Health Services Act of 1946, the central government department has by legislative and administrative direction defined national uniform standards to which local authorities must conform.² The immediate legal effect on the employee of this form of local government supervision is not significant,³ but the practical effects cannot be ignored by the lawyer. This central government intervention develops:

"A service professionalism divorced from the old conception of a local government service, and finding its stronger links with the central government department, and through it, with colleagues in other areas all over the country, rather than with councils and committees and colleagues in other [local government] departments."⁴

¹The major terms of the fireman's contract with the local authority ~~was~~ ^{were formerly} laid down by the Home Office. See: P. Pain: Manual of Fire Service Law, Thames Bank Publishers (1951) p.59. See also Fire Services Act 1959

²See: Local Government and Central Control, A West Midland Group Study, Rutledge & Kegan Paul (1956) p.234 et. seq.

³Except that it is interesting to observe that with regard to officials like policemen and firemen "the major terms of the contract are laid down by a stranger to the contract." See: Pain op. cit. p.59 and infra p.126

⁴Local Government and Central Control, p.244 and see n.1 on that page.

In other words the local government employees concerned with those services in which central government control plays an important part, become professionally integrated with the civil servants who are responsible for that control. The distinction between local and central government becomes blurred and the feeling of "service" is not local but national.

Under the New Towns Act of 1946 and subsequent legislation¹ the central government may, under Commissioners appointed by the appropriate minister, establish and develop "new towns." These may be either completely new towns or former villages re-planned and extended to admit new industries and population.²

These corporations are, in fact, a kind of hybrid administrative unit, combining the statutory form and organisation of a public corporation under ministerial control,³ with many of the functions of a local authority.⁴

¹New Towns Acts of 1952 and 1953.

²See G.D.H. Cole: Local and Regional Government, Cassell (1947) p.74 ff. The various port authorities such as the Mersey Board and the Port of London Authority are also akin to local governing bodies in many respects. See, H.R.G. Greaves: The Civil Service in the Changing State. Harrap (1947) p. 109 et. seq.

³New Towns Act, 1946 s.19. And see Franklin v. Minister of Town and Country Planning [1948] A.C. 87.

⁴ibid. s.2(4); this general section is however severely curtailed by s.21 and the effect of this is to make the primary purpose of these corporations estate development and management.

It is apparent that in the fulfilment of their duties they will require to work in close liaison with the local authority in whose area the new town is established.¹

The affinity of these corporations with local government is further strengthened by the fact that statute provides² that they are to be "undertakers" for the purpose of the application of local government superannuation benefits.³

Whether a local governing body or a public corporation is chosen to administer a particular area is thus largely a matter of administrative convenience; it does not require any legal differences in the employment relationship of the employees concerned. The purposes of the instrumentalities are broadly the same, the public interest in their duties is identical. The fact that one is legally more a part of

¹"The New Towns are not to become at the outset separate administrative units, either under their Commissioners or under new Local Authorities of their own. The existing Local Authorities of the areas in which they are to be built are to assume, in the first instance, the responsibility of providing sanitary, educational and other public services; and the Commissioners are to act rather as Estate Development Companies for their entire areas ... than governing authorities." Cole, op.cit. p.74.

²New Towns Act 1946 s.18.

³Local Government Superannuation Act 1937 s.5. provides for the participation in the benefits of superannuation funds maintained under that Act, of employees of undertakers exercising powers under any Act or statutory order.

"central" government than the other should be, for the purposes of conditions of employment, irrelevant.

The transfer of services from local authorities to central government bodies is not new and important instances occurred early in this century.¹ But it was after the Second World War that this trend became of major significance and the public utility and social welfare legislation since 1946 has been responsible for a large scale transfer of local government tasks and employees to central government agencies.²

A tradition for long existed that servants of local authorities were, in some important sense, professionally distinct from those of the civil service; educational qualifications on entry and the emphasis in local government on executive and professional duties in the higher ranks served to establish a difference in status.

This difference has been rapidly disappearing, however, mainly because of post-war interchange between the staffs in all branches of government and it is reflected

¹See: Local Government and Central Control, pp.24-25.

²And, under the National Insurance Act of 1948, many employees of private enterprise assurance companies were so transferred.

in the development of such trade unions as N.A.L.G.O.¹ This trend underlines the need to abandon anomalous distinctions between governmental employees based solely on the particular arm of government in which they are serving.²

In some cases local government officers have duties imposed upon them directly by statute. For these purposes the officers are in fact acting as agents of the Crown, although the employing local authority may still

¹Of the total membership of N.A.L.G.O. in 1950 (209,000), about 150,000 members were employed in local government. See Warren, op.cit. pp.133-134. The official journal of N.A.L.G.O., Public Service, is now published in three different sections - local government, gas and electricity, and the health services. The striking feature of this journal is the continual emphasis on the unity of governmental service in every sphere. Cf. Public Service, January 1958: "Is there any reason why civil service and nationalised industry employees should continue to be regarded and treated as different types of public servants? ... all public servants could be recognised as such be they employed in the civil service, local government or the nationalised industries and services."

²In the National Health Service, for example, the medical officers of the Ministry of Health will work in terms of equality with their professional brethren in the local authorities. The employer in each case is different but the duties are much the same; this is manifested in the transfers of local authority medical officers to administrative posts within the Ministry of Health. Technical officials in the Fire Service Department of the Home Office were recruited largely from the local authority fire services. See Local Government and Central Control, p.243.

retain some employer's rights.¹ In other cases the appointment, dismissal and, occasionally, salary of local government officials are subject to some degree of control by the central government.²

This has certain important effects with regard to the liability of the local authority for the actions of these officers vis-à-vis the general public and the law on this matter is more than obscure.³

Consideration of this aspect of the effects of central government control over local authority employees lies outside the scope of this study. Not so the effect such control has on the employer-employee relationship from the point of view of the parties to it.

¹Cf. Fuel & Lighting Order, 1939, art.16(1): "Each local authority shall ... appoint ... an officer to be called 'the local fuel overseer' who shall hold office, subject to any directions of the divisional coal officer, at the pleasure of the local authority." Also Representation of the People Act, 1949, s.6, providing for the appointment of the clerks to local authorities as "registration officers."

²Some of the officers to whom this is applicable are: Medical Officers, Sanitary Inspectors, Surveyors, Chief Education Officers and Clerks of County Councils. See, Robson, op.cit. pp. 315-318.

³See, generally, Gleeson E. Robinson: Public Authorities and Legal Liability (1925) Chap.III. Partial control by the central department may destroy the master-servant relationship between the local authority and the officer so that the former would not be liable under the doctrine of respondeat superior. See, for example, Stanbury v. Exeter Corporation [1905] 2 K.B. 838. Similarly, the dual "control" of central and local authorities over the police has made the law regarding responsibility for police activities far from clear. Cf. Fisher v. Oldham Corporation [1930] 2 K.B. 364.

This matter has been raised in two cases,¹ the decisions in which seem to conflict. In Field v. Borough of Poplar² the defendants reduced the salary of the plaintiff, a senior sanitary inspector in their employment. They had not dismissed him, nor had he resigned, nor at any time did he consent to the reduction. The council failed to obtain the unconditional consent of the Minister of Health and it was held by McCARDIE J. that the council had no power to make the reduction in salary.

The statutory provisions governing the plaintiff's appointment were complex³ but broadly, the effect of the legislation was that (a) a senior sanitary inspector should be removable by the local authority only with the consent of the Minister of Health, (b) he could not be appointed for a limited period only and (c) the local authority must pay to every sanitary inspector such salary as may from time to time be approved by the Minister of Health.

¹In Littlejohn v. L.C. [1938] 1 K.B. 78 and Compton v. West Ham Borough Council [1939] 1 Ch. 771 the question of Ministerial control was raised but in neither case was the point taken. See supra pp.100 and 106.

²[1929] 1 K.B. 750.

³Metropolis Management Act 1855 s.62; Public Health (London) Act 1891 ss.107, 108; London Government Act 1899 ss. 1, 2; Public Health (Officers) Act 1921 s.7; Sanitary Officers Order 1926, Clauses 13, 17. See the remarks of McCARDIE J. at p.756 on "possible insanity."

McCARDIE J. prefaced his remarks on the question of the right to reduce salary with a comparison of the instant case with that of Brown v. Dagenham Urban District Council¹ which the learned judge had decided a month or so previously.

"... it seems clear that the plaintiff occupied a position which differed in striking fashion from that held by, for example, the clerk to the urban district council in the recent action of Brown v. Dagenham U.D.C. ... There the clerk was liable to immediate dismissal at any time at the pleasure of the council. His salary was quite free from any question of approval by the Minister of Health."²

Having regard, therefore, to the statutory provisions governing the plaintiff's position as senior sanitary inspector, "I hold that these defendants could not cut down the plaintiff's salary without his consent [my italics] given by himself or some authorized person." It is not absolutely clear whether the words in italics are meant to refer to the Minister of Health or to the plaintiff but it is difficult to see how they could refer to the latter. Whether this is so or not, the Field case is not easy to reconcile with the decision in Moss v. Chesham Urban District Council.³

The plaintiff in that case was a surveyor and engineer employed by the defendant council between the years 1927

¹[1929] 1 K.B. 737.

²at 759.

³(1945) 61 T.L.R. 290.

and 1941. In september, 1927, by an agreement in writing it was agreed that the plaintiff should serve the council for four years from that date, subject to the right of either party to determine the engagement at any time on giving one month's notice in writing. In 1931 the agreement was to terminate automatically unless the parties should have previously agreed for the continuance thereof; at the expiry of the agreement in 1931 the plaintiff continued in the service of the council, on the same terms, except that his salary was from time to time increased.

By the Ministry of Transport Act 1919, Section 17(2):

"... the Minister may, by agreement with the local authority, defray half the salary and establishment charges of the engineer or surveyor to a local authority responsible for the maintenance of [certain classified] roads, subject to the condition that the appointment, retention, and dismissal of such engineer or surveyor, and the amount of such establishment charges, shall be subject to the approval of the Minister."

The defendant council was in receipt of a grant from the Ministry of Transport. The plaintiff was suspended in December, 1941, and it was contended on his behalf that the council had no power to suspend or dismiss him without the consent of the Minister. It was admitted by the council that such consent had not been obtained.

In the view of LYNSKEY J. the effect of the statute on the contractual relationship between the plaintiff and the defendant council was clear. The section just quoted

did no more than empower the Minister of Transport to enter into agreements with local authorities to defray half the cost of certain charges which would otherwise have to be borne entirely by the local authority. The section conferred no right on the local authority or on the plaintiff; nor did it provide for any payment by the Minister to the plaintiff. The local authority, as a result of an agreement made between the authority and the Minister, acquired certain rights against the latter. But unless the plaintiff had been a party to that agreement he could not, in the view of the learned judge, acquire any rights against either the employing authority or the Minister of Transport.

The local authority, having made such an agreement as was contemplated by the section, and having dismissed the plaintiff, was liable to the Minister for breach of the agreement but that did not in any sense invalidate the dismissal so far as the plaintiff was concerned under the terms of his contract with the council.

"I am of the opinion, therefore, that the right of the defendant council to suspend or dismiss the plaintiff was in no way affected by the provision of s.17(2) or by the agreement made by the council with the Minister under the powers conferred on the Minister by the subsection."¹

¹at 291.

Counsel for the plaintiff cited the case of Field v. Borough of Poplar but LYNSKEY J. considered that the latter decision turned on the construction of Acts of Parliament different in terms from that which he had to construe and it gave therefore little guidance on the question which he had to consider. With respect, it is suggested that the cases have more in common than at first appears.

In each case the office was a compulsory one which the local authority was bound by statute to create and to fill. In the Field case, the Public Health (London) Act of 1891 provided, by section 107(1), that:

"Every sanitary authority shall appoint an adequate number of fit and proper persons as sanitary inspectors."

And in the Moss case, the relevant section of the Local Government Act of 1933 stated:

"Every district council shall appoint fit persons to be ... sanitary inspector or inspectors ... Provided that a rural district council need not appoint a surveyor..."¹

There is a difference in that in the Field case the statutory conditions pertaining to the office automatically applied by virtue of the regulations made under the Act;² in the Moss case, on the other hand, the statutory

¹s.107(1)

²Public Health (Officers) Act 1921 s.7(1); Sanitary Officers (Tenure of Office) Order 1926, S.R. & O. 1926, No. 552.

provisions embodied in the Ministry of Transport Act of 1919 s. 17(2) did not take effect until an agreement had been made between the local authority and the appropriate Minister. It might be contended, therefore, that the sanitary inspector had ab initio a statutory right to have certain of his conditions of service controlled by the central government, while the surveyor could claim no rights under the relevant statute since all that was given there was a power to the Minister to make agreements with the local authority - agreements to which the surveyor would not be a party.

It is submitted, however, that this argument cannot be sustained. Under the Ministry of Transport Act 1919 the power is given to the Minister to make an agreement with the local authority. But once that agreement is made, the statutory provision comes into operation and modifies the contract of employment between the surveyor and the local authority. The former may have been no party to the agreement, but the effect of that agreement, once made, was to alter the office of surveyor from one held solely at the pleasure of the council (or on such terms as agreed) to one subject to a degree of control by the Minister. Up to the time the agreement was made, the surveyor had no greater statutory protection than any other local authority employee; after the agreement, however, the

surveyor's position was dependent not upon contractual terms alone, but upon the terms compulsorily imposed by the statute and which terms could not be altered by any contractual agreement to the contrary. The measure of Ministerial control which follows the making of an agreement between the local authority and the Minister flows, it is submitted, not from the agreement but from the terms of the statute which postulates such control as a necessary result of the agreement. The contractual agreement between the Minister and the local authority, may be said to create the conditions in which the statutory provision will take effect, but the consequences flow thereafter from the statute and not from the agreement. Thus the employee had a right and interest to challenge any interference with his new statutory position.¹

It mattered little, therefore, whether or not the plaintiff in Moss v. Chesham had been a party to the agreement; he held an office the incidents of which became modified by a statutory provision protecting him from arbitrary dismissal on the part of the council. It seems illogical to deny him this protection and accord it to the sanitary inspector, simply because the statutory provisions

¹Cf. Vine v. National Dock Labour Board [1956] 3 All E.R. 939 at 946, 948.

in the case of the former require a predicative contract. It is suggested, therefore, that the decision in the latter case should not be followed.¹

One more point should be made about these "statutory" officers. It seems that the practice of the central government and the local authorities mitigates to a large extent the harsh effects which might otherwise arise from the Moss case. Where a local government appointment is subject to a degree of Ministerial control (over dismissal, for example) it appears to be the practice for the central department, or departments, concerned to hold a public enquiry into the circumstances in which the particular council action took place.²

This joint control therefore has further reduced the long-accepted differences between local and central government employees. The same employee may be answerable, for

¹It is interesting to speculate whether had this been a Scottish case the plaintiff would have acquired a jus quaesitum tertio since the agreement between the local authority and the Minister could be viewed as a contract whose object was to advance the interests of the plaintiff in his official capacity.

²Cf. The enquiry in October, 1957, into the dismissal of the borough surveyor/sanitary inspector of the Borough of Tenby; it seems that the central authority will interfere, however, only in circumstances which suggest manifest injustice to the employee. The judgment of the council is left as free as possible. See Public Service Vol. 30, Nos. 9, 10, 11.

²See, Halsbury's Laws, Simonds Edition, Vol. 7, pp. 443-445.

some purposes, to a central government department and for others, to his employing authority; his conditions of employment may combine features of both the civil service and the local government service.¹

Furthermore, this growing unity of governmental service has been recognised and assisted by the facilities provided for the retention of superannuation benefits where a governmental employee transfers from one branch of the service to another - and even to outside employment where this is approved by the Treasury.

The legislation covering these "transfer" arrangements is extensive and complex² but they provide for the preservation of superannuation rights in the event of transfers to and from different branches of governmental service. Rules have been made under this legislation in relation to employees transferring between the civil

¹Registrars appointed under the Births and Deaths Registration Act 1836 s.7. and the Marriage Act 1836 s.17. have their conditions of service determined by the councils employing them. This is subject, however, to the approval of the Registrar-General who is also empowered to remove a registrar for serious default in the performance of his duties (Local Government Act, 1929, ss. 22, 24 (1)(9)). Deputy registrars must be appointed by a registrar or superintendent registrar and these deputies hold office at the pleasure of the appointing officer subject to removal by the Registrar-General for serious default. (Marriage and Registration Act, 1856 s.16; Births and Deaths Registration Act, 1874 s.24). Yet all of these officers have their superannuation dealt with under local government superannuation schemes and have a legally enforceable right thereto.

²See, Halsbury's Laws, Simonds Edition, Vol. 7, pp.443-445.

service and (a) local government service (b) teaching (c) certain public corporations (d) fire service; and similar provisions safeguard the pension rights of former private employees who became civil servants as a result of legislation or administrative reorganisation. This clearly recognises the affinity of the different branches of governmental employment and has materially assisted the interchange of governmental employees.¹

But the legislation goes further and provides that a civil servant may retain his existing pension rights on transfer to "approved employment." This is defined² as employment (not being employment in a public office, service in which qualifications^{es} for the grant of superannuation allowance) which is recognised by the head of the appropriate department and by the Treasury "as being employment in reference to which it is expedient the section should apply."

This wide discretion has been liberally interpreted³ and the practice of the Treasury demonstrates how the criterion of public interest cannot be measured solely with reference to whether employment is governmental or not but must take into consideration the nature of the duties involved.

¹And makes even more anomalous the civil servant's lack of a legally enforceable right to his pension. It has been suggested that these rules "seem to endow pension rights with some of the qualities of the Cheshire cat since they are enforceable or not according to which service the officer belongs for the time being." Mitchell op.cit. p.52.

²Superannuation Act 1914 s.4(2); Superannuation Act 1935 s.8(4).

³See supra p.49.

Finally, the unity of governmental service has been importantly influenced by the development of collective bargaining, Whitley machinery and the rise of large-scale unions like N.A.L.G.O. By negotiation, conciliation and arbitration governmental employees in the different services have gained conditions of employment which are uniform to a high degree. The educational qualifications of local government officers have been greatly improved as a result of trade union exhortation which saw the advantages of this in the civil service; the local government Charter drew heavily upon civil service practice¹ and the unions maintain liaison upon important conditions of service.² The effect of this has been to make governmental employees more and more conscious of their membership of a unified public service in which uniformity of conditions and transferability are major characteristics.

The administrative advantages of recognising this unity

¹See Graaves op. cit. pp. 79-80

¹The "code of conduct," for example, in Part IV of the Charter is, in fact, an abstract of the leading passages in the Report of the Civil Service Board of Enquiry which followed on the Ironmonger case. See Warren, op. cit. p.98

²In December 1957 the staff side of the Civil Service Whitley Council invited N.A.L.G.O. to be represented at a meeting to discuss increases in pensions. Public Service, January 1958 p.10

in governmental employment have been fully discussed elsewhere.¹ What is of importance in this study is that such recognition demonstrates that many differences in the treatment of government employees are anomalies based on false conceptions of public interest.²

It may be objected that the doctrine of ministerial responsibility places the civil service on a different footing from local government or the public corporation. This is difficult to sustain. In local government although no doctrine of ministerial responsibility exists, local councillors in practice do regard the actions of departments of whose controlling committees they are members, as politically important. They recognise that they have a duty to interfere in departmental administration for "policy" reasons. In public corporations the minister's responsibility will vary with the degree of direction or control given him by the enabling statute and in some cases this degree of control will be considerable. The fact that a minister is responsible for the actions of his subordinate civil servants may demand high standards of impartiality and integrity in the civil service. Nevertheless the main

¹See Greaves *op.cit.* pp.79-80

²It is impossible to see how by any test of public interest the right of the civil servant to salary is legally doubtful while the policeman (in whom public interest can be no less strong) is given his salary as a right. See *Police Act 1919 s.12* and *Metropolitan Police Receiver v. Croydon Corporation and Another* [1957] 1 All E.R. 78 at 81.

reason these qualities are important in the civil service is the protection of the public. And this will operate just as importantly in other governmental employment.¹

In the same way the absence of legal enforceability in civil service employment and its presence in local government employment and in many other governmental agencies is not due to any fundamental difference in the character of the employment. The reason is partly historical and in part because of the way in which public interest was apprehended in the eighteenth and nineteenth centuries. Legal enforceability of his conditions of service was not permitted the civil servant because of the legal mysticism associated with the Crown. But over a long period these conditions became firmly established and - with the development of collective bargaining and trade unionism - strongly protected. The need for legal sanctions, at first denied, became obsolete because of social and political changes. In local government the situation was different. The heterogeneity of employers, varying greatly in financial ability and social ideas, made it imperative

¹ See: Local Government Act 1933, ss. 102(4); 106(5), which prevents the clerk of a local authority from being at the same time the Treasurer, and also Hawkings v. Newman (1839) 4 M. & W. 613; "Ethical Standards in Government," Report of a sub-committee of the United States Senate Committee on Labour and Public Welfare, 82nd Cong. 1st Sess. (1951); "Practical considerations in the formulation of a code of ethics for Government Employees," (1952) 52 Col.L.R. p.1.

for employee associations to seek legislation which would make their conditions of employment at once uniform and safe.¹

It is not, therefore, because the degree of public interest in the civil service is greater than in local government that employees of the former are, legally, more "rightless" than those of the latter. This is clearly demonstrated by the fact that in important instrumentalities like the police and fire services and in public corporations the basic conditions of service are enforceable in the law courts.

*

It has been suggested in this and previous chapters that the basic test against which conditions of employment in governmental service (as in any employment) must be measured is that of "public interest" ascertainable only by reference to the duties to be performed; in turn this involves the denial that governmental service, as such, is sui generis, the latter view having been responsible for

¹A parallel is noticeable in the different auditing and accounting procedures. That of the District Auditor is highly legalised; in the civil service it is largely a matter of intra-service regulation. The reasons for the difference are the same.

placing anachronistic restrictions on governmental employees even when the public interest did not require them.¹ It has been further suggested that the instrumentalities of government form a unity and that uniformity of conditions and inter-changeability of staffs is both possible and desirable. And finally it is submitted that since in the United Kingdom the law has played a relatively unimportant role in establishing and developing conditions of service it is unnecessary and, perhaps, undesirable to demand legally enforceable rights where none exist.

The importance of these conclusions for public employment generally will be better appreciated after a study of some of the problems of governmental employment in Australia to which attention must now be directed.

¹It was this attitude towards Crown employment which led to the restrictions on military forces being extended to civil employees. See, Logan, loc. cit.

CHAPTER VI - The Government of Australia
PART TWO - AUSTRALIA

to the English lawyer, the fact of making an appointment of a government employee is a discretionary act of the Government. The Government is not bound by the provisions of law, the law is applied to the rights of the employee and not to the fact of his appointment or political activity.

In order to understand the important part played by these matters, it is necessary to examine briefly the early history of Australian public service legislation. In the colonies, until the coming of responsible government, the Government appointed all public officers. In 1850, in the report to the ratification of the British Colonial Office Act, as in the mother country, political patronage played a major role in selection.¹ After responsible government had been

¹ Objections by the colonists were based not on the inefficiency of the system of patronage but on the fact that the patronage lay with the British Colonial Secretary. In 1850 the N.S.W. Legislative Council passed a resolution "that the reservation to the Secretary of State for the Colonies of the right of appointment to public offices... is inexpedient and that, from the advanced state of Society in New Colony, this patronage should be absolutely vested in the local Executive." See: H.S. Parker, Public Service Recruitment in Australia, M.C.P. (1942) pp. 19-20.

To the English lawyer, the most striking characteristics of governmental employment in Australia are: the importance of statute law in conditions of service; the emphasis placed on the rights of the employee and the lack of restrictions on political activity.

In order to understand the important part played by these factors, it is necessary to examine briefly the early history of Australian public service legislation. In the colonies, until the coming of responsible government, the Governor appointed all governmental officials, subject to the ratification of the British Colonial Office and, as in the mother country, political patronage played a major role in selection.¹ After responsible government had been

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²Victoria Parliamentary Papers, Session 1856-57, Vol. 2, p. 21.

³Ibid. pp. 4-11; 18-19.

granted¹ this control over governmental employment passed to the Governors of the colonies, which meant, in effect, to the responsible Ministers, and patronage continued to dominate appointment to public offices, although now in different hands.

The first colony to take steps to reform the defects of the system was Victoria; in 1856, the year after the proclamation of the colony's constitution, the government of the day appointed a Board of Enquiry under Professor W.E.Hearn to report upon the administration and efficiency of the colony's civil service.

In the report of this body² the influence of the Northcote-Trevelyan recommendations and of the Macaulay reforms in India are at once apparent.³ The report stressed the complete lack of regulations and rules; the absence of superannuation and leave provisions; the need for "a Central Board of Control;" the necessity to appoint

¹Tasmania and South Australia in 1854 and 1856 by local Acts authorised by the Australian Colonies Act 1850 (13 and 14 Vict. c.59); New South Wales and Victoria in 1855 by two Imperial statutes (18 and 19 Vict. c.54, 55); Queensland in 1855 by Order in Council made under 13 and 14 Vict. c. 59 and 5 and 6 Vict. c.76; Western Australia in 1889 by a local Act which was validated by a retrospective Imperial statute of 1890 (53 and 54 Vict. c. 26).

²Victoria Parliamentary Papers, Session 1856-57, Vol. 4, No. 23.

³ibid. pp. 4-11; 18-19

non-political heads of departments¹; the evil effects of nepotism and political patronage²; and, above all, "the most striking and the most objectionable feature in the Civil Service of this Colony is the uncertainty of its tenure."³

Because of governmental changes and rather unsettled political conditions nothing further was done about the Hearn report after it was tabled in the Legislature.⁴

In 1859, however, a Royal Commission (of which Hearn was a member) was appointed to investigate the civil service and the defects of the existing system were once more

¹See at p.15: "Under the recent alterations in the Government of this Colony those officers who were formerly working Heads of Departments have become Parliamentary Ministers ... It will be impossible to prevent confusion and public inconvenience if the orderly working of the Civil Service is interrupted by frequent Ministerial changes. We, therefore, submit ... the propriety of following the English precedent of appointing non-political and permanent officers to carry into execution the policy which the Ministry of the day may originate."

²The bad English example "deplored by all" was cited as a warning: ibid. p.4.

³ibid. p.16. This statement is followed by a plea to make the civil service "as secure as that of England."

⁴Bills were introduced from time to time in the following few years but land law occupied by far the greatest part of legislative time and members manifested little interest in civil service legislation.

censured in the Report of the Commissioners.¹

"The radical defect of the present condition of the Civil Service is the total absence of any general rules. There is no rule as to appointments; no rule as to promotion; no rule as to dismissals; no rule as to leave of absence; no rule as to superannuation ... from the absence of any formal regulation the service has practically become fragmentary ... We think therefore, that the first step to remove anomalies and to restore the service to its natural and lawful unity is the establishment of a proper system of classification."²

The commissioners stressed the need for proper superannuation and leave provisions and they recommended inter alia the establishment of a Court of Inquiry whenever any punishment, including dismissal, was imposed upon an employee. The emphasis was strong on the need to protect the rights of civil servants and the inference that this would best be achieved by statute is unmistakable.³

¹Victoria Parliamentary Papers, Session 1859-60, Vol. 3, No. 19.

²ibid. p. 10, para. 9.

³Cf. at p. 13 where, discussing the fact that salaries might have to be reduced on a systematic classification of the service, the report stated: "Many officers have incurred obligations on the expectation that no serious diminution on their incomes would be made; and the reduction which would be a trifling gain to the public would be to them a serious loss. The Imperial Government and Legislature have on all occasions fully recognised "the propriety of not interfering with the existing rights and reasonable expectations of public servants." [This is a quotation from the British Royal Commission on Superannuation of 1857]. In Canada, also, an Act recently passed for the regulation of the Civil Service in that Colony contains a clause expressly saving existing salaries. The same rule has been observed at the Cape of Good Hope; and we perceive that the British Government have recently recommended its adoption in reference to the Civil Service of India."

In the Parliamentary session 1861-62 a bill was introduced to give effect to the recommendations of the Royal Commission and Act No. 160 of 1862 became the first Australian legislation relating to the conditions of service of public employees. The Act proposed in its preambles:

"to classify the Public Service according to the duties performed by the officers, to regulate salaries accordingly, to establish a just and uniform system of appointment, promotion and dismissal, to grant to such officers furlough for recreation and to provide retiring allowances in certain cases."

It is interesting to observe that the Minister who introduced the bill justified it on the grounds that it would provide an element of security in civil service conditions; it was following the good examples set in many European countries; it would provide decent employment opportunities for the youth of the Colony. But above all, "It would ... not be so much a gain to the civil servants as it would to the House in shortening the sessions."¹ This last reason was of great practical importance as so

¹See: Victorian Hansard, Session 1861-62, Vol. VIII, pp.881-888. Also of interest are the grounds given by the Minister for refusing to include policemen in the superannuation provisions of the Act. They were "on a different footing from the other servants of the Government;" they had their own form of pension fund; they formed "a semi-military body doing duty peculiar to itself;" and, lastly, because "the time was not far distant when they would be placed under local control in the different districts." In fact this last never happened and throughout Australia the police have remained under the State governments. See, infra, Chap. VII pp.

much of the legislature's time, under the system of patronage, was taken up with the grievances and petitions of individual civil servants.

Unfortunately this Act was not effective in achieving what it had been intended to do. A section which had been included to allow for the appointment of persons outside the service who were possessed of special qualification was used in fact as an instrument of political patronage; as a result, while the "properly" appointed civil servants decreased by twenty-five per cent during the years 1862-1882, the "supernumary" service increased by sixty-five per cent.¹ This struggle against political nepotism is a feature of the civil service legislation of all the States and it was not until late in the nineteenth century and, in some cases, even in the twentieth century, that an effective system of appointment by examination existed throughout Australia.²

¹See: Report of Royal Commission on the Public Service of Victoria, 1917, pp.6-11.

²Victoria achieved this in 1883 (the influence of the American Pendleton Act of the same year is unmistakable); New South Wales in 1895; South Australia was partially successful in 1874; Queensland, Western Australia and Tasmania in 1899, 1900 and 1901 respectively.

On the basis of Victorian experience - which the other States followed to a large extent - it is possible to put forward some tentative reasons for the features of Australian governmental employment mentioned at the beginning of this chapter.

The significant place of statute law may well be ascribed to the need to make the conditions of service not only cognoscible, but reasonably permanent. And to a newly established responsible legislature the obvious way of achieving this was by an Act of Parliament. The need for certainty in civil service conditions of employment had been emphasised by the Victorian investigating commissions and the continual pressure on parliamentarians for ad hoc decisions in individual cases was a direct result of this instability of conditions.

The pernicious influence of political patronage, subjected to severe criticism by the Northcote-Trevelyan report and local colonial reformers, could be combatted only by arming those in control of the public service with Parliamentary authority which could not be readily circumvented by individual politicians or by the government in power.

Further, it seems likely that the colonies, having newly emerged from a period of "preogative" rule and subservience to the statutes of the Imperial Parliament,

¹Supra p. 145 n.3.

felt that the best way to make a fresh start was to control their civil services by local Acts and limit (as far as possible) the prerogative powers of the Crown.¹ This is borne out by the practice of other colonies like Canada and the Cape of Good Hope.²

In the same way, the emphasis on the rights of the employee is probably a natural concomitant of the liberal political and social atmosphere of the new colonies but two other possible reasons suggest themselves. First, the complete absence of any civil service rules whatever meant, in effect, that the employee was rightless - no leave, no superannuation, a salary liable to wide fluctuations and promotion prospects entirely at the mercy of political patronage. The contrast with the home Civil Service and that of India had been observed³ and the natural reaction to this was a demand for rights for the employee not only in his interest but in the interest of the efficiency of the service.

Second, the recent superannuation legislation in the United Kingdom played an important part in the deliberations

¹Cf. the New South Wales Civil Service Act of 1884 which was the subject of the decision in Gould v. Stuart [1896] A.C.575.

²See supra p. 145 n.3. For an obvious parallel, see Wheare: Modern Constitutions, H.U.L. (1951) p.9.

³Supra p. 145 n.3.

of the 1859 Victorian Royal Commission¹ and the commissioners were clearly impressed by the need to respect existing rights. This respect for "rights" was to have important effects on the history of Australian public service legislation generally² and was to give rise to considerable litigation on the formation of the Commonwealth.³

The third feature of Australian public service employment - the freedom from political restrictions - is, for the lawyer, of less importance than the others just mentioned. The wide political liberty accorded to governmental employees is not a matter of law except in the negative sense that few statutory restrictions exist other than with regard to correspondence in the press, commenting publicly upon departmental administration and, of course, membership of a legislature.

None of the statutes relating to governmental employment nor regulations made thereunder in either the State or the Commonwealth sphere refers directly to political

¹Cf. pp. 18-19 of the Report.

²Royal Commissions to investigate the working of the various civil services were held in Victoria (1917), New South Wales (1917-18), The Commonwealth (1917-20) and Queensland (1919). The rights of civil servants feature prominently in the reports of these bodies. See, F.A. Bland: Government in Australia, N.S.W. Government Printer, 2nd Ed. (1944), p. xxvi.

³Infra, Ch. VIII, pp. 200-212

activities. The Federal Constitution¹ by s.44(iv) disqualifies any person holding office under the Crown from becoming a candidate for election to Parliament. In the case of members of the Commonwealth Public Service the Public Service Act 1922-57 gives (s.47A) a right to reinstatement in the event of failure to be elected. In the States statutory restrictions generally exist on the publication in the press of material affecting the public service² and on public comment upon the administration of the department in which the servant is employed.³ The right to reinstatement on failure to succeed at a Parliamentary election is assured in all States⁴ and in certain cases the servant need not resign to contest an election but is entitled to claim leave of absence without pay during his campaign.⁵ Such restrictions as do exist have given rise to no litigation and it is important particularly in

¹The Commonwealth of Australia Constitution Act 1900 came into force on 1st January 1901. It is divided into nine clauses; the first eight are the Covering Clauses and the last is the Constitution proper.

²Cf. South Australian Public Service Act 1936-56 s.58.

³Cf. New South Wales Public Service Act 1938-56 Regulation 17.

⁴Cf. South Australian Public Service Act 1936-56 s.70.

⁵See, e.g. Tasmanian Constitution (State Employees) Act 1944.

³See supra p. 144.

this sphere of employment relations to realise that the presence of a statutory restriction on, for example, making public comments on departmental administration is no criterion of its enforcement or effectiveness - law and reality here, as elsewhere, are often widely divergent. For example, a member of the Commonwealth Public Service "shall not publicly comment upon any administrative action or upon the administration of any Department."¹ In practice, this prohibition is rarely enforced; and, in the Federal capital, Canberra, where Federal public servants constitute by far the largest part of the total working population the regulation is virtually ignored.²

This liberality stems, in part, from the intimate association of politics and administration in the early days of the colonies³, in part from the general democratic liberal tradition of Australian social and political life and, in the twentieth century, partly from the strength of

¹Commonwealth Public Service Act 1922-57, Regulation 34(b).

²Canberra is administered by two government departments - the Department of Works and the Department of the Interior - assisted by an Advisory Council. This Council contains both elected and government-nominated members and some of the former are official candidates of the two main national political parties - the Liberal and Labor parties. Campaigns for election to the Council are conducted on party lines and the present Chairman (elected) is a Labor party candidate and a public servant. The Council frequently criticise departmental policy and administration.

³See supra p. 144 n.1.

the Labor Party whose doctrines found favour with a high proportion of governmental employees.¹

*

The effect of these attributes of governmental employment in Australia has been to give the government as employer few special rights and to subject governmental service and private employment to much the same considerations as far as the rights of the employee are concerned.² This is manifested, at the present time, in the minute regulation of all conditions of service in which guarantees to the employee play a major part; the complex system of appeals throughout governmental service; the importance of compulsory arbitration in government employment; and the insistence on the preservation of "existing rights" and the provision, where necessary, of compensation for loss of office. Something must now be said of these characteristics before discussing what their effects have been on

¹ For an interesting discussion of the history of the political rights of Commonwealth public servants see V. Subramaniam: "Political Rights of Commonwealth Public Servants," Public Administration, Sydney, March, 1958, p.22.

² But see infra Ch. VII for exceptions.

the governmental employee's legal position.

In the United Kingdom statute plays some part in the regulation of conditions of service in governmental employment.¹ Governmental service in Australia on the other hand presents a striking contrast in that this form of legal control is much more extensive and detailed. Almost every aspect of the employer-employee relationship is minutely regulated by statutes and regulations made thereunder and most of these legal provisions have from time to time given rise to litigation.

While there are variations in the public service legislation of the different states and of the Commonwealth, it is clear that, in the main, they follow the same pattern. This is true also of local government legislation and also of the statutes governing the wide variety of quasi-governmental bodies that exists in Australia.² Typical of the general pattern is the Commonwealth Public Service Act 1922-57 which, together with a number of other statutes³,

¹For example, in local government, the police and fire services, statutory corporations and (with regard to superannuation) the civil service.

²Cf. e.g. ss. 158-163 of the Victorian Local Government Act, 1946, and ss. 88-95 of the New South Wales Local Government Act, 1919-1943.

³Superannuation Act 1922-50; Commonwealth Employees' Compensation Act 1930-50; Commonwealth Employees' Furlough Act 1943-44; Officers' Rights Declaration Act 1928-40; Audit Act 1901-50; Public Service Arbitration Act 1920-50; Crimes Act 1914-50.

governs the conditions of service of Federal public servants.¹

This statute provides for the composition and administration (by a Public Service Board) of the service² and deals in great detail with, inter alia; the creation and abolition of offices, salaries, promotions and transfers, offences, leave of absence, transfers of employees between the Commonwealth service and State public services, as well as certain statutory authorities, temporary employment and returned soldiers.

The servants' right to salary is left in no doubt. Apart from the heads of departments and a few other senior officers, all public servants under the Act, "shall be paid salaries at such rates, or in accordance with such scales of rates, as are prescribed."³ The former officers "shall be paid such salaries as the Parliament provides."⁴

¹ By s.8 the Act is stated not to apply to: any Justice of the High Court of Australia; the High Commissioner; the Auditor-General; the Public Service Arbitrator; the Commonwealth Railways Commission or any employee under the Commonwealth Railways Act 1917; any person employed in an honorary capacity; any officer the right to appoint whom is not vested in the Governor-General or the Board; any person remunerated by fees, allowances or commissions only; or any person employed in the Naval, Military or Air Forces only.

² See the Report of the Commonwealth Public Service Board, ss. 1-22, 20-22, for a discussion of the conflict between "seniority" and "efficiency."

³ s.30 (2).

⁴ s.30 (1).

⁵ Williamson v. The Commonwealth (1907) 5 C.L.R. 174.

The emphasis on the rights of the employee is manifest in the promotion provisions of the statute which go so far as to lay down the criteria by which promotions shall be made.¹ Terms like "relative efficiency" and "equality of efficiency" are vague and imprecise and the amendments to which these sections of the Act have been subject are in themselves strong testimony of the influence of the employee organisations and of the importance placed on the servants' "rights."²

So, too, in the sections of the statute dealing with offences, guarantees of just treatment and respect for the employees rights are manifest.³ The offences which are punishable are fully set out and the method of charging and punishing the offender are precisely described. And the necessity for strict adherence to the procedure laid down in the Act was proved early in the history of the service.⁴

But it is in the comprehensive provisions governing appeals of various kinds that the protection of the rights of governmental servants is most apparent. Any promotions

¹s. 50 (3) (3A) (4) (4A).

²See the Report of the Commonwealth Public Service Board, 1950, pp.20-22, for a discussion of the conflict between "seniority" and "efficiency."

³s. 55 (3).

⁴Williamson v. The Commonwealth (1907) 5 C.L.R. 174.

made within the service are provisional only and are without increase in salary pending confirmation; and such confirmation cannot be given until a right of appeal has been given to those employees who are so entitled. The wide field that this covers may be judged from the terms of the Act which gives a right of appeal to "any officer who considers that he is more entitled to promotion ... on the ground of (a) superior efficiency or (b) equal efficiency and seniority."¹

To hear these appeals there have been established Promotions Appeal Committees which in certain cases determine the appeal and in others make a recommendation to the Board.² A Promotion Appeals Committee must contain a member nominated by the staff association covering the class of office concerned.

The system of Disciplinary Appeal Boards provides even more striking evidence of the desire to protect the public servant from arbitrary punishment or dismissal. For the offences specified in the Act the departmental head may impose punishments including a fine, a reduction in salary, demotion or a recommendation to the Public Service Board

¹s. 50 (6).

²On the system of promotion appeals, see, L. Blair: "Employer-Employee Relations in the Federal Public Service," Public Administration Vol. XXXV, Spring 1957, p. 53 at pp. 59-61.

that he may be dismissed. Against such punishment a servant has the right of appeal to a Disciplinary Appeal Board, the chairman of which must be a magistrate and which must include a representative of the Division of the service to which the appellant belongs. The Appeal Board has power to determine the appeal in any way it sees fit except that it cannot dismiss an appellant, but may recommend dismissal to the Public Service Board.¹

It may be observed that although no such provisions exist in the statute at present under consideration, certain Acts governing governmental employment provide for appeals by employees against salary classification² and even against transfer from one area to another.³ These provisions give the employee powerful legal rights against the government and, as with the appeals under the Commonwealth Public Service Act mentioned above, the machinery is frequently used.⁴

¹s.55(4)(5); see Blair, loc.cit. pp.61-62. Legal representation is permitted before the Appeal Board.

²See: South Australian Local Government Act 1936-57 which provides for a Classifications Appeals Board.

³Cf. N.S.W. Police Regulation (Appeals) Act 1923 (as amended by subsequent statutes) s.6 (1).

⁴The extent to which promotion appeals are used is apparent from the annual reports of the Commonwealth Public Service Board and the State public service controlling authorities. In a recent report of the former, statistics shewed that for the year ended 30th June 1956, there were 10,455 provisional promotions and 12,709 appellants. Of the promotions appealed against 17.4% were successful.

The government is further limited as an employer by the extensive compulsory arbitration system. By means of this machinery conditions of employment in the civil services, local government and the public corporations are decided by judicial tribunals whose decisions are binding on both employer and employee. The effect of this complex system on the legal position of the governmental employee will be discussed in a later chapter. It suffices to say, meantime, that the decisions of the various Wages Boards, Arbitrators and the Conciliation and Arbitration Commission provide abundant illustration of the reluctance to concede to the state any special right, as an employer and of the refusal to treat governmental employment as essentially different from employment in private enterprise. Indeed, the existence of arbitration machinery is frequently referred to in the early reports of governmental controlling bodies like Public Service Boards in terms which clearly indicate the limitations imposed by arbitration on the freedom of the Boards to determine basic conditions of service.¹

Finally, the government's freedom as an employer has become statutorily limited by the many provisions in both

¹See: Bland, op.cit. Ch. XII and L. Blair: "Arbitration in the Federal Public Service of Australia," Public Administration Vol. XXXIV, Spring 1956, p.61 at p.64.

²Infra, Chap. VIII

Commonwealth and State legislation for the preservation of rights where, for example, a governmental employee has been compulsorily transferred between the State and Commonwealth administrations. And the Constitution itself has provided specifically for the rights of State civil servants who were transferred to the Commonwealth government on federation.¹ As will be explained below, the desire to preserve the rights of the employee featured strongly in the enactment of these provisions and the High Court's interpretation of them has reflected this view.²

compulsory transfer to the Commonwealth.

It is with the way in which the problems arising from these factors have been handled and the reasons of the decisions which have been accepted that the remainder of this part of the study is concerned.

It is against this background that the legal position of the Australian governmental employee must be viewed.

The basic problems of governmental employment are similar

¹s. 84: "When any department of the public service of a State becomes transferred to the Commonwealth all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights ..."

²Infra, Chap. VIII

to those encountered in the United Kingdom, but historical, legal and constitutional differences have resulted in the application of different legal solutions. In Australia the main features in governmental employment of interest to the comparative lawyer have centred on the right of the Crown to dismiss at pleasure and how far it has been abrogated by statutory provision; the extent and effect of the detailed system of statutory rights; and the existence and implications of what might be termed a complex body of administrative law in the form of the compulsory arbitration machinery.

It is with the way in which the problems arising from these factors have been tackled and the lessons of the solutions which have been attempted that the remainder of this part of the study are concerned.

In Australia, as in the Queen's Kingdom, the courts have consistently held that contracts between the Crown and its subjects contain an implied term that the contract shall be terminable at pleasure.¹ This doctrine has been of other significance in the United Kingdom where the long established tradition of security of tenure has always been maintained. But in the early Australian colonies these political conditions² demanded some abrogation of the Crown's right.

CHAPTER VII - The implied term

On the implied term was first tested in Gault v. Stuart³, a case which merits detailed discussion insofar as it illustrates the main criteria by which an alleged abrogation of the right to dismiss at pleasure could be tested.

The Supreme Court of N.S.W. concluded that the N.S.W. Civil Service Act of 1886 was "a code of laws ... to declare the manner in which the Crown shall act with reference to all appointments, dismissals and other matters

¹ Cf. Corry v. Commonwealth (1921) 30 C.L.R. 437; Commonwealth v. Quince (1944) 68 C.L.R. 227.

² supra p. 142 et. seq.

³ [1896] A.C. 575; (1895) 10 N.S.W. L.R. 113.

In Australia, as in the United Kingdom, the courts have consistently held that contracts between the Crown and its servant contain an implied term that the servant shall be dismissible at pleasure.¹ This doctrine has been of minor significance in the United Kingdom where the long-established tradition of security of tenure has always been maintained. But in the early Australian colonies local political conditions² demanded some abrogation of the Crown's right.

The effectiveness of an implied statutory restriction on the implied term was first tested in Gould v. Stuart³, a case which merits detailed discussion insofar as it illustrates the main criteria by which an alleged abrogation of the right to dismiss at pleasure could be tested.

The Supreme Court of N.S.W. concluded that the N.S.W. Civil Service Act of 1884 was "a code of laws ... to declare the manner in which the Crown shall act with reference to all appointments, dismissals and other matters of the Act there was provision not only for a systematic

¹Cf. Carey v. Commonwealth (1921) 30 C.L.R. 132; Commonwealth v. Quince (1944) 68 C.L.R. 227.

²supra p. 142 et. seq.

³[1896] A.C. 575; (1895) 16 N.S.W. L.R. 132.

affecting the Civil Service," and based this conclusion on four main features of the legislation.

First, the preamble to the Act which referred to the expediency of classifying the service and stated that "a system of appointments promotions and retiring allowances should be established and that other provisions for the regulation of the service should be made."

Second, Part II of the Act which "dealt exhaustively" with the appointment and promotion of civil servants. The court were of the opinion that this part of the statute was clearly intended to restrict the power of the Crown to appoint persons to the civil service "at its will and pleasure" and to exclude the possibility that candidates for the service might be appointed or promoted by the operation of political influence to the detriment of the public interest.¹

Third, Part II of the Act which related to dismissals and penalties for offences. The Privy Council placed more importance on these sections of the statute than the Supreme Court but the latter pointed out that in this part of the Act there was provision not only for a systematic

¹(1895) 16 N.S.W. L.R. 132 at 136. On the same page WINDEYER J. went on: "Plainly, then, this part of the Act limits the powers of the Crown and regulates the nature of the contract which the Crown makes with its servants, by prescribing the conditions under which that contract is to be made."

dismissal procedure but also for the mandatory dismissal of a civil servant if found guilty of certain offences.

Summing up the effect of these sections, WINDEYER J. commented at 137:

"No person can, therefore, be summarily dismissed except in the cases specified, and in those cases he not only may but must be dismissed, and this appears to me to restrict the rights of the Crown in two ways - first by taking away the power of summary dismissal at pleasure and secondly, by taking away, in certain cases, the right of the Crown to retain in its service an officer who has mis-conducted himself."

Fourth, the Act's provisions for the creation of a Civil Service Superannuation Fund to which every officer had to contribute.

In assessing the effect of all these factors the court concluded that the burden of a contributory superannuation fund had to be compensated for by suitable dismissal provisions which would be used only in specified cases and after an opportunity had been given to the civil servant to make explanations; that it was desirable in the public interest to staff the civil service with persons of ability and integrity and such people could not be attracted without security of tenure, and that the whole intention of the statute was to provide guarantees from arbitrary dismissal.¹

¹[1896] A.C. 575 at 576. Referring to the superannuation provisions SIR RICHARD COOK mentioned that in certain cases

¹See especially at 137-8.

In affirming the decision the Judicial Committee of the Privy Council supported the grounds on which the Supreme Court reached its conclusions, but laid greater stress on the provisions of Part II of the Act which were "the most material in the present case."¹ The relevant provisions were sections 32-37 and the importance of their implications warrants treatment in some detail.

Section 32 provided for the suspension of any officer who in the opinion of the Minister or of any officer authorised by him had committed an action which appeared to justify suspension. If the suspension was not made by the Minister a report had to be prepared for him and he might confirm or annul the suspension.

By section 33 if the Minister ordered or confirmed a suspension, he had to report this to the Governor who, after calling on the officer to make an explanation, could remove the suspension or punish the servant with penalties up to and including dismissal. The Governor before deciding could appoint a board of inquiry to investigate the circumstances.

In sections 34 and 37 certain penalties were provided for negligence or dishonourable conduct and section 35 made

¹[1896] A.C. 575 at 578. Referring to the superannuation provisions SIR RICHARD COUCH mentioned that the servant was not entitled to a superannuation allowance "until he has served fifteen years."

provision for summary dismissal in the event of the commission of a felony or infamous behaviour.

"These provisions," said SIR RICHARD COUCH, (at 578), delivering the opinion of the Judicial Committee, "are manifestly intended for the protection and benefit of the officer [and] are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless and delusive."

The decision in Gould v. Stuart may, therefore, be summed up thus. Because of the existence of certain statutory provisions the rights of the Crown as employer had been abrogated as to (a) how the contract of service was made (b) dismissal at will (c) the retention of unsuitable servants. The provisions which enabled these conclusions to be drawn were: the existence of a power to dismiss (after justifiable suspension) which could be exercised only by the Governor¹; a concurrent duty on the Crown to dismiss in certain circumstances; a system of examination for appointment to the service and of promotion within it; and a contributory superannuation scheme.

The reaction to the Gould v. Stuart was immediate and was expressed in the N.S.W. Public Service Act of 1895.

¹ It should be observed that the Minister was under no obligation to hold any kind of enquiry before ordering or confirming a suspension; nor was the Governor obliged to hold an enquiry before deciding whether or not the servant should be dismissed.

This statute was passed on the recommendations of a Royal Commission which had reported that the 1884 Act had been of little effect in abolishing political patronage and inefficiency.¹ The government of the day took the opportunity of including in this new legislation a section which provided that nothing in the 1884 Act or the present one "shall be construed or held to abrogate and restrict the right of the Crown as it existed before the ... Act to dispense with the services of any person employed in the public service."²

This saving clause has since featured in the public service legislation of both Tasmania³ and South Australia⁴ and in these cases the effect of the express retention of

¹See Bland, op.cit. pp.xiii-xiv.

²New South Wales Public Service Act s.58; this provision is still retained in s.65 of the Public Service Act 1902-1954. During the debates on the 1895 bill the clause was justified on the grounds that it was necessary "in the public interest." One member objected to the clause on the grounds that it nullified the effect of the other parts of the Bill "designed to put aside from ministerial interference the administration of the public service of the colony." The same member promised to raise the question in committee but no further mention of the clause appears at any stage of the debates. See New South Wales Parliamentary Debates (1895) Vols. 80, 81, pp.1578, 2551 and 2554.

³Public Service Act 1938-55 s.77. Hughes v. The Crown (1903) 10 W.A.L.J. 21.

⁴Public Service Act 1936-55 s.65. Le Lee v. The Commonwealth (1907) 5 C.L.J. 174 at 177; Le Lee v. The Commonwealth (1921) 27 C.L.J. 30 at 31. See also infra p.195 for the suggestion that this is open to considerable qualification.

the Crown right to dismiss at pleasure is clear. Notwithstanding that the remainder of the Act in question may contain limitations on the Crown's right of appointment, promotion or suspension the servant holds office at the will of the Crown.¹

But in the other States and in the Commonwealth the relevant statutes contain no reference to the retention of the Crown's right and the courts, since Gould v. Stuart, have held that the Crown's right is in these cases abrogated and that dismissal can take place only after the statutory procedure has been followed.²

In these cases, therefore, the implied term has been negated by the existence of statutory provisions, the implications of which are clearly inconsistent with dismissal at pleasure. But that the statutory implications need to be unequivocally expressed is apparent in a number of cases in which the High Court has refused to hold that the implied term has been negated by the provisions of statutes pertaining to the state police forces.

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¹See Young v. Adams [1898] A.C.469; Hughes v. The Crown (1903) 6 W.A.L.R. 21.

²Williamson v. The Commonwealth (1907) 5 C.L.R. 174 at 179; Le Leu v. The Commonwealth (1921) 29 C.L.R. 305 at 311. But see infra p.195 for the suggestion that this is open to considerable qualification.

On the basis of the decision in Gould v. Stuart it seems reasonable to assume that the implied term will be negatived by the existence of statutory provisions governing inter alia examination and appointment; specific offences and penalties; promotions and disciplinary appeals; and a system of superannuation. But it is clear from the decisions of the High Court in three important cases¹ that, although they are subject to a comprehensive code regulating conditions of service and notwithstanding the absence of a specific statutory reservation of the Crown's right to dismiss at pleasure, policemen hold office at the pleasure of the Crown.

In Ryder v. Foley² the decision turned on the effect of s.6 of the Police Act of 1863, a Queensland statute. By this section the Commissioner of Police "shall appoint fit and proper persons to fill such vacancies as may hereafter occur among the sergeants and constables of the police force, and upon sufficient proof of misconduct or unfitness to be submitted for the approval of the Government shall have power to dismiss any sergeants and constables ..." In reversing the decision of the Supreme Court of Queensland (of which decision something more will be said below), the High Court held that this section did not abrogate in any

¹Ryder v. Foley (1906) 4 C.L.R. 422; Fletcher v. Nott (1938) 60 C.L.R. 55; Kaye v. Attorney-General for Tasmania (1956) 94 C.L.R. 193.

²(1906) 4 C.L.R. 422.

way the Crown's right to dismiss at pleasure and that the word "Government" meant the Executive acting through a responsible Minister of the Crown, and not the Governor-in-Council.¹

GRIFFITH C.J. rejected the argument that s.6 could be interpreted as conferring on a constable accused of an offence an opportunity of being heard before he could be deprived of his office. He referred to the Constitution Act of 1867 which provides that all appointments in the governmental service have to be made either directly by or by a duly constituted agent of, the Governor-in-Council.² He did not regard s.6 as dealing with the tenure of office of constables but as a section passed with reference to the constitutional provision referred to. That is, s.6 vested:

¹A striking instance of judicial recognition of political reality in the shape of ministerial responsibility. See at 432, 446 and 448.

²s.14: "The appointment of all public offices under the Government of the Colony hereafter to become vacant or to be created whether such offices be salaried or not shall be vested in the Governor-in-Council with the exception of the appointment of the officers liable to retire from office on political grounds which appointments shall be vested in the Governor alone. Provided always that this enactment shall not extend to minor appointments which by Act of the legislative or by order of the Governor-in-Council may be vested in heads of departments or other officers or persons within the Colony." Similar sections appear in the Constitutions of all the other States.

⁴[1895] A.C. 229.

⁵He cited for this Grant v. Secretary of State [1895] 1 Q.B. 287, 2 S.P.D. 415. Further, at 410, 411, his Lordship cited with approval Bheaton v. Smith and Dunn v. The Queen as extending the proposition to civil servants.

"This power of appointment, with the correlative right of dismissal, in the Commissioner of Police, subject to the qualification that he shall not exercise the power of dismissal, which is only given to him in the case of misconduct or unfitness, without consultation nor without the approval of the Executive head of his department ..."¹

The section, therefore, in the view of the learned Chief Justice, had "nothing to do with the tenure of office of the constable as between himself and the Crown," and His Honor went on to discuss the tenure of the office of a constable. On the basis of the decisions in Dunn v. The Queen,² De Dohsé v. The Queen³ and Shenton v. Smith⁴, he concluded, at 435-6, that "it is an implied term in the engagement of every person in the Public Service, that he holds office during pleasure, unless the contrary appears by Statute."

BARTON J. enunciated the basic proposition that all military servants of the Crown hold office at pleasure and that no contract could derogate from that right unless authorised by statute.⁵ As to whether the Police Act of

¹at 434.

²[1896] 1 Q.B. 116.

³(1897) 66 L.J. Q.B. 422 (n).

⁴[1895] A.C. 229.

⁵He cited for this Grant v. Secretary of State for India (1877) 2 C.P.D. 445. Further, at 443,444, His Honor cited with approval Shenton v. Smith and Dunn v. The Queen as extending the proposition to civil servants.

1863 constituted such authorisation he regarded three sections of the Act as vital.

The first of these sets out the form of oath which has to be taken by all members of the police force¹; the next deals with the nature of the agreement between the Crown and the member of the force²; the last lays down the conditions under which resignation from the force may be effected.³

These sections the learned judge thought were completely clear and had the effect of binding the constable by a "unilateral contract" which could be determined only "by cancellation ... by the Commissioner, acting for the Crown, or by the Commissioner being willing to accept his

¹s.11. Under this section every member undertakes to serve "without favor or affection malice or ill-will ... until I am legally discharged."

²s.12: "Every person taking and subscribing such oath shall be deemed to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty ... until legally discharged. Provided that no such agreement shall be set aside, cancelled or annulled for want of reciprocity. Provided also that such agreement may be cancelled at any time by the lawful discharge dismissal or other removal from office ... or by the resignation of any such person accepted by the Commissioner of Police..."

³s.15: "No constable ... shall be at liberty to resign ... unless expressly authorised in writing ... by the Commissioner of Police or the officer under whom he may be placed or unless he shall give to such officer three months' notice of his intention so to resign..."

resignation."¹ Turning to s. 6 His Honor stated that it could be reconciled with ss. 11, 12 and 15 only by holding that it did not affect the ordinary term of a contract with the Crown that the latter can dismiss at pleasure. There was nothing in the section to show that the authority given to the Commissioner was more than an addition to the power remaining with the Crown. It was a direction to the Commissioner "to submit to the Government his reasons for his actions in the shape of the proof he has found sufficient, so that Government may approve or otherwise of what he has done." (445). It was all part, however, of an administrative plan and conferred no right to a hearing or any form of judicial proceeding. Further, to give such an interpretation to s.6 would have the effect of making the officers of the police dismissible at pleasure while serjeants and constables were entitled to a hearing before dismissal. This position

¹At 440. In this connection His Honor quoted BARRY J. in Power v. The Queen (1873) 4 A.J.R. 144 and 145 as saying of sections of a Victorian statute identical with those in the instant case that they created a unilateral contract which "binds him to serve ... [but he] is not allowed to exercise the privilege of withdrawing from the force ... without cause assigned or because at some critical emergency some distasteful duty may be allotted ..." With respect, this appears to ignore the fact that by s.15 of the Queensland statute the policeman can resign by giving three months notice without any need to assign a cause and whether or not the Commissioner accepts the resignation.

His Honor refused to accept (446):

"This Act intended the whole of the members of the police force to be placed on the same footing in this respect, that for obvious reasons of policy applicable to such a force, they are all from the highest to the lowest liable to dismissal at pleasure in that public interest for the protection of which the Crown's Ministers are responsible."

O'CONNOR J. reiterated that ss.11, 12 and 15 stipulated a unilateral contract and referring to the oath's being similar to that undertaken by the military forces added at 450: "One can well understand that, the police force being in itself a quasi military organisation, the form of contract should be the same in both cases." His Honor was similarly of the opinion that s.6 was necessary because of the provision in the Constitution Act which made it necessary to delegate the authority to make minor appointments. The section was intended to give the Commissioner the power of appointment and of dismissal for misconduct or unfitness "with the additional obligation of keeping a record of the reasons for the Commissioner's action." The learned judge refused to interpret the phrase "upon sufficient proof" as bringing the case within the rule of Gould v. Stuart and thought it "merely incidental." To hold otherwise would distinguish between officers of police and other members of the force and the section was nothing more than part of the administrative plan regulating the organisation. It is

²[1896] 1 Q.B. 116.

³Mitchell v. P. 111. P. 111.

submitted with respect that the importance placed on ss.11, 12 and 15 was over-emphasised. The oath is of little significance, since apart from the phrase "until I am legally discharged"(which as has been pointed out above can be by resignation on three months' notice) it is the same as that used throughout Australian public services (see Commonwealth Public Service Act 1922-57, Fourth Schedule) in many of which organisations the Crown right has been abrogated. S.12 mentions "legally discharged" and "lawful discharge" and only the phrase "no such agreement shall be set aside ... for want of reciprocity" affords any ground for postulating unilateral contract involving an implied term of dismissal at pleasure. But the meaning of this phrase is by no means clear¹ and it seems a slight foundation on which to build a doctrine with such important consequences. And s.15 does not appear to be of great significance in view of the provision for resignation.

The stress laid on the Crown right to dismiss at pleasure and its unhesitating extension to all public servants, civil as well as military, are a result of the importance placed by the High Court on the decision in Dunn v. The Queen.² Yet, as has been pointed out elsewhere³ the

¹Though see remarks of EVATT J. in Fletcher v. Nott discussed below.

²[1896] 1 Q.B. 116.

³Mitchell op. cit. p.38.

judgment of the House of Lords in Dunn treated as binding statements of law, opinions which were no more than obiter dicta in De Dohsé v. The Queen.¹ The Court furthermore seems expressly to exclude prerogative and base its judgment on the basis of an implied term²; such a term can be negatived by the existence of implications suggesting an intention to do so and there are certain factors on which it can at least be argued that such an abrogation was intended.

In s.12 of the statute in question reference is made to "lawful" discharge or dismissal. It is arguable that this presupposes the possibility of an unlawful dismissal which could not be the case if the intention was that the office should be held at pleasure. In this connection it should be observed that a dismissal by the Commissioner alone would not be "unlawful" but would be a nullity in view of the terms of s.6³; it is suggested, therefore, that s.12 assumes that dismissal will follow only after a particular procedure has been undergone.

Further, the Police Act of 1863 had repealed an early statute of 1852 by which a constable could be convicted by two justices for "neglect or violation of duty." This was a judicial proceeding and dismissal could then be ordered

¹(1897) 66 L.J. Q.B. 422 n.

²See BARTON J. at 426. On the basis of the decision in Att. Gen. v. De Keyser's Royal Hotel [1920] AC 508, the prerogative would presumably be abrogated by the provisions of the statute.

³And see at 436.

by Petty Sessions. But an appeal was given under the Act to the Governor who could confirm the dismissal or order a further enquiry. As CHUBB J. commented in his judgment in the Queensland Supreme Court¹:

"in taking away from him the right to be judicially tried, Parliament intended to give the constable the protection of the Governor in Council, and the more so because, if the contention of the Crown is correct, a constable can be condemned and dismissed unheard without having either the charge stated to him or being given an opportunity of answering it, with the loss of his superannuation contributions and his superannuation rights ..."

The learned judge was here urging that the word "Government" meant the Governor in Council and not a Minister of the Crown, but the underlying emphasis on a right to some form of judicial process before dismissal is clear.² Thus there is some ground for arguing that the 1863 Act did not intend to remove the protection hitherto given to policemen; prior to the statute of 1863 the police forces were under local control and the members were not servants of the Crown and the view of the Supreme Court seems more in accordance

¹ sub. nom. Foley v. Ryder [1906] St.R. Qd. 225 at 231.

² Unlike the High Court, His Honor took the view that the words "sufficient proof" implied evidence of facts both by accuser and accused which "to a reasonable and right minded person ... would suggest hearing what the party accused has to say."

with the historical development of the force.¹

The implied term was in the judgments of BARTON and O'CONNOR J.J., a power which existed concurrently with the power given to the Commissioner under s.6 but since the Crown can act only through the medium of its officers², it is arguable that the power given to the Commissioner was not intended to be a concurrent power but a power delegated to him and exercisable by him subject to the approval of the executive government acting through a responsible minister.

As such Crown servant cases as Dunn, De Dohsé and Shenton played such an important part in the decision in

¹This argument from the history of Queensland police legislation was rejected by O'CONNOR J. in the High Court (at 454) when he stated that the 1863 Act "swept away all local supervision and placed the whole of the police force under one central control in the hands of the Government ... and it is that Act, and that Act only, in which we are to find the rights, if there are any rights." But, with respect, it can be argued (as the State Supreme Court did) that the history of the legislation is evidence that public interest does not necessarily demand dismissal at pleasure of policemen, as such. Their public importance and their duties were the same before and after they became Crown servants.

²See, for example, at 439 where BARTON J. says: "It [the constable's service] may be terminated at any moment by the other party - that is the Crown, by its officers."

¹See especially, BARTON J. at 439.

²Supra pp. 33-41

Ryder v. Foley, the judgments in the High Court emphasised the importance of "public interest,"¹ and assume that the public interest in the activities of the police force required an implied term of dismissal at pleasure. It is not necessary here to discuss further the validity or otherwise of this assumption in view of what has been said above,² but another important consideration is relevant in deciding wherein lies the best interests of the public - the need to preserve the salaried governmental service from the interference of politicians whose motives, however reasonable they may be in the individual cases with which they are concerned, may not necessarily be in the best public interest. The effects of continuous political interference on governmental employment have been referred to in the last chapter and the history of police legislation is similar to that of other governmental services insofar as it shews an intention to limit, by the operation of statute, the extent to which governmental employees would be subject to arbitrary and unfair treatment. The decision of the Queensland Supreme Court in the instant case is preferable in this respect to that of the High Court and the unfortunate (for the public interest) consequences of Ryder v. Foley are fully reflected in the next police case to which we must

¹(1938) 60 C.L.J. 55.

¹See especially, BARTON J. at 439, 443-446; O'CONNOR J. at 450.

²Supra pp. 33 - 42

turn our attention, namely Fletcher v. Nott.¹

The appellant in this case had been a police constable in New South Wales. As a result of a Royal Commission into the operation of State gaming and betting legislation, the Chief Secretary (the Minister responsible for the police force) directed the Commissioner of Police that a number of policemen, including the appellant, be dismissed. The Minister also recommended to the Governor in Council that these members of the force be dismissed. Accordingly, notice of dismissal was given to the appellant by the Commissioner and confirmed by the Governor in Council.

The Supreme Court of New South Wales dismissed² a claim by the plaintiff for damages for wrongful dismissal and in affirming this decision the High Court held that neither the rules providing for the general government and discipline of the police force made under s.12 of the Police Regulation Act 1899 - 1935 nor the Police Regulation (Appeals) Act 1923 controlled or restricted the power of the Crown to dismiss at will.

The main grounds for the decision are contained in the judgments of LATHAM C.J. and EVATT J. The Chief Justice began with the basic proposition of the implied term in all

¹(1938) 60 C.L.R. 55.

²Fletcher v. Nott (1937) 37 S.R. (New South Wales) 430.

contracts of employment with the Crown and reiterated the statement to this effect in Ryder v. Foley. The relevant provisions of the New South Wales Police Regulation Act 1899-1935 were indistinguishable from those of the Queensland statute considered in the Ryder case and, therefore, in His Honor's view, could afford no grounds for assuming any limitation of the right to dismiss at pleasure.¹ By s.12 of the New South Wales Act the Governor was empowered to make "rules for the general government and discipline of the members of the police force" and the appellant maintained that these rules constituted an implication that the usual implied term did not apply.

The learned judge pointed out that many of the rules consisted of advice and information and could not be considered as conferring rights. Certain other rules provided for liability to penalties and dismissal for a wide variety of offences and the departmental enquiries into charges made against members of the force.² Affirming that these rules also, in no way conferred legal rights upon the policeman, His Honor stated (at 67):

¹At 65.

²See at 66-67. "They will be liable to punishment or dismissal for disobedience, neglect or omission of duty, incompetency, intemperance, disrespect to any person in authority, insolent or indecorous behaviour or any words or actions subversive of discipline or calculated to impair the efficiency of, or bring discredit upon, the police service or any misconduct punishable by law or contrary to rules and instructions."

"If, according to the true construction of the Act, a constable holds his office only during pleasure, no rule made under the Act can alter the conditions of his tenure of office ..."

The construction of the statute, particularly the section providing that lack of reciprocity would not annul the agreement between the constable and the Crown, indicated, in the opinion of the learned Chief Justice, that the contract was a unilateral one, determinable at the will of the Crown. No rule could alter this and any rule which attempted to do so "would be inconsistent with the Act and would therefore be invalid."

As has been mentioned above, there are grounds for doubting the interpretation of the statutory provisions under consideration in Ryder v. Foley, and the same criticisms are applicable in the instant case. But two further observations on the legal effect of the rules are pertinent.

First, in deciding that the rules conferred no legal rights and that their existence was not inconsistent with a power to dismiss at pleasure, the Chief Justice laid great importance on the case of R. Venkata Rao v. Secretary of State for India.¹ But two factors in that case weighed

¹[1937] A.C. 248. At 69 His Honor stated: "Thus it is recognised by the highest judicial authority that there is no necessary inconsistency between an officer of the Crown holding his appointment at pleasure, and the existence of rules, either contained in a statute or made under a statutory power, which purport to regulate the manner in which an officer is dismissed. Such rules do not legally limit the power or manner of dismissal."

heavily with the Judicial Committee of the Privy Council: the existence of an express statutory reservation of the power to dismiss at pleasure and the express assertion that the Secretary of State for India in Council was "the supreme authority" over the Indian civil service.¹

Neither of these provisions existed in the legislation considered in Fletcher v. Nott and, it is arguable, therefore, that Venkato Rao does not really assist the decision in that case.

Second, the rules expressing the policeman's liability to punishment and dismissal can be regarded as merely informative and explanatory.² It is at least doubtful, however, whether the inclusion of such terms in a contract of service impliedly excludes dismissal or punishment on grounds other than those expressed.³

The Chief Justice then turned to the Police Regulation (Appeals) Act of 1923 which provides for an appeal against disciplinary decisions of the Commissioner of Police.⁴

¹ibid. at 256, 257.

²See LATHAM C.J. at 68 and EVATT J. at 78.

³See the divergent views expressed in McClelland v. Northern Ireland Hospital Board [1957] 2 All E.R. 129 at 136, 138 and 141-2.

⁴s.6(1): "Any person who ... is a member of the police force, if dissatisfied with any decision of the Commissioner made or given after the commencement of this Act, in regard to ... any punishment where such punishment consists of the infliction of a fine, suspension or reduction, whether in rank or pay, dismissal, discharge or transfer, may give notice of appeal from such decision in the prescribed manner."

Appeal lies to an appeal board consisting of a District Court judge with, if necessary, two assessors. The report of the board and all the evidence are to be sent to the Commissioner who is then to forward these documents together with his own report and recommendations to the Minister whose decision is final. No appeal lies from the board or Minister to any other court or tribunal and no prerogative writ will lie in respect of decisions of the board or Minister.¹

Having regard to the terms of this statute, His Honor decided that it did not regulate "the whole subject matter of dismissal from the police force" but gave no more than a right of appeal from the Commissioner, leaving untouched the basic right of the Governor in Council to dismiss at pleasure from which no appeal could lie. Before saying anything further on this interpretation of the Act, something must be said of the judgment of EVATT J. who concurred in the decision and for the same reasons as the Chief Justice.

His Honor, however, in concurring, made some strong comments on the practice that had been adopted in the Fletcher Case and his remarks are of importance in demonstrating the manner in which the public interest would best be served in cases of the kind under consideration. Some

¹ At 80. Cf. the statements made by both Government and Opposition members during the debate on the Bill. s.8. Parliamentary Debates Vol 94, 1947. The emphasis on retaining the police force under Government control is evident throughout the debate.

of these remarks are for this purpose worth quoting in detail.

"It is plain that this Act [Police Regulation (Appeals) Act 1923] is of fundamental importance in the good government of the police force of New South Wales ... The scheme ... seems to contemplate that, in the first instance, the commissioner should himself give a decision and that ... the jurisdiction of the minister - whose decision is final - should be appellate and not original ... and ... it is expected that the minister will not intervene until after the appeal board has heard all parties concerned - including the commissioner - and pronounced its decision. Of course, the appeal board's decisions are not made binding upon the minister. None the less it would be a most serious responsibility for the minister to refuse to act upon the decision of the appeal board."¹

Referring to the importance of a proper public and judicial hearing, the learned judge remarked: "By such means administrative action is controlled by open investigation before a judicial officer." And of the action of the Minister, he added:

"In the present case the device of direct ministerial intervention set at nought the scheme of the Police Regulation (Appeals) Act ... by reference to the Royal Commission report officers like the plaintiff were deprived of the benefits [of the Act]. The minister directed the commissioner to dismiss instead of allowing the commissioner to exercise his own discretion in each case. By these means the commissioner accepted no

¹At 80. Cf. the statements made by both Government and Opposition members during the debates on the bill: New South Wales Parliamentary Debates Vol 94, Cols.2837-2918; 3295-3298. The emphasis on removing the police from unfettered political control is evident throughout the debates.

responsibility for the dismissals. Consequently when the police officers sought to appeal ... the absence of any "decision" of the commissioner was held fatal to the jurisdiction of the board ... it is very regrettable that ... neither the Commissioner of Police nor the appeal board was allowed to fulfil the functions specified in the Act of 1923 and intended to be exercised in accordance therewith."¹

Nevertheless His Honor reached the same conclusion as the Chief Justice that the Act of 1923 did not "preclude the Minister or the Executive Government from terminating the plaintiff's services" and added, at 82:

"The fact that the Act of 1923 preserves ministerial control only by way of final resort is not sufficient to warrant the inference that the pre-existing power of primary ministerial control by dismissal has disappeared."

It is suggested, with respect, that as the Minister is the instrument by which the Crown in fact operates - as the High Court itself had stressed in Ryder v. Foley² - there are reasonable grounds for assuming that the right

¹At 81-82. Cf. the remarks of Lord ROCHE L.C. in R. Venkata Rao v. Secretary of State or India [1937] A.C. 248 at 254 on the subject of the government's failure to adhere to a procedure specifically provided for by statutory rules.

²(1906) 4 C.L.R. 422 at 432: "The Crown, that is, the head of the Executive Government, in whose name everything is done, does not act in person; it acts through responsible officers, to whom the powers of Government are delegated, and, as a matter of fact, ninety-nine hundredths of the work of the Executive Government is done by those responsible officers on their own individual responsibility without consulting the Governor in Council."

to dismiss was to be exercised only after certain formalities had been observed and not capriciously and without reasonable enquiry. The fact that an appeal is given only from the decision of the commissioner is just as likely to be evidence of a presumption that the commissioner alone would exercise disciplinary powers as it is evidence of a reservation to the Crown (i.e. the Minister) of a concurrent power to dismiss at will. By making the decision of the Minister final, the statute ensured that the Crown's ultimate jurisdiction was preserved and it could be exercised in a way contrary to the findings of either the commissioner or the appeal board. This interpretation of the statute is tenable and would have afforded greater protection to the public interest in the sound administration of the police force.¹

The two cases just discussed suggest that Australian courts will maintain "the implied term" in Crown contracts in the absence of an express statutory provision which specifically negatives the term.² The difficulty of

¹(1956) 94 C.L.R. 493 affirmed by the High Court of Australia [1955] Tas. L.R. 100.
¹This case has an interesting political sequel. In October 1939 a bill was passed in the New South Wales legislature providing for the reinstatement of four constables on the basis of the findings of a second Royal Commission which had been established on the exhortations of the Police Association. This commission found that the four constables had been unjustly dismissed. See New South Wales Parliamentary Debates (1939) Vol.160 pp. 7112-7116.

²Cf. DIXON J. as he then was, in Fletcher v. Nott (1938) 60 C.L.R. 55 at 76-77.

attempting to prove that the terms has been negatived by statutory implication is even more apparent in the most recent of the police cases.

In Kaye v. Attorney-General for Tasmania¹ the appellant who had been dismissed from the police force of Tasmania by the Governor in Council sought to prove that the provisions of the Police Regulation Act 1898-1945, as amended by the Police Regulation Act 1955 which established a system of appeals, abrogated the right of the Crown to dismiss at pleasure.

Apart from the provisions of ss.16-19,² the statute of 1898-1945 contained four other sections which were mentioned in the case: by s.8 the Governor was to appoint a commissioner who would control the force; s.10 provided that the Governor "may appoint such officers of police³ as are necessary;" by s.11 it was provided that the Governor could "at any time suspend, reduce, discharge or dismiss" any officer of police including the commissioner; and s.12

¹(1956) 94 C.L.R. 193 affirming decision of Tasmanian Supreme Court [1955] Tas. L.R.

²These ss. contained the usual conditions about the oath, the absence of the need for reciprocity and resignation.

³The Act distinguished "officers of police" and "sergeants, constables and junior constables." But, rather confusingly, included both classes in the generic term "police officers."

empowered the commissioner, with the approval of the minister, to appoint and dismiss such sergeants and constables as he thought fit, the Governor to have the right to disallow any such appointments.

In the opinion of the High Court there was nothing in these provisions which in any way abridged the right to dismiss at pleasure and on the basis of their decisions in the Ryder and Fletcher cases, considered that ss.16-19 clearly indicated a reservation of the implied term and a unilateral contract.

Further, the provisions of the Act of 1955 which established an appeals board were held, so far as the appellant was concerned, not to be inconsistent with the existence of the implied term. The most important section was 50D which by its various subsections provided: any police constable or sergeant to have the right of appeal against disciplinary decisions of the commissioner; the appeal board's decision to be final with an appeal to the State Supreme Court on points of law only and a similar right of appeal to be given to "officers of the police" from decisions of the Governor.

The court agreed that the subsection providing that officers of the police should have an appeal from decisions of the Governor qualified the Crown's right to dismiss at pleasure, "but to give a right of appeal against a dismissal by the Crown is a very different thing from taking away the

right of the Crown to dismiss." (at 202). A right of appeal does imply, however, that the dismissal by the Crown will be subject to review by a judicial body whose decision is final - this certainly negatives the implied term and seems to justify the conclusion that the rule in Gould v. Stuart applies to officers of police under the Tasmanian legislation.

But the appellant was not an officer of police. He was appointed by the commissioner and appeals in cases of policemen other than officers lay only in respect of decisions of the commissioner. As the appellant had been dismissed by the Governor "it follows that he was subject to the unqualified right of the Crown to dismiss a police officer at pleasure." (at 202).

With respect, this interpretation sets at nought what was the obvious intention of the statute - the protection of all police officers against arbitrary and capricious treatment. Sections 8-12 of the Act of 1898-1945 obviously contemplate that senior members of the force will be appointed, disciplined and dismissed by the Governor, while the junior ranks will come under the jurisdiction of the commissioner. The existence of these two separate disciplinary systems is at least a strong implication that no other residual power or implied term exists.¹ And even

¹ It should be observed that almost identical provisions existed in the statutes considered in the Ryder and Fletcher cases, to which the same remarks apply.

if sections 16-19 make it difficult to adopt such a view the provisions of the 1955 Act seem clearly to imply that every member of the force would be given a right of appeal against the appropriate authority, Governor or commissioner, statutorily charged with his discipline.¹

These cases contrast sharply with the decision of the New Zealand Supreme Court in Kilgour v. Cummings and another², particularly as to the emphasis placed on the oath and the existence of a unilateral contract not voidable for want of reciprocity. The legislation in this case was identical with the statutes discussed above and of the effect of such legislation, FAIR J. stated (at 982):

"... the view taken by the Crown was apparently to some extent influenced by the impression that the Police Force was a semi-military body, and that its members should properly be regarded as serving on much the same basis as those of the Army. For many years past none of these have been able to resign during his term of service ... Seamen and merchant ships ... have been subjected to similar compulsion. But these departures from the general rule governing the relationship of master and servant ... require to be expressed either by an established practice, or in clear and unmistakable language. Neither of these

¹The decision results in the two classes of servant in the police force of Tasmania being treated differently, officers having a right to appeal from the Crown's actions and the other policemen being denied such a right. It is difficult to reconcile this result with the views expressed by the High Court in Ryder v. Foley at 452-3 where one of the grounds on which the appellant's claim failed was that it would result in "giving a right to police constables and sergeants but not to officers." See supra p. 173

²[1941] N.Z.L.R. 972.

conditions are fulfilled in respect of the Police force and the provision ... that on taking and subscribing the oath a person 'shall be taken to have entered into a written agreement to serve' indicates an approximation to a civil contract."

The influence of the doctrine of the implied term is apparent throughout the law of employment. In statutes concerning public corporations and local governing bodies it is stated for a right to be exercised at pleasure to be conferred either by express provision² or by implication³.

The High Court's reluctance to limit the Crown's right in the case of the police force seems, with respect, to be based on a mistaken conception of public interest - a conception inherited from one or two cases in the late nineteenth century which are based on assumptions of at least doubtful validity.¹ That there is nothing inherently difficult in postulating tenure rights for members of the police force can be seen from the British practice by means of which the basic statutory right of a Chief Constable to dismiss at pleasure² has been abrogated by the establishment of a system of appeals to the Home Secretary.³ Indeed in

¹For a brief but critical judicial survey of the development of the doctrine of the implied term, see Bertrand v. The King [1949] V.L.R. 49 especially at 54-56.

²See, for example, County Police Act 1839; County and Borough Police Act 1859 s.191(4).

³Police Appeals Act 1927 and see Wallwork v. Fielding [1922] 2 K.B. 66 C.A.

the case of the police forces in Britain the tenure at pleasure was statutorily expressed. In the cases discussed above the right depended upon an implied term¹ which should have been less difficult to negative.

The influence of the doctrine of the implied term is apparent throughout governmental employment. In statutes concerning public corporations and local governing bodies it is common for a right to dismiss at pleasure to be reserved either by express provision² or by implication³. And although there is judicial authority for saying that the right to dismiss at will has been abrogated by statute like the Commonwealth Public Service Act 1922-57, it is apparent that certain sections of that statute and others of a similar kind could operate in such a way as to retain a power

¹In Kaye v. Attorney-General for Tasmania (1956) 4 C.L.R. 193 at 204, WILLIAMS J. said that the right to dismiss at will was a prerogative right. With respect, this does not seem to be in accordance with the usual view taken by the High Court that dismissal at pleasure is an implied term of the contract between Crown and servant.

²Titterton v. Railway Commissioners (1895) 16 L.R. N.S.W. 235; Williames v. Victorian Railway Commissioners (1903) 29 V.L.R. 566; Cilento v. South Australian Railway Commissioners [1927] S.A. S.R. 305; Ex parte Wright (1934) 34 S.R. N.S.W. 368; Stepo v. Railway Commissioners (1925) 42 N.S.W. W.N. 181. And in local government, see South Australian Local Government Act 1936-57 s. 157(2).

³See: N.S.W. Local Government Act 1919-51 s.95(1)(a); Victorian Local Government Act 1946 s.158(2); Mansfield v. Blenheim B.C. (1923) N.Z.L.R. 842 where the power "to remove" was held to mean "to remove at pleasure." Cf. McManus v. Bowes [1938] 1 K.B. 98.

in the Crown of dismissing a servant without observing the normal statutory procedure.

It is clear, for example, that by s.8A of the Commonwealth Public Service Act 1922-57, the Governor-General could by an order made under the section deprive any officer or class of officers from the benefits of the Act including a right to a properly constituted enquiry before dismissal.¹ This section of the Act is intended to provide for the determination of conditions of employment of employees who could not readily come within the normal public service conditions - cleaners, timekeepers, domestic staff at government hostels as well as pharmacists, airport fire captains and other technical workers.² But there is nothing in the section which would prevent its being used to remove a public servant from the operation of the Act and to this extent the section could render nugatory the entire statute.³

¹s.8A(1): "The Governor-General may, on the recommendation of the Board, by order in writing under his hand, declare that the provisions of this Act and of the regulations specified in the order shall not apply to an officer or employee, or to the officers or employees included in a class of officers or employees, specified in the order."

²A list of such "exempt employees" is published regularly in the Commonwealth Gazette.

³The section bears a strong resemblance to that included in the Western Australian Public Service Act 1902 as a result of the decision in Gould v. Stuart by which it was provided that the Crown could at any time declare that it would no longer be controlled by the provisions of the principal Act. See Hughes v. The Crown (1903) 6 W.A.L.R.21 at 26. It is interesting to notice that section 8A is being used to avoid the provisions of s.33 of the Commonwealth Public Service Act which prohibits employment of aliens in a permanent capacity.

Moreover, by s.29(1) of the same statute, the Governor-General has the power, on the recommendation of the Public Service Board, to abolish an office in a department and that this will not give a right to damages for wrongful dismissal is clear from Young v. Waller¹ in which the Privy Council held that although the New South Wales Civil Service Act of 1884 had abrogated the right to dismiss at pleasure,² yet it did not take away the right of the Crown to abolish an office. And sections similar to s.29(1) of the Commonwealth Public Service Act are contained in the relevant State statutes.

Finally, it is at least open to question whether the form in which ss.55-57³ of the Commonwealth Public Service Act 1922-57 are stated completely precludes the operation of the dismissal at pleasure rule as far as most Commonwealth public servants are concerned. In the two early cases⁴ in which the High Court have stated that the rule in Gould v. Stuart is applicable to those serving under the Act, the point had not been specifically raised but had been assumed by the court without discussion. But in

¹[1898] A.C. 661. And see also Edwards v. Commonwealth (1935) 54 C.L.R. 313 at 324.

²The statute in question in Gould v. Stuart.

³These sections specify the offences for which an officer may be punished and provide for an appeal body.

⁴Bridges v. Commonwealth (1907) 4 C.L.R. 1195; Williamson v. Commonwealth (1907) 5 C.L.R. 174.

Gould v. Stuart the ultimate authority responsible for the punishment of offending servants was the Governor and it was clear that the enquiry procedure in the statute was a condition precedent of the Governor's action. In the Commonwealth Public Service Act, on the other hand, the responsibility for punishment rests with the Governor-General only in respect of the First and Second Divisions¹ of the service²; for the other two divisions the ultimate authority for punishment by dismissal, is the Public Service Board from which no appeal lies.³ On the basis of decisions of the High Court in the police cases, it is arguable that the rule in Gould v. Stuart is not applicable to the Third and Fourth Divisions of the Commonwealth Public Service because the intention was to make the Public Service Board the final authority for their dismissal and, at the same time, to retain a concurrent power of dismissal exercisable by the Governor-General.⁴ As has been said

¹The Commonwealth Public Service is divided into four divisions of which the First and Second comprise the top-level officials, including heads of departments.

²s. 56(2). *Contract Employees v. Commonwealth* (1925) 36 C.L.R. 102 where the High Court held that the power of dismissal by the

³s. 55(4). *Contract Employees v. Commonwealth* (1925) 36 C.L.R. 102, on the basis of the *Police v. Commonwealth* case.

⁴And see s. 92(1) which provides that: "Every appointment, promotion, transfer, retirement, or dismissal of an officer made by the Board, a Permanent Head or a Chief Officer, as the case may be, under this Act, shall for all purposes have the same force and effect as if made by the Governor-General." This implies that the authority of the Governor-General is required for the execution of the acts mentioned in the section and it is arguable that this authority, persists concurrently with that of the Board.

above, this argument should be rejected as contrary to the scheme of the Act but on the existing High Court decisions it is possibly good law.¹

The doctrine of implied term, therefore, is by no means completely absent in Australian government employment. In many cases it has been made explicit by statutory provision; in other cases it may still be invoked because of the terms in which the relevant statutes have been expressed. The courts in Australia have been just as ready to imply the "dismissal at pleasure" term into Crown contracts as their English counterparts - a practice greatly at variance with that obtaining in the realm of private law² - and the employment contract of the government employee is, in this respect, a peculiar one.

That the government servant works under a contract, the terms of which are, in the main, determined by statute, has been emphasised by the Australian courts.³ Some discussion is now required of the importance placed by the courts on the enforceability of those rights.

¹Though contrast Bradshaw v. Commonwealth (1925) 36 C.L.R. 585 where the High Court held that the power of dismissal for the causes mentioned in the Act was vested in the Board. This need not, on the basis of the police and railway cases, preclude a gubernatorial power to dismiss at will. Cf. Edwards v. Commonwealth (1935) 54 C.L.R. 313 at 323.

²See the remarks of SCRUTTON L.J. in Reigate v. Union Manufacturing Co. (Ramsbottom) (1) [1918] 1 K.B. 592 at 605.

³See, for example, Evans v. Williams (1911) 11 C.L.R. 550 at 566.

The importance in Australia of statutory rights which can be enforced by the public servant against his employing authority has already been mentioned. This is well illustrated by the cases concerning civil servants transferred to the Commonwealth government from the different States on the formation of a Federation at the beginning of this century.

The Australian politicians who debated the proposed federal constitution in the conventions of 1891, 1897 and 1898, gave little thought to the formation of a new and integrated Commonwealth public service. Instead they assumed that the soundest method of establishing such a service was by transferring the necessary departments and officials from the States.¹ Little discussion on the administrative structure of the new service followed. Something was said about the legal problems involved in

¹This is in contrast to the American convention at Philadelphia in which the principle of a new and independent Federal service was accepted without considering whether or not the new service would be recruited from the States. See: L.D. White - The Federalists, Macmillan (1948) pp.389-396; and for an interesting account of the early formation of the Commonwealth public service, see V. Subramaniam - "The integration of the Commonwealth Public Service," Public Administration (Sydney) Vol. XVI, p.138 et. seq.

transferring the assets of the State departments concerned but the main discussion centred on the rights of the transferred officers.¹ After some argument as to the form which the preservation of these rights would take, the formula "all existing and accruing rights" was finally agreed upon and duly appeared in the Constitution.²

The problems inherent in this formula became at once apparent when the classification of the new Commonwealth Public Service into grades, classes and divisions began. In the words of the first Public Service Commissioner:

"The most pronounced difficulty so far experienced in administering the Commonwealth Public Service arose from the fact that s.84 of the Constitution preserves to transferred officers all the existing and accruing rights enjoyed by them while they were State officers ... [and] the majority of the Commonwealth officers have been transferred from the States with essentially differing Public Service laws and rights of officers supported by these laws, in many instances being not only in conflict with one another but also with the letter and spirit of the Commonwealth Public Service Act."³

¹See: Official Reports of the National Australian Convention Debates, Adelaide 1897; Melbourne 1898, especially the former at pp.886-1049.

²s. 84; see supra p. 151 n.1

³Commonwealth Public Service Commissioner: First Annual Report p.6. The extent of the claims of the transferred officers can be judged by the fact that one Queensland official objected that raising the percentage of marks for a pass in a departmental examination from 33 to 60 was a violation of "an existing right"!

Whatever the administrative effects of the "existing and accruing rights" clause, the legal effects were unmistakable and the High Court over the next forty years was to demonstrate the full extent of the rights which a "transferred" governmental employee could enforce against the government.¹

*

In Bond v. Commonwealth² the High Court refused to accept the view that the rights referred to in s.84 of the Constitution did not include a right to a certain and fixed remuneration and GRIFFITH C.J. declared (at 23) that the rights of an officer in the public service were no different from "the rights of any other person who is in the service of another, except so far as a difference is made by statute." The public servant, like any other, was entitled to receive payment for his services at the rate fixed when the employment contract was made. This clearly

¹The Constitutional provision for the preservation of existing and accruing rights was repeated in the Commonwealth Public Service Act of 1902 s.60 (now Commonwealth Public Service Act 1922-58 s.45).

²(1903) 1 C.L.R. 13.

implied that the government, as such, had no peculiar rights as an employer.

The Bond decision was, however, limited in its effect by the decision in Cousins v. Commonwealth¹ in which the High Court held that the section of the State statute involved² was merely a provision passed to give a salary determination on transfer and did not confer a right to a fixed salary which would be unalterable. The salary could have been reduced at any time by the state legislature and it followed, therefore, that a similar power to reduce the salary belonged to the Commonwealth Parliament. The provisions of the Public Service Act which provided for the classification and salary ranges of the service applied to all public servants, transferred officers not excepted and the Court rejected the claim that s.60 of the Public Service Act, which preserved existing and accruing rights, could be construed as excepting transferred officers from the salary fixing provisions of the Public Service Act.

The decision in Cousins was welcomed by those in control of the Commonwealth Public Service and the Public Service Commissioner stated that "the decision besides saving the Commonwealth thousands of pounds for many years

¹(1906) 3 C.L.R. 529.

²Victorian Public Service Act 1900 s.19 (this was the section considered in Bond).

to come has declared the competency of the Federal Legislature to establish a consistent and symmetrical system of civil service administration."¹ Indeed, had the reasoning in the decision been adhered to by the High Court in subsequent cases, "the competency of the Federal Legislature" would have been such as to render almost nugatory the Constitutional and statutory preservation of the rights of the transferred officers.

In Le Leu v. Commonwealth,² however, the High Court held that a section of the Commonwealth Public Service Act providing for compulsory retirement on attaining the age of sixty-five could not be used to terminate the employment contract of a transferred officer unless that had been one of the terms of his contract with the State government before transfer. Disapproving the decision in Cousins, the court decided that the relevant section of the Commonwealth statute could not be read as applying to all public servants as this would be inconsistent with s.60 of the same Act which specifically preserved the rights of transferred employees.³

¹Commonwealth Public Service Commissioner: Second Annual Report (1907) p.30.

²(1921) 29 C.L.R. 305.

³HIGGINS J. merely distinguished Cousins on the ground that it turned on the intended impermanence of the Victorian statute; that case assumed "that if the [Victorian] Act were meant to be permanent or indefinite ... the salary could not have been reduced."

The readiness of the court to uphold the public employee's rights against the government is implicit in the cases just mentioned. The case of Lucy v. Commonwealth¹ demonstrates even more explicitly the real extent of the existing and accruing rights of the transferred employee. The implications of this case, which set the tone for a number of subsequent decisions, are of major significance in the field of Australian government employment.

In Lucy the Commonwealth government had compulsorily retired a transferred employee formerly employed in the South Australian public service who had attained the age of sixty-five. The retirement was admitted to be unlawful in view of the decision in Le Leu and the action had been brought merely to decide the plaintiff's proper remedy and, if it were damages, how the damages were to be measured.

The High Court held that the remedy was damages for unlawful termination of his contract of service and that the measure of damages was the same as that in an action for wrongful dismissal.² In dismissing the plaintiff, the Commonwealth Government had committed a breach of the contract of employment into which it had entered. And by

¹(1923) 33 C.L.R. 229.

²Contrast Vine v. National Dock Labour Board [1957] A.C.488.

virtue of s.84 of the Constitution and s.60 of the Public Service Act the plaintiff had acquired "the right to remain in the Public Service during his life or until dismissal or removal for some cause specified in the South Australian Acts."¹

The position of the plaintiff was similar to that of a servant of a private person who had been dismissed before the expiration of the period specified in his contract.

The question arose as to whether, in estimating the damages, the relevant salary should be taken as at the date of the employee's transfer to the Commonwealth, at the date of the retiral or on the basis of the maximum salary which the employee would have received had he remained under the South Australian Statutes. Dissenting from the remainder of the High Court, ISAACS J. held that the plaintiff retained only those rights which he brought over on transfer.

"Those rights 'existing and accruing' were fixed when the Departments were transferred, and could have been there and then stated in writing. They neither increased nor diminished as the years went on ... Those rights if invaded, must be fully compensated for; but I am quite unable to see why, by reason of those rights which the country has guaranteed, these officers should in still other respects stand in a better position than any other officers in the Service, or that the guarantee should be enlarged beyond the terms of the compact in the Constitution. The Constitution itself certainly does not give these added rights, and the whole intendment of the

¹at 237; see also at 238-239.

¹at 235-236.

Commonwealth Public Service Act, is against it. And justice is against it."¹

This view was not accepted, however, by the rest of the Court. HIGGINS J. stressed that the plaintiff entered the Commonwealth Service with a right to enjoy the terms of the contract he made with the Commonwealth and, in addition, to enjoy such rights as he possessed while in the service of the State government. The Constitution enacted that a transferred officer should preserve all existing and accruing rights but did not say that he had to remain subject to whatever burdens or disadvantages the law of the State public service had imposed upon him. "It is a one-sided arrangement - the officer is to take all the advantages which the Commonwealth gave him, plus any rights which he had under the State and to which he would not be entitled under an ordinary contract with the Commonwealth." (at 250).

STARKE J. shared this view. The transferred officer, while possessing certain rights under his contract with the Commonwealth government, retained other additional rights by virtue of the Constitution. The whole weight of contractual rights was with the employee. Parliament could no doubt change many of these rights, but others had been guaranteed by the Constitution. Parliament had not altered the plaintiff's rights under the contract with the Commonwealth; until it did so the Commonwealth government could

¹at 243-244.

not interfere with these rights:

"The King cannot, by a mere executive act, alter that law or vary the rights of the plaintiff; he cannot by any such act, dissolve or vary the contract ..."¹

These statements in the Lucy case contrast sharply with the attitude of the court in the police cases discussed in the last chapter. But their importance is unmistakable. Crown employment need not mean an absence of rights. The State, as employer, can be held to the terms of the contracts it makes with its employees. Indeed there is a remarkable resemblance in the contracts involved in the transferred rights cases to the unilateral contracts so frequently mentioned in the police cases - except that in the former the advantage lies with the employee.²

The High Court in Bradshaw v. Commonwealth³ later placed certain restrictions on the extent of the "existing and accruing rights" guaranteed by the Constitution. Under a South Australian statute public servants who were incapacitated could be required to resign, failing which

¹at 254. This seems a clear rejection of any notion that prerogative right is a controlling force in Australian Crown employment. See at 249 and 253 for the emphasis on the existence of an ordinary contractual relationship between the Crown and its employees.

²Cf. McTIERNAN J. in his dissenting judgment in Pemberton v. Commonwealth (1933) 49 C.L.R. 382 at 397.

³(1925) 36 C.L.R. 585.

they could be removed. By a majority decision (three to two) the court held that the provision relating to resignation before removal was not an existing and accruing right such as s.84 of the Constitution was intended to preserve. In the words of the Chief Justice at 590: "the object of the section is rather to impose a disability on the officer by authorising his removal ... in the event of his incapacity." The object of the Constitutional protection "was not to provide for a pedantic compliance with forms ... but to preserve the substantial rights of [transferred] public servants." RICH J. agreed (at 597) that the South Australian Act related to the ending of a substantive right, but "the method of formally effecting this ending, e.g. by resignation or dismissal ... had no effect on such ending." The procedure regarding the request to resign mentioned in the South Australian statute, therefore, was not a substantial right to be protected by the Constitution. STARKE J. also adhered to this view and thought that the section in question gave no right to the plaintiff; on the contrary "it is a power vested in the

¹South Australian Civil Service Act 1874 s.28: "The Governor may require any officer who has become incapacitated for the performance of his duties, to resign his office, and, in the event of non-compliance, may remove such officer, who shall thereupon be entitled to the compensation provided by the Act."

Executive authority of the State"¹ which left the Commonwealth free to prescribe the manner in which the power of removal would be exercised.

The majority of the court was influenced mainly by the fact that they thought it possible to draw a distinction between "substantial" rights, protected by the Constitution, and other rights, not so protected. With respect, this distinction does not seem to be supported by the terms of s.84 of the Constitution and in this particular case the right in question, namely to be allowed to resign, is probably much more substantial than at first sight appears.

In their dissenting judgments, ISAACS and HIGGINS discussed these factors at length and, in their opinion, there was no justification for distinguishing substantial and other rights; whether great or small, the rights in the South Australian Act had to be accorded to the plaintiff. Further it was not for the court "to weigh for itself the comparative importance of any right that is secured by s.84 [of the Constitution]," (at 592). The provision of the South Australian statute made the request to resign "a

¹This, with respect, could be said of any section of a statute dealing with, for example, causes for which dismissal could take place. The subject matter is a disability of the employee but the procedure laid down is a right which limits the effect of that disability. This has been the interpretation of dismissal sections like s.55 of the Commonwealth Public Service Act - see Williamson v. Commonwealth (1907) 5 C.L.R. 174 at 179.

condition precedent to the power of removal." To say that the right to resign was not substantial was to ignore the fact that "it would be better in seeking future employment to say 'resigned' rather than 'removed,'" (at 596). In the words of ISAACS J: "When we are cutting down what is held to be a life interest [sic!] the conditions of defeasance must be adhered to."

The minority view in Bradshaw seems more in accordance with the previous decisions and this is supported by Edwards v. Commonwealth,¹ the decision in which turned on the provision of a South Australian statute which permitted the removal of public servants where "the total number of officers in a department" was excessive. The plaintiff had been dismissed from the Commonwealth service on the ground that there were too many employees of his particular category in the service. The High Court held that this dismissal was an infringement of the plaintiff's existing and accruing rights and that there must be "a strict adherence to the conditions upon which his employment in the Civil Service of the State could have been determined" (at 320). And the importance placed on this strict adherence is apparent from the statement, at 321-2, that:

¹(1935) 54 C.L.R. 315.

Development and Migration Act 1920 ss. 11, 12; Industry Research Act 1920-25 s.14A.

"... when an officer's employment is liable to defeasance if it is found that the number of persons of the classification to which he belongs, is excessive and no other position is available for him, his tenure is not the same as if his employment is liable to defeasance if it is found expedient to reduce the total number of officers in a department. The appellant's tenure was liable to the latter defeasance, not to the former."

The phrase "existing and accruing rights" was clearly vague and imprecise and made it impossible to determine with any exactitude the extent of the rights to which governmental servants transferred between State and Commonwealth public services. The same situation might have arisen with regard to the rights of government employees transferred between the Commonwealth public service and various Commonwealth statutory authorities, the Acts establishing which provided for the protection of the "existing and accruing rights" of transferred employees.¹

The experience, however, of the litigation over s.84 of the Constitution taught the wisdom of defining in clear terms exactly what rights were to be protected and by the Officers' Rights Declaration Act 1928-53 it is provided in s.5 that the "existing and accruing rights" referred to in the statutes of the type just mentioned:

¹See, for example, Commonwealth Bank Act 1911-27 ss.16A, 35Q; Development and Migration Act 1926 ss.11, 15; Science and Industry Research Act 1920-26 s.14A.

"are hereby declared to be rights in respect of -
(a) leave on the ground of illness
(b) long service leave or pay in lieu thereof...
(c) superannuation
(d) child endowment
(e) in the case of female officers, payment
on marriage..."

It should be observed that s.84 of the Constitution does not apply to these cases because that section refers only to state government departments taken over by the Commonwealth government. There are, however, still a number of Commonwealth public servants to whom s.84 does apply - namely those transferred on Federation. And it is possible that the terms of the Income Tax (War-time Arrangements) Act 1942-46 could be interpreted so as to give State taxation employees who were transferred under that Act to the Commonwealth service, the benefit of the Constitutional preservation of their rights.¹

It is now standard practice to insert, in statutes setting up new Commonwealth authorities, a section providing that the Officers' Rights Declaration Act 1928-53 shall apply,² thus placing limitations on the rights of those transferred. The most recent example of this is the

¹See: ss. 11,12. These are tantamount to a transference of a department which would bring those transferred under s.84 of the Constitution.

²Cf. Snowy Mountains Hydro-Electric Power Act 1949-52 s.34.

Commonwealth Police Act of 1957, assented to on 12th December, 1957, but at the date of writing (April 1959) not yet proclaimed. By s.6 of that statute it is provided that if a member of the Commonwealth Public Service should transfer to the Commonwealth Police "he retains his existing and accruing rights;" it provides also that the Officers' Rights Declaration Act 1928-53 shall apply. The effect of this will be that a public servant who transfers to the Commonwealth Police may lose the security of tenure he formerly enjoyed, since the Officers' Rights Declaration Act does not mention rights connected with tenure of office; and the police cases already discussed make it clear that police tenure is "at pleasure."

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In the cases just discussed the rights protected by the courts owed their origin to statute. There is also ample evidence that in Australia the rights of the governmental employee, even where they stem from contract, will be just as zealously enforced.

²Evans v. Donaldson (1909) 9 C.L.R. 410

The plaintiff in Evans v. Williams¹ was appointed under a New South Wales statute by the provisions of which he could be removed only by a bench of magistrates for cause. By the same statute he was remunerated in part by fees and in part by a salary paid by the Crown for services rendered in another capacity. At a later stage the plaintiff agreed to give up his fees to the appropriate government department and accept an increased and fixed salary. Some years later the plaintiff was dismissed by order of a magistrate sitting as a Court of Petty Sessions; the order was set aside by the High Court² but the plaintiff was de facto excluded from his office and, thus, from earning the fees due to him under his appointing statute. He accordingly brought an action claiming damages for breach of an implied contract.

The High Court (ISAACS J. dissenting) held that the terms which had to be implied into the plaintiff's agreement with the Crown were that he would faithfully perform his duties in exchange for the salary agreed and that in the event of the Crown terminating the agreement, the plaintiff would be left free to receive his statutory

¹(1911) 11 C.L.R. 550

²Evans v. Donaldson (1909) 9 C.L.R. 140

fees.¹ The Chief Justice, discussing the argument that the whole agreement, express or implied, could be terminated by the Crown at pleasure, thought this immaterial. The agreement contained an implied term that if terminated (whether at will or with notice) the opportunity would be restored to the plaintiff of earning his former statutory fees. Of the Crown's action, the learned judge commented at 565: "A party cannot, while retaining the benefit of an agreement, refuse to bear the burdens and it is a mistaken use of language to speak of such a refusal as a termination of the agreement. It is properly described as a breach."

Nor could it be argued that the relationship between the plaintiff and the Crown was not a contractual relationship. "By what right," asked the Chief Justice, "did the Government receive and retain the emoluments payable to the plaintiff? The only possible answer is ... under an agreement that they should do so," (at 566). The relation between the government and a government servant "as in every other case of employer and servant" is a contractual relationship. In the normal case of public service

¹ISAACS J. held that on acceptance of a fixed salary the plaintiff had become liable to the New South Wales Public Service Acts and the Crown could therefore lawfully terminate his employment at any time. He did not appear to doubt, however, that such a contract could be made and enforced, see at 577.

employment the only consideration given by the employee for his salary is his services; in this case a further consideration was the plaintiff's surrender of his statutory emoluments. "So long as that consideration existed ... and the Government took the benefit of it, I am disposed to think that the obligation on their part to pay the salary could not be terminated. But if it could the action will still lie for breach of the implied contract."¹

The same willingness to concede rights against the government to the employee is apparent in Siebert v. Hunkin.² The Crown could dismiss or suspend a servant at pleasure under the Public Service Acts of South Australia; but the terms of the contract between Crown and servant are binding on the Crown in the period between appointment and dismissal.³ There was no justification, therefore, for the denial of salary during suspension from office - the contract of employment had not been terminated and until this took place

¹On the ability of the Crown to make such a contract, see remarks of BARTON J. at 568-9 where he mentions Williams v. O'Keefe [1910] A.C. 186. And for an interesting example of statutory rights operating to the employee's disadvantage, see Parker v. Attorney-General [1958] N.Z.L.R. 108.

²(1934) S.A.S.R. 347; affd. (1934) 51 C.L.R. 538.

³Cf. Lord ATKIN in Reilly v. The King [1934] A.C. 176 at 179-180. See Geddes v. Magrath, Morgan v. Geddes (1933) 50 C.L.R. 520, especially at 530-531 where the High Court refused to accept the view that the existence of a power to remove without cause should reduce the amount of compensation statutorily payable for abolition of office.

the terms of the contract subsisted.¹

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Thus, as with any other employer, the Crown, or other governmental instrumentality, can be compelled to meet obligations incurred towards its employees. "Public interest" is no justification for many of the special privileges which governments seek from time to time, particularly if the test of public interest is to be satisfied merely by upholding the interests of the Crown as representing the community.

When, furthermore, the interests of the Commonwealth government clash, for example, with those of a State government then the employee cannot be refused rights on the basis of some vague notion of government sovereignty - it is impossible to say in such circumstances wherein it lies.

Rights can be granted against the government as an employer; this is demonstrated by the cases mentioned above.

¹With regard to local government, see: Wilson v. Central Illawarra Municipal Council (1931) 10 L.G.R. 101; Chadwick v. St. Mary's Municipal Council (1948) 17 L.G.R. 39; Webb v. Sydney City Council (1956) 20 L.G.R. 340.

Further, the existence, in Australia, of a highly developed system of public service arbitration imposes severe limitations on governments as employers and the operation of this system shews that such limitations are no more detrimental to the "public interest" in governmental employment than they are in private enterprise.

CHAPTER IX

Industrial arbitration in Australia began early and developed fast.¹ Arbitration courts and tribunals of all kinds, created under both Federal and State authority, have produced a large amount of law relating to industrial employment generally and to public service conditions in particular. The decisions of these bodies, together with the multiplicity of statutes and regulations enable certain important conclusions to be drawn, of which possibly the two most important for this study are: that governmental employment, as such, has not placed public employees outside the ordinary processes of industrial arbitration and that the concept of the State as a "sovereign" employer is

¹The history of arbitration in Australia is an interesting commentary on the essentially empirical nature of Australian politics and law. Theories of social philosophy have not been conspicuous; but the underlying social and political assumptions which succeeded in removing most franchise restrictions before the end of the nineteenth century were no less implicit in the creation of a system of compulsory industrial arbitration. See, generally: L.F. Crisp: The Parliamentary Government of the Commonwealth of Australia, 2nd ed. Longmans (1954) pp. 19-21. R.J. Hawke: "The Commonwealth Arbitration Court," Annual Law Review (University of Western Australia), Vol. III, p. 422. On public service arbitration in particular, see: E.E. Crichton: "The Development of Public Service Arbitration," Public Administration (Sydney), Vol. XV, pp. 150, 214 and 319; L. Blair: "Arbitration in the Federal Public Service," Public Administration (London) Spring, 1956, p. 61.

difficult to sustain in Australia where the conditions of service of so many governmental employees are determined by bodies over which the employing government has no control whatever.

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By placitum XXXV of sec. 51 of the Australian Constitution the Parliament of the Commonwealth is given the power to make laws with respect to:

"Conciliation and arbitration for the prevention of industrial disputes extending beyond the limits of any one State"

and, under this power, the Commonwealth Parliament has passed legislation which provided, inter alia, for the constitution of a Commonwealth Court of Conciliation and Arbitration with power to determine industrial disputes where more than one State is involved.¹

¹See Conciliation and Arbitration Act of 1904. The High Court in the Boilermakers' Case (1956) 94 C.L.R. 254 (affirmed by the Privy Council) decided that the Arbitration Court could not constitutionally exercise, together with its arbitral functions, the judicial power of enforcement; this has made necessary amending legislation which was passed in 1957. This legislation established two new bodies - the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court - the former being given the arbitral functions proper and the latter all the judicial powers necessary to enforce awards. As these internal arrangements do not affect the law considered in this chapter, the term "Arbitration Court" will be used throughout.

In interpreting the word "industrial" both the High Court and the Arbitration Court have given ample illustrations of their view that governmental employees can be brought within the ambit of the Conciliation and Arbitration Act, and that the Crown, no less than any other employer, is subject to its provisions.

The High Court in Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation¹ was of the opinion that the Crown was bound by the Arbitration Act of 1904 and that the intention to so bind the Crown had been clearly expressed in sec. 4 of that statute which included in the term "industrial dispute":

"Any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State."²

The Crown, therefore, could not claim for its disputes with its employees, an immunity from the operation of the arbitration legislation unless it could show that the dispute was not "industrial." The government was not to be exempt where a private individual or company would not

¹(1919) 26 C.L.R. 508.

²See, HIGGINS J. at 537-8;; also Amalgamated Society of Engineers v. Adelaide Steamship Co; Ltd. (1920) 28 C.L.R. 129 at 163.

be and work that is industrial, if privately performed, is no less so because it may happen to be carried out by a government instrumentality.

The Sydney Harbour Trust, for example, is closely directed by the government of the State of New South Wales and subject to the latter's financial control. Furthermore, ports and harbours are among the matters over which the monarch in former times exercised the prerogative; it might be argued, therefore, that a dispute between the Trust and its servants cannot properly be termed an "industrial" dispute since the ordinary relationship of employer and employee does not appear to be present.

This argument was, however, rejected by the High Court in Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association [No. 2]¹; the prerogative was limited in extent² and on the basis of the decision in Mersey Docks and Harbours Board v. Lucas,³ the Court held that the Sydney Harbour Trust was essentially an industrial concern, the employees of which were within the scope of the Arbitration Act notwithstanding the governmental nature of their employer. The words "industrial

¹(1920) 28 C.L.R. 436 at 449.

²Cf. Blackstone Comm. I, 264.

³8 App.Cas. 891.

dispute" did not "in their natural and ordinary meaning" exclude disputes in which one party was a State government even when it was exercising executive powers for the benefit of the public and financed by Parliamentary appropriations.¹

Acceptance of the justice and feasibility of this is implicit in the legislation governing Commonwealth Public Service arbitration. Originally, Commonwealth public servants were excluded from the benefits of the Arbitration Act of 1904. This was not, it should be observed, because they were governmental employees and Crown servants, but simply because, as defined in the Act, the word "industry" did not apply to the functions performed by members of the public service.² Agitation on the part of public service groups of various kinds, however, led to the passing of legislation which secured for public servants the right of access to the Arbitration Court.³ It was argued by

¹Cf. HIGGINS J. at 452: "What would the man in the street say when there is a strike of officers or engineers on a government dredger, if he were told that there is no industrial dispute?"

²See: Conciliation and Arbitration Act, 1904, sec.4.

³Arbitration (Public Service) Act 1911. By this statute public servants working under the Commonwealth Public Service Act of 1902 were deemed to be employees in an industry within the meaning of the Conciliation and Arbitration Act of 1904.

opponents of this legislation¹ that it would undermine the discipline of the service not only by superimposing on it an additional authority capable of fixing conditions of service,² but by encouraging the formation of staff associations. This view was not accepted, however, by the Arbitration Court in the first public service litigation under the new statute, the case of Australian Postal Electricians' Union v. Postmaster-General.³ HIGGINS J. here refused to apply different principles to a claim for higher wages by public servants than he would have done in the case of ordinary private employees:

"... the idea of this Act ... is peace - peace in the service of the King, which is the service of the people; and I conceive it to be my duty to apply the same principles as I apply in other arbitrations - that is to say I have to see that provision be made for securing to the employee the satisfaction of his normal essential needs ..."

And, on the same page (7), His Honor asserted that: "it certainly makes for the dignity and efficiency of the public service that the remedy of strike for grievances

¹Commonwealth Parliamentary Debates, Vol. LXII, pp.3562-70; Vol. LXIII, pp. 3627-8.

²Then the task of the Public Service Commissioner.

³(1913) 7 C.A.R. 5.

should be forever abandoned in favour of the remedy of discussion before an impartial arbiter."

Among the "normal essential needs," wage claims present the most difficult problems in public service arbitration. Money must be appropriated by Parliament which will obviously examine closely additional calls on public funds;¹ advantageous conditions of service like security of tenure and pension schemes, it is arguable, ought to be taken into consideration in fixing salaries;² and because of the public nature of their employment, it might be suggested that governmental employees should be more "patriotic" in time of national economic crises and refrain from claiming higher wages.³

These arguments, however, are, it is submitted, based on the false assumption that the government as an employer of labour is inseparable from the government as governor. What an increase in the salaries of government employees is going to cost the nation should be a factor in deciding whether or not to grant such an increase only insofar as it is part of a national wages policy. To single out the salaries of public employees for restriction on the ground of the additional cost to public funds is inequitable and

¹See, supra p. 113

²Supra, pp. 45-48

³Cf. [1914] A.R. (New South Wales) 298 at 299.

rests on a misunderstanding of the nature of the governmental employee's "allegiance" to the state as his employer. "What an increase will cost Parliament is not for the court to consider in making an award,"¹ nor should it be for the government in its role as employer.² HIGGINS J. refused to accept the argument that the privileges of public service employment be taken into account in making a wage award³ and in Australian Public Service Clerical Association v. Public Service Commissioner,⁴ POWERS J. (at 536) rejected a suggestion that for patriotic reasons governmental employees, as such, should not make claims for higher wages during a national emergency and expressly disapproved of the consideration of such a doctrine by the court.⁵

¹(1916) 10 C.A.R. 578 at 587.

²In Australian Telegraphetc. Maintenance Union v. Public Service Commissioner (1914) 8 C.A.R. 119, the Arbitration Court also rejected the argument that public service salaries could not be tied (as were the salaries of all private employees) to a cost of living index because of the alleged political difficulties which would be encountered should public service salaries have to be reduced. In this respect the government was like any other employer and could not plead "politics" to justify special consideration. See at 131.

³(1913) 7 C.A.R. 5 at 13.

⁴(1918) 12 C.A.R. 531.

⁵The argument here rejected seems closely analogous to that which would classify strikes by governmental employees as "insurrection" (see supra pp. 60-62) and is based on the same fallacious reasoning.

Moreover, since 1920 the Commonwealth Public Service has had a separate Public Service Arbitrator¹ from whom an appeal lies to the Arbitration Court if the Arbitrator thinks that it would be in the public interest to grant the appeal.² Both the Arbitrator and the Arbitration Court have made it clear that they will interpret "public interest" not as mere departmental or even governmental interest, but as the wider interest of the community in the satisfaction of which an important part is played by harmonious relations in the government service.³

In a dispute with its employees, therefore, the Crown can claim immunity from Federal arbitration legislation

¹Public Service (Arbitration) Act 1920-58 provides in details for the "settlement of matters arising out of employment in the Public Service."

²ibid. sec. 15A(1); should leave to appeal be refused an appeal lies to the Chief Judge of the Arbitration Court against the refusal.

³Cf. Professional Officers' Association v. Public Service Board (1952) 72 C.A.R. 45 at 46; Small Arms Factory Employees' Association v. Minister for Defence (1915) 9 C.A.R. 97 at 104; Australian Letter Carriers' Association v. Public Service Commissioner (1920) 14 C.A.R. 40 at 53.

²See: "The Publicity of Industrial Arbitration in the Federal Sphere," (1951) 25 Labour Law 1.

³(1919) 28 C.A.R. 400.

only if the dispute is not an "industrial dispute."¹ Few terms have given rise to more constitutional litigation,² and it is far from clear precisely what governmental activities are "industrial" so as to make the conditions of service therein subject to the jurisdiction of the Arbitration Court.

In Australian Workers' Union v. Adelaide Milling Co. Ltd.³ the High Court had to decide whether a dispute between an association of employees engaged in wheat lumping and stacking operations and the State governments controlling these operations was an "industrial dispute."

¹In each state there is also industrial arbitration legislation which applies to the Crown in varying circumstances from state to state: in New South Wales, the Industrial Arbitration Act of 1940 gives limited powers to specified tribunals to determine conditions of employment in the State Public Service, the main control over these conditions being exercised by the State Public Service Board in accordance with collective agreements negotiated between the Board and the staff associations concerned; in Western Australia, although public servants do not have a separate system of arbitration, Part X of the Industrial Arbitration Act of 1912 refers exclusively to them; in Queensland, government employees have the right of access to the State Industrial Court set up by the Industrial Conciliation and Arbitration Act of 1932; a similar right exists in Victoria and South Australia, while in Tasmania a Public Service Tribunal Act of 1958 has set up a separate tribunal to determine employment conditions for all government servants in that state.

²See: "The Jubilee of Industrial Arbitration in the Federal Sphere," (1951) 25 A.L.J. 360.

³(1919) 26 C.L.R. 460.

Deciding that the operations were "governmental" and not industrial in their nature, the court placed great emphasis on the absence of profit in the scheme and on the exigencies of war-time defence (the Crown alleged that the purpose of the scheme was to ensure adequate supplies of wheat for the United Kingdom at a reasonable price).¹

But in the case of the Shire Employees,² the High Court, by a majority, held that employees of a municipal corporation engaged in road making and maintenance could be involved in an industrial dispute notwithstanding the absence of profit-making and the obvious public purposes of the work in question.³

It was pointed out in this case that the element of "trading" was not necessarily the discrimen used in deciding whether or not functions were industrial as

¹HIGGINS J. dissenting, rejected (at 474-5) the Crown's contentions as to war-time exigencies and pointed out that the relevant Victorian legislation under which that State government operated was expressed to be enacted "on behalf of the growers." But he thought that, in any case, the terms of sec.4 of the Commonwealth Conciliation and Arbitration Act were wide enough to give the Arbitration Court jurisdiction.

²(1919) 26 C.L.R. 508.

³It had already been decided that "so far as it engaged in a trading occupation," a municipal corporation was subject to the jurisdiction of the Arbitration Court - Federated Engine Drivers' etc. Association v. Broken Hill Proprietary Co. [No.2] (1913) 16 C.L.R. 245.

⁴(1918) 41 C.L.R. 569.

opposed to governmental.¹ The criterion of profit is not, therefore, an accurate one.² It may be doubted if any suitable criteria can be found. The Public Service Case³ decided that "ordinary government departments are not part of the industrial system of the country" and that, therefore, employees of such departments could not engage in an industrial dispute. Similarly, the decision in Federated School Teachers' Association of Australia v. Victoria and Others⁴ assumed that the "primary and inalienable functions of government" are not industrial.

These cases therefore do not provide a satisfactory solution to the problem of deciding which governmental activities come within the scope of industrial arbitration. The term "ordinary government departments" is not an immutable nor an exhaustive one; as the tasks of government change, so new departments and agencies are created -

¹Cf. at 526: "... there are municipal functions which are neither [governmental nor trading]. The case of parks and the establishment of free libraries could not properly be brought under either head."

²See, for example, Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association [No.2] (1920) 28 C.L.R. 436 where it was stated that in order to be a party to an industrial dispute it was not necessary that an undertaking be carried on for profit.

³R. v. Commonwealth Court of Conciliation and Arbitration ex parte Victoria (1942) 66 C.L.R. 488

⁴(1928) 41 C.L.R. 569.

and whether the new creation is an "ordinary" department or a "quasi-governmental" body is often a matter of chance, even if the distinction was, in any important sense, a valid one. So, too, what constitutes "primary and inalienable" governmental functions is now well-recognised to be a matter of political predilection. In the Teachers' Case mentioned above, the High Court took the view that education was a governmental function, the nature of which could not secure for those engaged in it the protection of the Arbitration Court. Nevertheless, it is unlikely that even at the present time public education would be considered to be "an inalienable function" of government by all shades of political opinion and the assertion by the court (at 575) that "a private person could no more carry on this system of public education than he could carry on His Majesty's Treasury" underestimates, it is suggested, the powers of a private corporation to undertake large-scale educational functions.¹

¹The numerous correspondence schools - some with international "student populations" - are obvious examples. The dissenting judgment of ISAACS J. in this case contained an interesting attempt to limit the scope of the "inalienable governmental functions" by dividing the educational activities of government into two separate parts. The first was "governmental regulation" which makes education compulsory and authorises expenditure from public funds - departmental officials connected with this are "representative of regal functions only and outside the industrial power." The other part was the "educational service" which is undertaken by the government, "just as a company would, if authorised, undertake a State railway or other industrial enterprise." The employees in this latter group should not, His Honor asserted, be exempt from the industrial power.

Even so, while it is not clear to which governmental activities the industrial arbitration legislation applies, there is no doubt that such legislation can apply to the Crown in a wide range of its operations and Crown employment alone will not exclude public employees from the benefits of the industrial power.

*

Further, two ways in which Australian constitutional law has developed make it almost impossible to advance doctrines like that of the "sovereign" employer which even yet continues to bedevil American administrative law.¹ In the first place, the original exclusion of State-regulated employees, both public and private, from the jurisdiction of the Arbitration Court, necessitated by an early interpretation of the Constitution, was later abandoned. Secondly, the general principle of the supremacy of Commonwealth law over State law has been held to apply to a wide variety of arbitration legislation and awards.

¹See supra p. 11 n. 1

The doctrine of the immunity of instrumentalities formulated in the United States by McCulloch v. Maryland¹ and Collector v. Day² came before the High Court very early in the history of Australian federation. In D'Emden v. Pedder³ the court held that the doctrine should apply to prevent State legislative or executive interference with the Commonwealth government's activities and shortly afterwards in the Railway Servants' Case⁴ the doctrine was held to be reciprocal so as to prohibit Commonwealth interference with State instrumentalities. Inter-governmental immunity became, therefore, part of Australian constitutional law.

In 1920, however, in the celebrated Engineers Case,⁵ the High Court reversed the former acceptance of the doctrine and laid down that:

"States, and persons, natural or artificial representing States, when parties to industrial disputes ... are subject to Commonwealth legislation under pl.xxxv of Sec.51 of the Constitution if such

¹(1819) 4 Wheat. 316 (in favour of the Federal government).

²(1870) 11 Wall. 113 (in favour of the States)

³(1904) 1 C.L.R. 91.

⁴(1906) 4 C.L.R. 488.

⁵Amalgamated Society of Engineers v. Adelaide Steamship Co.Ltd.
(1920) 28 C.L.R. 129.

legislation on its true construction applies to them." ¹

The legislation, therefore, of both States and Commonwealth were to be given "full operation within their respective areas and subject matters" and previous decisions, so far as they rested on the doctrine of the mutual immunity of the various governments, were overruled. ² But an express constitutional provision that in the event of a conflict between a Commonwealth law and a State law, the former should prevail, ³ at once put the Commonwealth into a more favourable position than the States.

Employees in the States, therefore, both public and private, insofar as they were "industrial," could be subject to the industrial power possessed by the Commonwealth government by virtue of the Constitution; furthermore, enactments of the State governments which attempted to regulate employment conditions within their own territories,

¹ at 155. For the wider constitutional implications of this important case and subsequent developments, see: A. Wynes, Legislative, Executive and Judicial Powers in Australia, 2nd ed. (1956) pp.521-524; R. Else-Mitchell (Ed.), Essays on the Australian Constitution (1952) pp.1-16; G. Sawyer, Cases on the Constitution, 2nd ed. (1957) pp.14-23. All published by Law Book Co. of Australasia.

²The notion of inter-governmental immunity has also, of course, undergone great modification in the United States. See, for example, New York v. United States (1946) 326 U.S. 572.

³sec.109: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid."

but which conflicted with Commonwealth laws were, to that extent, invalid.

This general principle of the supremacy of Commonwealth law was still further strengthened in respect of the system of arbitration by the decision of the High Court in Clyde Engineering Co. Ltd. v. Cowburn¹ that an award made by the Arbitration Court has the "force of a law of the Commonwealth" and thus prevails over conflicting State legislation in accordance with sec.109 of the Constitution.

The implications of the developments just described for the doctrine that a government is, in any real sense, a "sovereign" employer are obvious and have been illustrated in a number of cases. In H.V. McKay Pty Ltd. v. Hunt² it was held that a minimum wage rate determined by a Commonwealth tribunal nullified a different award made by a State tribunal; in R. v. Commonwealth Court ex parte Engineers' State Conciliation Committee³, the High Court unanimously held as valid a section of the Commonwealth Conciliation and Arbitration Act providing that the appropriate Commonwealth arbitration tribunal might make an order restraining a State authority from dealing with an industrial dispute

¹(1936) 37 C.L.R. 466. In this case it was held that a State Parliament could not prevent the operation of an existing federal award; in Ex parte McLean (1930) 43 C.L.R. 472, the principle of the supremacy of a Commonwealth award was extended to cover State legislation even where the latter was first in point of time.

²(1926) 28 C.L.R. 308.

³(1927) 38 C.L.R. 563.

where the former considered that the dispute fell within its jurisdiction. Again, in Australian Railways Union v. Victorian Railways Commission,¹ the High Court rejected the contention that the State railways were exempt from the operation of federal arbitration awards, a contention based, inter alia, on the ground that these railways occupied a special position in relation to the States which was recognised by the Constitution.

Hence a federal body may interfere with State employees, public as well as private, even where this may run contrary to the desires of the State government and the latter can claim no special "sovereign" privileges which would leave it in sole control of the conditions of employment of all its servants.² Furthermore, as pointed out above, various State and Commonwealth enactments have given government employees (even those engaged in the "inalienable functions of government") the right to have their conditions of service determined by tribunals whose awards will further

¹(1930) 44 C.L.R. 319.

²In the Engineers' Case (1920) 28 C.L.R. 129, the disadvantages of excluding State governments from the federal industrial power were strongly emphasised (see at 155; 163-4); and in the Shire Employees' Case (1919) 26 C.L.R. 508, HIGGINS J. (at 536-7) expressed the view that any interference in State employment disputes by the Arbitration Court "was not a burden like taxation, but primarily ... meant to aid ... parties to the dispute."

limit the "sovereignty" of the employing government.¹

There is nothing in Australian experience to suggest that these limitations and the consequent inapplicability of the "sovereign" employer doctrine have unduly inhibited the operations of government bodies, and the practice from the point of view of the employee seems to have much to recommend it.

CHAPTER 2 - Conclusion

¹For a good example of how widely these tribunals are able to interpret their jurisdiction, see the wide definition of "industrial dispute" in R. v. Industrial Court ex parte Brisbane City Council [1957] Queensland State Reports 553.

The first of these is the fact that the study was conducted in a laboratory setting. This is a limitation because the results may not be generalizable to the real world. However, the laboratory setting allows for control of variables and the use of standardized procedures. This is a strength of the study. The second limitation is the small sample size. This may have affected the statistical power of the study. The third limitation is the lack of a control group. This makes it difficult to attribute any effects to the treatment. The fourth limitation is the short duration of the study. This may not have allowed for long-term effects to be observed. The fifth limitation is the lack of blinding. This may have introduced bias into the results. The sixth limitation is the lack of a theoretical framework. This makes it difficult to interpret the results in a theoretical context. The seventh limitation is the lack of a clear definition of the variables. This makes it difficult to compare the results to other studies. The eighth limitation is the lack of a clear statement of the research objectives. This makes it difficult to understand the purpose of the study. The ninth limitation is the lack of a clear statement of the research questions. This makes it difficult to understand what the study is trying to answer. The tenth limitation is the lack of a clear statement of the research hypotheses. This makes it difficult to understand what the study is trying to prove.

CHAPTER X - Conclusion

The purpose of this study was to investigate the effects of a specific treatment on a specific outcome. The results of the study suggest that the treatment has a significant effect on the outcome. This is a positive finding. However, there are several limitations to the study that should be taken into account. The first limitation is the laboratory setting. The second limitation is the small sample size. The third limitation is the lack of a control group. The fourth limitation is the short duration of the study. The fifth limitation is the lack of blinding. The sixth limitation is the lack of a theoretical framework. The seventh limitation is the lack of a clear definition of the variables. The eighth limitation is the lack of a clear statement of the research objectives. The ninth limitation is the lack of a clear statement of the research questions. The tenth limitation is the lack of a clear statement of the research hypotheses.

To suggest that conditions of employment are restricted should be considered an important problem. The study suggests that the employer and the duties of the employee are not as simple as a function of the output. This, again, is the "realities" that have been proposed together with a theoretical framework in which uniformity of conditions is found to be important, even essential.

The main conclusions of this survey may be briefly re-stated thus: first, restrictions on conduct appear in a wide range of employment, public and private, and the justification for these is the public interest, ascertainable by reference to the duties involved; second, there seem to be no valid reasons, legal or political, why the government employee should be denied rights against the government as his employer, enforceable either in the ordinary courts or otherwise; and finally, there are strong grounds for asserting that government employment is not, as such, sui generis and invariably subject to fundamentally different considerations from those arising in private employment. Some final remarks must now be made on these conclusions, in the light of the comparisons made possible by this study.

To suggest that conditions of employment and restrictions thereon be related to duties raises two important problems. Can one, in fact, separate the employer and the duties of the employee, or is one no more than a function of the other? And, again, is the "duties" test here proposed compatible with a stratified service in which uniformity of conditions is administratively important, even essential?

It is clear that certain functions carried out by the government are truly "governmental" in the sense that it is difficult, if not impossible, to visualise their performance by any other agency - foreign affairs and defence, for example. Thus it may seem correct to say that it is the "governmental" nature of these functions which necessitates the imposition of certain conditions and restrictions on the government employees performing duties in connection with them. In other words, duties and employer are inseparable.

But not all functions performed by the government are "governmental" in the sense that the state alone can carry them out. The authorities concerned with the provision of various public utilities, for example, may be now private, now governmental, or even a mixture of both.¹ In such cases it would seem to be incorrect to base conditions of service on the nature of the employer - it is the tasks undertaken which are germane to the degree of control to be exercised over the employees concerned. The nature of the employer and the duties to be performed are not necessarily conjoined. To base conditions of service on the former and not the latter prevents the drawing of distinctions between different classes of employee, having

¹See, supra, p. 65

different duties but the same employer.¹ And, for this reason, even where the truly "governmental" functions are concerned² in which duties and employer are inseparable, it is important to retain as a yardstick the duties involved, if unnecessary "blanket" restrictions based on the nature of the employer are to be avoided.

At first sight it might seem impossible to relate conditions of service to duties in a modern bureaucracy. The necessarily stratified structure of classes and grades in such an organisation clearly call for a high degree of uniformity of employment conditions. The whole of certain classes may require to be restricted in some way, because such restriction is needed in respect of certain members of those classes.

It is clear that a modern public service, by its very size, cannot be run on the basis of individual cases; one duty might involve one type of restriction, another type of duty, another restriction, and so on. Closer examination of the duties test advanced in this survey,

¹ Cf. Report of the Committee on the Civil Service, *Activities of Civil Servants*, para. 7/10, p. 23.

¹ Crown servants of all grades are thus dismissible at pleasure because of the long-established peculiarities associated with the legal position of the Crown. See, supra, p. 3 n. 1. For the effect of the same approach in American public employment, see, supra, p. 11.

² The scope of "inalienable functions of government" is, of course, by no means certain! Cf. supra, pp. 220-231

however, suggests that there is here no necessary incompatibility. To relate conditions of service and restrictions to duties, as here proposed, does not preclude uniformity; it does allow individual distinctions to be made where this is desirable in the public interest.

Thus the duties performed by a particular employer - civil service department, local authority or public corporation - may require the imposition of special conditions and restrictions on a wide number of employees based not only on the duties those employees at any given time may be performing, but also on those that they may be called upon to perform, on promotion or transfer, for example. That is, an employee because he may be moved from a "non-restricted" position to a "restricted" one is subjected to "restricted" conditions throughout his service because of the duties he may have to perform later in his career.¹ It is, nevertheless, the duties that are important.²

¹Cf. Report of the Masterman Committee on the Political Activities of Civil Servants, Cmd. 7718, p.23.

²Thus, for example, a clerical officer in the Ministry of Labour who takes, or seems to the public to have the discretion to take, decisions affecting their personal well-being is precluded from participating in various political activities; the Post Office counter clerk, on the other hand is not. See, Cmd.8783, White Paper on the Political Activities of Civil Servants, p.8.

Furthermore, when the basic conditions of service such as tenure, salary and superannuation are considered, there is good ground for asserting that the duties test would in no way impair the application of uniform conditions - indeed the practice of the various arms of the public service seems to recognise the indispensability of such a test.

As far as superannuation is concerned, there seems no valid reason for treating different classes of public employees in different ways. The whole trend of public service superannuation legislation has been towards uniformity of superannuation conditions, a fact which is borne out by the wide range of "transfer provisions" now in operation.¹ The legal anomaly of the denial of enforceable pension rights to the civil servant is difficult to justify; the official reasons for such denial are not very convincing² and the practice of the service indicates that basically the civil service scheme is no different from other public service pension systems. At any rate, what is clear is that the duties test would not call for the making of distinctions as to conditions governing superannuation between different classes of the public service. The test would not, therefore, affect uniformity.

¹See, supra, p. 135-6

²Cf. supra, p. 50-51

³See, supra p. 33

So too with the right to salary and restrictions governing, for example, its alienation. Only in the service of the Crown does any doubt arise as to the legal right to salary and this does not now look like remaining even a legal problem; nor are restrictions on alienation of civil service salaries as extensive as formerly.¹ Again, however, the application of the duties test would not require different classes within the public service to be given different rights regarding salary; and the rare exceptions - the Auditor-General,² for example - are obvious applications of the test suggested.

Similarly, there is no problem in applying the duties test to tenure of office. Indeed, its operation appears to be accepted, to some extent at least, within the public service; the particular duties involved make it necessary, for example, to give special terms of tenure to certain local government officers.³ The rule of dismissal at pleasure applicable to Crown servants seems, as has already been said,⁴ an unjustifiable legal anomaly in

¹See, supra p. 4 and p.42 n.4

²A permanent officer of Parliament, not of the Crown, whose salary, because of the nature of his duties, is a charge on the Consolidated Fund. For a local government example, see, supra p. 101

³Cf. supra p. 126 Similarly, in Australia the terms of the Federal Public Service Act does not apply to certain specified appointments e.g. the Public Service Arbitrator, see supra p. 155 n.1

⁴See, supra p. 33

present times. The internal law of the British civil service which provides adequate administrative safeguards in respect of dismissal, coupled with the long-established security of office enjoyed by the civil servant, suggest that no such rule is required by the public interest. Australian experience and practice, particularly in the Commonwealth public service, lend strength to this view.

At any rate, the application of a uniform system of tenure would not be vitiated by the duties test and where certain public service posts might seem to require the full power of dismissal at pleasure, the test would provide a reasonable and justifiable criterion by which such posts could be selected.

Moreover, in the cases involving security and loyalty, uniformity is impossible. Each individual case must be dealt with on its merits and the practice of the public service in this difficult field of employment conditions demonstrates complete acceptance of the duties test. So much is at stake for both employer and employee in these cases that an individual approach is imperative - sensitive key positions may occur in the lower ranges of the public service as well as in the higher and only by reference to the duties of each employee can one determine whether or not he is a "risk."¹

¹Cf. supra p. 20 n. 1

Thus two positive advantages seem to follow from the use of the test proposed. Extension of anachronistic doctrines of "sovereignty," "privilege" and of the peculiarities associated with Crown employment can be avoided. And where restrictions and special conditions are required they are placed on a logical and acceptable basis.

It is submitted, therefore, that to justify conditions of employment and special employment restrictions one must determine how far they are required by the public interest. This will, in turn, be determined by the duties of the employees involved. There do not seem to be any formidable obstacles in the way of applying this concept to public service conditions; difficulties may be more apparent than real. Furthermore, there is at least good ground for asserting that the test here suggested is in practice regularly adopted.

experience indicates that... even extensive rights... necessarily incompatible with... governmental agencies. A comparison of Australia and

Reluctance to concede to the public employee enforceable rights against his employer has been a not unnatural result of political and legal theories

of the state and sovereignty. It has long been considered an infringement of the supreme power of government to grant legal rights, the enforcement of which implies limitations on the sovereignty of the state. The peculiar position of the Crown in tort and contract and American cases like McAuliffe v. Mayor of New Bedford¹ are manifestations of this attitude.

True, the exercise of such rights may, on occasion, prove administratively inconvenient² but that is far from saying that their existence is an impossible infringement of governmental sovereignty. In any case, sovereignty is a concept, the political and legal antecedents of which are, to say the least, vague and imprecise. It is a concept scarcely capable of supporting a general theory of public employment.

Moreover, it is difficult to believe that public interest demands the imposition of a state of virtual rightlessness on government employees. Australian experience indicates that there is no need to suppose that even extensive rights granted to government employees are necessarily incompatible with the effective functioning of governmental agencies. A comparison of Australian and British practice in this connection enables certain

¹For examples in local government, see supra p. 94 in public corporations, supra pp. 29-31

¹155 Mass. 246, 220 N.E. 517 (1892).

²Cf. supra p. 199

observations to be made of some importance for this survey. Some reference to these observations would now seem appropriate.

As previously shewn,¹ legally enforceable rights play a major part in public employment relations in Australia. This is but a reflection of the general pattern of Australian industrial relations and the reasons for this emphasis on legal rights are at once apparent from an examination of the history of labour relations and public employment in Australia.² Such rights based either on statute³ or contract⁴ are not, of course, unknown in governmental employment in the United Kingdom. They are, however, (with few exceptions) almost completely absent in the British civil service and when contrasted with other public service systems such as the Australian, the position in the United Kingdom may appear to be in need of some reform.

¹Ch. VIII, supra

²See, supra, pp. 142-153

³Cf. for example, Local Government Act, 1948 sec. 140; Minutes of Evidence to Franks Committee on Administrative Tribunals, Memorandum I, p.20 and also days 1-2, pp.27-29.

⁴For examples in local government, see supra p. 94 et. seq; in public corporations, supra pp. 28-31

²Quoted from the records of the staff of the Whitley Council and made available to the courtesy of the Chairman, to whom great is made.

This situation has not escaped notice and the suggestion that the British Crown servant's conditions of service should be "legalised" either by incorporation in statute or in some form of administrative contract has found favour with a number of critics.¹

But this legal formalising of civil service rules may be unnecessary and perhaps undesirable, for the very practical consideration that the staff associations do not appear to desire that the Crown-servant relationship be "legalised."

The staff side of the National Whitley Council have at different times over the past few years considered the suggestion that the civil servant's conditions of service be put on a legal basis. The most recent discussion of the topic took place in 1952 when there was a full-dress debate on the proposition that staff associations should try "to secure for civil servants the same rights vis-à-vis the State employer as are available to persons, other than employees of the Crown, against their employers."² The main case against the proposition was accepted by the staff side and was put by one of the principal speakers thus:

¹See: Mitchell, op.cit. pp.240-241; Beinart, loc.cit., p.71; Street, op.cit. pp.114-115; Williams, op.cit. p.66.

²Quoted from the records of the staff side of the National Whitley Council and made available to the author by courtesy of the Chairman, to whom grateful acknowledgement is made.

"I would want to see many more bad cases before I could agree that there was a prima facie case for even considering the idea of a contractual relationship. ... A civil servant without a contract had a life career [sic!] but under a contractual system his period of service might well be for a fixed period, not for life. An established civil servant was possibly in a stronger position without a contract of service than he would be with one since the existence of a contract meant that it was open to legal argument, [sic!] whereas the security of tenure which was not traditional was rarely threatened.

"Further, trade union action might be prejudiced if officers had individual contracts. In the case of unestablished officers, for example, a contract might be a protection against discharge and would complicate the application of any agreed order of discharge of staff on redundancy. For this reason, against others the staff side pressed not long ago - successfully - that arrangements made with certain established officers should be clearly indicated to be only gentlemen's agreements and not contracts."...¹

The legal correctness of some of the statement made by the speaker quoted above may be open to question but the import of the argument is clear. The civil servant's representatives do not feel that he is inadequately protected under the existing system of "extra-legal" rules and regulations; nor that legally formalising the

¹ ibid. See, for example: F.A. Bland, Government in Australia (Government Printer, Sydney), p. 141; Report of Auditor-General for South Australia, 1953, p. 10; also Parsons, loc. cit. pp. 60-73.

Crown-servant relationship would be to his advantage.¹

Furthermore, the highly legalistic structure of employment relations in Australia has, in recent years, become the subject of criticism both by employers' and employees' associations.² Critics of the public service systems of statutory rights have suggested that they result in a spirit of constant litigiousness in which enforceable rights are exercised often without any regard for the merits of the case but because the rights exist.³

¹The civil servant might well be excused a certain degree of scepticism towards the common law whose "protection" so far has consisted in (a) making him a "tenant at will" of the Crown - Dunn v. The Queen [1896] 1 Q.B. 116; (b) denying him a right to salary - Mulvenna v. The Admiralty, 1926 S.C. 842; (c) refusing legal recognition to his system of collective bargaining - Rodwell v. Thomas [1944] K.B. 596. Cf. "Because of the courts' reluctance to interfere with government action taken against his employees, their protection lies largely with the President, and, to some extent with Congress." "Rights of Federal Employees," 47 Col. L.R. (1947) p. 1188; see also: "Termination of Civil Service Status," Brooklyn Law Review Vol. XX, No.2., April 1954, pp.258-263.

²See, for example, the statement of the Secretary of the South Australian Trades and Labor Council that Australia would do well to abandon compulsory arbitration and that, because of the "voluntary" system, disputes in Britain were discussed in a much better atmosphere than in Australia ("Adelaide Advertiser" of 21 August, 1956); see also the letter in the "Times" of 13 January, 1958, complaining of the "excessive legality" of the Australian system.

³See, for example: F.A. Bland, Government in Australia (1944) Government Printer, Sydney, p. xxvii; Report of Auditor-General for South Australia, 1955, p.2; and see also Beinart, loc. cit. pp.64-65.

It is possible, therefore, that the absence of rights, enforceable in the ordinary courts, may be of little importance in the public employee's employment relationship. What is important is that rights are not denied. In Australian governmental employment generally these rights will be legal in the sense of their being incorporated in statute; in the local government service and in the public corporations in the United Kingdom this is also true, to some extent. The virtual absence of statute or individual contract in the British civil service does not mean an absence of rights, nor need it mean that the civil servant is unprotected. He has the protection afforded by the influence and standing of the staff associations; by the well-entrenched and universally accepted system of collective negotiations and by the fact that those who staff Establishment Divisions are not unaware of the needs of the employee.

This may seem rather shifting sand on which to build a sound edifice of harmonious staff relations but the ethos of the civil service provides the civil servant with a protection which may well be stronger than that which the letter of the law could provide.¹

¹Cf. Borchard: "The protection of the individual against the Administration depends less upon the tribunal than on the mores of a particular community as reflected in the political instrument it creates." Quoted by Dicey, Law of the Constitution, 9th ed., App. p.477.

An American administrator has remarked that the crux of employer-employee relations "is more than passing laws and writing regulations ... these contribute little and often actually stand in the way."¹ Legal rights, either statutory or contractual, can mean little in reality; the spirit of the law is of greater practical importance than the letter.² The few cases involving civil servants which come before the courts may perhaps be due to the employee's knowledge that he has little chance of success against the Crown.³ But this dearth of civil service lawsuits could

¹H.L. Case, Director of Personnel, Tennessee Valley Authority, in Public Administration Review, Vol. XV, No.2, 1955, p.101.

²Discussing the right of the American employee to organise, Professor A. Dotson says: "In private enterprise this right is now generally conceded to be 'fundamental.' It is only protected, not given, by legislation. But the public employee's right, when it exists at all, is given by statute and is subject to peremptory restriction." Public Administration Review, Vol. XV, No.2, 1955, p.84. This suggests that the reality of practice is often more reliable than the legal "right." Cf. also: Royal Commission on Industrial Disputes, Fifth and Final Report, House of Commons Papers 1894, Vol. XXXV, p.120: "We desire to say in conclusion that, in our opinion, many of the evils to which our attention has been called are such as cannot be remedied by any legislation, but we look with confidence to their gradual amendment by natural forces now in operation.... Powerful trade unions on the one side and powerful associations of employers on the other have been the means of bringing together in conference the representatives of both classes enabling each to appreciate the position of the other... and it has been found possible to devise articles of agreement... which have been loyally and peacefully maintained for long periods."

³See Street, op. cit., pp.115-116.

be evidence of a healthy state of employer-employee relations.¹

One final observation on rights. Where the duties of the employee demand a high degree of restriction - as, for example, in the case of the civil servant, it may be that status and not contract is a more accurate description of the employment relationship.² Such a status, it should be stressed, does not arise by virtue of the special character of government service, as such, but from the duties undertaken or likely to be undertaken by those to whom the special conditions and restrictions are applied.

It is clear from the cases of Vine v. National Dock Labour Board³ and Barber v. Manchester Regional Hospital Board⁴ that the courts will be willing to concede status only where the regulation of the employee is, in the strictest sense, statutory.⁵ This would not apply to the British civil servant, but the possibility of a

¹Cf. Kahn-Freund, *op. cit.*, p.44: "Reliance on legislation and on legal sanctions for the enforcement of rights and duties between employers and employees may be a symptom of an actual or impending breakdown and, especially on the side of the unions, frequently a sign of weakness, certainly not a sign of strength."

²See, L. Blair: "The Civil Servant - a Status Relationship?" 21 M.L.R. (1958) p. 265.

³[1957] A.C. 488.

⁴[1958] 1 All E.R. 322.

⁵See, supra p. 31

status governed by the internal "law" of the service should not be ignored. And, clearly, because of the importance of the element of statutory control, there is good ground for suggesting that many public employees in Australia stand in a status relationship to their employers.¹

The concept of status, if adopted where appropriate, would not imply an absence of rights² and, as far as the Crown servant is concerned, the difficulties associated with the "implied term" and the dismissal at pleasure rule where these have on occasion caused hardship,³ could perhaps have been avoided.

Nevertheless, it is difficult to believe that the point here raised is anything more than a mainly academic one; in practice, as previously suggested, the safeguards implicit in the existing systems of collective bargaining are probably adequate and neither the public lawyer nor the public servant has much cause to doubt their efficacy.⁴

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¹Though this has been rejected by the Australian courts, it is submitted, with respect, that the view here expressed is probably more in accordance with the true position. See: 33 Canadian Bar Review (1955) p. 1108-1110

²See: Mitchell, op.cit., pp.52 and 211; Allen op.cit. p.286. In Vine the value of the protection given by this status to the dock worker was strongly emphasised by their Lordships. Cf. at 504-505.

³Cf. Chap. VII.

⁴This point could, of course, be of real practical importance in the United States where the influence of collective bargaining systems is weaker. See, supra p. 77 n.1

It has been suggested in this survey that the dichotomy of public and private employment may be a false classification which has survived mainly because of the legal and political confusion surrounding such terms as "the Crown," "the State," "sovereignty" and so on. Two important questions are raised by this assertion. Does not the element of expenditure of public funds imply that public service is necessarily different from private employment? Is not the existence of the constitutional doctrine of ministerial responsibility a factor which prevents application of the same principles to both public and private employees?

At first sight the argument that public service is essentially different from private employment, because the former involves the use of public monies, is an attractive one. It has had no little influence on both the law and practice of public employment.¹ It is, however, necessary to distinguish two separate ways in which governmental employment involves the use of public expenditure. First, public funds are used to pay for the engagement, salary, superannuation and related conditions of employment of public employees. Second, some, but not all, public servants are, because of their duties, involved in the handling of public monies.

¹Cf. Roberts v. Hopwood [1925] A.C.578; and see supra p. 131 for examples of ministerial interference in collective bargaining.

With regard to the latter, it is clearly desirable and necessary that certain restrictions must be imposed on those whose duties require that they be entrusted with the management of public funds; restrictions of this nature are commonplace in public employment.¹ Such conditions and restrictions may vary from severe penalties incurred, in certain cases, by failure to disclose an interest in a government contract, to uniform bans on the private use of official stationery and telephones. Public monies must be handled circumspectly and must not be employed for purposes other than those for which Parliament appropriated them. Control in this sense is obviously in the public interest where certain (but not all) public employees are concerned.

In a different category, however, comes the use of public funds to pay to government employees their salaries, superannuation and the like. To suggest that this requires that special conditions and restrictions be attached to tenure, wages and pension allowances, seems not only unjust but unreal. Many public employees,

¹A civil servant, for example, who becomes bankrupt or insolvent must, under pain of instant dismissal, report the fact to the head of his department: Treasury Circular 3 September 1923. See also 21 M.L.R. (1958) pp.272-3; Atomic Energy Authority Act 1954, First Schedule, para 5(1); Local Government Act, 1933, sec.123. The parallel of trustees and the funds administered by them is clearly analogous.

paid from public funds, are not more restricted than their counterparts in private enterprise - industrial employees for example. Moreover, many non-government organisations now spend public monies at least partly in paying staffs and no restrictions are suggested on those staffs, although the taxpayer's funds are involved.¹

The public, or the state, like any other employer, must pay for services rendered. If, because of national need, reductions in public expenditure are required, then this should affect wages and allied payments to public servants only insofar as such cuts are part of a general wages policy, not because it is administratively more convenient or on the vague ground that the public employee is less "entitled" to his emoluments.²

The constitutional doctrine of ministerial responsibility in some form or another permeates all governmental employment.³ It is, of course, absent in private enterprise and this difference may seem to require that basically different conditions of employment must be imposed on the public employee. In fact,

¹Universities seem to belong to this category. Quaere also those firms that are subsidised by such bodies as the Export Credits Guarantee Department.

²Cf. Australian Postal Electricians' Union v. Postmaster-General (1913) 7 C.A.R. 5 ; see supra p. 223

³See supra p. 138

however, this does not seem to be the case.

It is difficult to see what effect the doctrine of ministerial responsibility might have on basic conditions like salary and superannuation, for example. That it does not demand the dismissal at pleasure rule seems to follow from the practice of the service. Indeed, it is probably fairly accurate to say that the doctrine, insofar as the employee is concerned, means, in effect, that he must maintain certain high standards of impartiality and integrity in his dealings with the public, and, where appropriate, in his advice to the minister. This seems to have little to do with tenure, salary and superannuation; it is certainly germane to conditions of employment concerning political conduct and financial rectitude. But this means merely that some public employees will be affected by the doctrine - it does not call for restrictions on all.

Implicit in the assertion that governmental employment does not necessarily differ in nature from private employment is the proposition that within the former, legal differences - relating to tenure, for example - between the different branches of government service are often needless anachronisms. The growing number of transfers between those branches serves to emphasise the unified character of modern public administration. That a legal right to superannuation or salary should

depend on whether a government employee is on the staff of the Ministry of Health, a regional board or a local health authority is difficult to defend, when so much of the work done (as far as public interest is concerned) is the same whether the executive authority be local, regional or central.¹

The argument that public interest must necessarily be of greater importance the nearer one moves to the "centre" of government and that, therefore, the Crown servant must ipso facto be more restricted and regulated than his local authority counterpart, is not easy to appreciate. The degree of public interest will depend upon a wide range of circumstances - access to public funds, the need for a high degree of judicial impartiality, the opportunity to interfere with the liberty of the subject, and so on - and whether the Crown or any other public body be the employer, should

¹ Moving the second reading of the National Insurance Bill in the House of Commons, the Minister of Pensions and National Insurance, referring to the "contracting out" provisions (by means of which an employer may contract out of the national scheme) stated: "The special provisions for certain statutory superannuation schemes are designed to deal with the situation of certain public services where there was one service but many employers. Local government was an example. It would be plainly inconvenient to the work of that service if some employers contracted out and others did not. It was proposed that the Minister concerned with the service should, after consultation with those affected, make regulations taking unto himself the power to act as the employer simply for the purpose of contracting out and matters connected with it. This would be a convenient method." ^{H.C.} Hansard ^{5th Series} (1959) Vol. 598, Cols. 893-4

be for the employee immaterial.¹

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The eternal conflict of liberty and authority has been, for the public employee, more than usually acute. He is both a citizen of the state and a servant of it and, as such, he has been subject, more than the ordinary private employee, to the exigencies demanded by the public good:

"If the Good of the Community requires a Diminution or Annihilation of the Business of his Office, or the transferring of it elsewhere, the Officer cannot oppose the Regulation, the Diminution or Annihilation of his Profits; because not the emolument of the Officer, but the Advantage of the Public is the object of the Institution: to suppose in him a Right to make such an Objection would be to suppose the Office created for his Benefit, that is to suppose it to originate in a Violation of public Trust, an Abuse of Power, and an Offence against the State."²

(1876)

¹Cf. COCKBURN J. in Purcell v. Sowler {2 C.P.D. 215 at 218): "The Court below seems to have distinguished between the general and local administration of the poor law, holding that the general administration was a matter of national concern while the administration in a particular district was not. But it seems to me that whatever is a matter of public concern when administered in one of the Government Departments, is a matter of public concern when administered by the subordinate authorities of a particular district..."

²Eleventh Report of the Commissioners on Public Accounts (1780), Vol. ii, pp.133-4.

Even at the present time the views thus expressed are not entirely without relevance, but the sentiments implicit in them appear to have unduly coloured the attitude of the state to its employees.

To hold that public employment is a privilege or that the public employee can resign if he does not like the conditions imposed is an outmoded view and scarcely consistent with modern ideas of the dignity of the employee. Public interest is a consideration to which all employment, private no less than governmental, must be subject and, in certain circumstances, high national importance may be as much a characteristic of the former as of the latter.¹

Governments have, from time to time, paid great attention to employment relations in private enterprise where "the Good of the Community" so required; they have, however, been singularly reluctant to concede that the relationship of the state to its own servants is not basically different from that of the private employer to his employees.

The legal anomalies which have arisen because of this attitude to government employment have been discussed in this study and the public lawyer has, on occasion, been not a little perturbed by the obvious injustice of

¹Cf. Merchant Shipping Act 1894, ss.221-234.

cases like Mulvenna v. The Admiralty¹ and Lucas v. Lucas and the High Commissioner for India.²

Fortunately, the understandable concern of the lawyer can be tempered by an examination of the practice of the public service. The struggle between the common law and the law merchant over the legal difficulties posed by commercial practice, is an interesting example of how law and reality can be at variance.³ That struggle culminated in the Factors Acts which legalised what the lawyer had hitherto refused to accept. As has been suggested in this study, it could perhaps be unfortunate if the lawyer's refusal to appreciate the practice, as distinct from the law, of public employment were to have a similar result.

What appear to the lawyer to be matters of acute concern do not seem to trouble those one would expect to be most affected by them and it is submitted that this, for reasons already mentioned, is reason enough

¹(1926) S.C. 842.

²[1943] P. 68.

³"Lawyers see only the pathology of commerce and not its healthy physiological action and their views, therefore, are apt to be warped and one-sided."
Chalmers on Sale of Goods, 12th Ed., p.182.

to "let well alone." This is, however, far from saying that the lawyer can play little or no part in an examination of public employment. The lawyer's role in any analysis of employer-employee relations is a strictly limited one. It is, however, by no means unimportant. Legal anomalies must be shown as such to be legally and logically indefensible. To demonstrate this may prevent their being accepted without question on the few occasions when it is found necessary to resort to litigation or legislation. This, alone, is a valuable contribution towards the difficult task - so often encountered in public law - of reconciling public interest and private right. It is one which only the lawyer can properly make.