

**'One of the fundamental problems of the criminal justice system is its excessive reliance upon the discretion of individual actors'. Discuss in the context of policing.**

One of the fundamental problems of the criminal justice system is the amount of discretion exercise by the police. However a distinction must be made between theory and practice. Since the enactment of the Police and Criminal Evidence Act 1984 (PACE), the police in theory have had a lot less discretion and are made to account for a lot more of their movements and have more guidelines to follow than previously. However in practice there can be little accountability since most of the accountability of police required is in writing which can be achieved whether or not the police have acted in that way. The problem of the police having so much official discretion and unofficial discretion has been argued to be problematic and one of the major negative issues for the criminal justice system because of the police 'cop culture', a culture involving 'macho' feelings, a belief in strong stereotypes and beliefs about what is suspicious or not. Although there is much argument negating the existence of a police 'sub-culture' the arguments in favour of its existence and effect on the actions of the police are stronger. Therefore it is one of the fundamental problems of the criminal justice system that it has excessive reliance upon the discretion of individual actors and this is a problem because of the existence and influence on actions of the police 'sub- culture'.

Firstly it should be established whether there is an excessive reliance upon the discretion of individual actors. The introduction of PACE introduced wide stop and search powers. However an objective basis for this was included, stating that there should be a reasonable suspicion, there needs under s 1(3) to be 'reasonable grounds for suspecting that evidence of relevant offences will be found'. However this is an elusive concept, one which although appearing to give police guidelines to limit their discretion in fact adds to their discretion, as what they decide is reasonable will be largely based upon personal decisions. There have been a few cases on the issue but they have done little to define it and tend to contradict each other rather than clarify this area of the law, for example in the contradiction between *King v Gardner and Lodwick v Sanders*. This legal rule does little to constrain and structure police discretion and police are able to use their instincts, which research shows often leads to the application of stereotypes. As suggested earlier though PACE did intend to reduce discretion in this area and give police some guidelines when stopping and searching, so in theory there should be less discretion. However in practice because 'reasonable suspicion' is such a vague term there is a considerable amount of discretion here. Under PACE with the stop and search a police officer must provide certain information to suspects before searching them, including details about the police officer, the object of the search and the purpose for making the search, the suspect must also be told that the police officer will be making a record of the circumstances of the search and that the suspect is entitled to a copy of it. This provides strict boundaries to police discretion in theory; however when the theory/practice distinction is looked to it can be seen that in practice these guidelines are not adhered to this may be for a number of reasons. Firstly many situations may not actually lead to a search and so will not actually be recorded, most suspects will not

be aware of their rights to be told certain information, most people do not know of their record so the reason for its being there is not helped by the records existence. Also the fact that the suspect needs to consent to being searched in many situations is unhelpful as it is a situation where it will be the officer's word against the suspect. The problem of then having to write the record is that police officers jobs revolve around their acting in certain situations and not writing, therefore a police officer rather than get discipline will find it very easy to act in one way and then write it up in another way, according to the statutory guidelines.

Interrogation and detention is another area in which the excessive use of discretion by the police is a fundamental problem. Nearly half of all detained suspects are interrogated, PACE entitles an officer to question any person from whom he thinks useful information can be obtained. However this does not stop interrogation in informal settings and research shows that up to 10% of suspects are interviewed after arrest and prior to the arrival at the station. For instance the suspect could be interrogated in the car on the way to the station, or even in the toilets, McConville research quoted one officer as saying that 'you have to keep up the pressure'. Police have learned the use of psychological pressure rather than physical pressure and the extent to which the exercise of police powers can be reviewed after the event is limited where the officers act with the apparent consent of the suspect. There is virtually no accountability and no general accountability to a single body that can oversee consistency and any reviewability that there is tends to be within the police structure and is also controlled by dependence on official records.

If it is to be thought that there is excessive reliance upon the discretion of individual police in the criminal justice system, using the idea of discretion in practice rather than in theory it should be considered whether this is a fundamental problem or not. For instance if society in general was satisfied with the criminal justice system regardless of the fact that much discretion in practice was allowed then there would not be a problem. However much criticism of the police has arisen in recent years of the existence of a police 'sub-culture' otherwise known as the 'canteen culture'. Peter Manning described the police sub-culture as 'the accepted practices, rules and principles of conduct that are situationally applied and generalized rationales and beliefs'. It involves a culture that has been developed through informal talking, including beliefs in the 'macho' nature of being in the police which will then have a negative effect as it will make the policemen more violent. Police sub-culture tends to share stereotypes as to who to stop and search, for example males, the unemployed, ethnic minority groups, homosexuals and people that look out of place in their setting. However it has been argued, for example by Waddington that there is not actually a police subculture that creates problems in the way in which the police will then act. He argued that psychological experiments reaffirm that it is the circumstances that people find themselves in rather than the beliefs and attitudes that they hold. Police are likely through exaggeration of their job to say one thing and to do another, if so this shows that the police sub-culture provides little explanation of police behaviour. However such an argument can be negated by the fact that research with the police has shown what their general stereotypes tend to be and these views have been backed up with stop search figures. However although there is much support for the existence of a police 'sub-culture' there is much confusion as to the routes of this culture. Chan argued that you must look both to the policing culture and to the political and social environment. She adopted Bourdieus theory that there are two

concepts that of field and that of habitus and where the habitus is linked to aspect of the police occupational culture such as racist language the field emphasise the historical and structural relations in positions. It was argued that in order to change the sub culture both theories must be looked at. However no theory is clear as to how the police sub- culture could be changed and many argue that in some ways the culture should not be changed because it acts as a support, a sense of mission that the police have behind their job without which they would not be able to perform it.

One of the fundamental problems, in practice rather than in theory, of the criminal justice system is its excessive reliance upon the discretion of individual police. This is so much of a fundamental problem because of the police sub-culture that influences police actions like stop and search. However how to resolve this is unclear as it is uncertain as to how the police sub-culture has been created and how the police would work without its existence.