

POLICE DISCRETION AND PROCEDURAL JUSTICE: policing diverse communities

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ABSTRACT: Discretion is an important and inevitable characteristic of policing that raises several discussions among academics and practitioners in the field due to the significant impact that police decisions can have on citizens' lives and on the credibility of police institutions. This controversial attribute of police power presents challenges to the exercise of policing in democratic societies. This essay argues that procedural justice upholds police discretionary powers. It also presents real-life examples of how the exercise of police discretion in policing diverse communities may be used to counter or endorse principles of equality and procedural justice.

Keywords: Police discretion. Procedural justice. Equality. Policing. Diverse communities.

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1. INTRODUCTION

The exercise of discretion, although controversial, is an important and inevitable aspect of policing. This essay argues that procedural justice helps to build trust and generate legitimacy, which, in turn, upholds the exercise of discretionary powers by the police and secures cooperation and compliance from the public. Depending upon how wisely police discretion is employed, it can contradict or support principles of equality and procedural justice when used to serve diverse communities and safeguard vulnerable persons and minorities. Six examples are presented in order to corroborate this position.

In the first section, the role of policing in modern democratic societies is discussed. The second section brings the definition of police discretion and procedural justice, followed by the third section that examines their relevance in policing diverse communities and safeguarding vulnerable persons and minorities, and conclusions.

2. THE ROLE OF THE POLICE IN MODERN DEMOCRATIC SOCIETIES

The role of the police as a mechanism to control the conditions of sociability is a necessity that has existed for centuries in all spaces occupied by humankind. Even if it did not perform a specialised, professional, or organised function, it was at many times represented by persons authorised by a group to regulate interpersonal relations since the formation of the first social organisations (BAYLEY, 2006; MONET, 2006; MONJADERT, 2002; ROBINSON; SCAGLION, 1987).

Despite the existence of the police function dating from a period prior to the emergence of the Modern State, the relationship between policing and the state refers to the emergence of public policing, i.e., the modern concept of the police was

formulated in Europe in the 19th century, when it emerged as specialised forces, structured along the lines of professional bureaucracies, with the possibility of using force constrained by legality and legitimacy (MUNIZ, 1999; ARAÚJO; LIMA, 2012).

Therefore, in modern societies policing became a core function of the State, embedded in the political context. Hence, the police became an institution with a central position in the political functioning of the society, so that its existence was related to the maintenance of the state itself, since the legitimacy of a government depends on its ability to maintain social order: if security is not guaranteed, the state itself ceases to exist (MONET, 2006; WEBER, 1982). According to Reiner (2004, p. 37) “welcome or undesirable, protectors, pigs or pariahs, the police is an inevitable fact of modern life”.

Reiner (2004, p. 79) acknowledges that in modern societies policing occurs within a fragmented context of structured social inequality and conflict, being “more or less harmonious and consensual, or overtly oppressive, with important consequences”. Thus, policing is not restricted to the support of the binomial ‘law and order’, but faces challenges “in reconciling, on the one hand, the duty to enforce the law fairly and impartially, and on the other hand, the need to temper strict law enforcement for sound policy and operational reasons” (BRONITT; STENNING, 2011, p. 319).

3. FROM PROCEDURAL JUSTICE TO POLICE DISCRETION

During their daily activities, throughout the course of each encounter with the public, police officers have an extensive range of decisions about which official response is appropriate to be taken in any case they face, though limited by law and rules. This choice that police officers have and is present in every level of their work, especially at the micro level where frequently unsupervised decisions are made, is called police discretion: a controversial, although

“ubiquitous and legitimate aspect of modern policing” (BRONITT; STENNING, 2011, p. 319), which is a result of and, at the same time, emphasises the police politicality (BRONITT; STENNING, 2011; FINNANE, 1990).

As stated by Erez, Finckenauer & Ibarra (2003, p. 06) “using their discretionary arrest powers, the police are also the gatekeepers of the criminal justice process. They determine who is subjected to the power of the law and who is not”. As a consequence, unlike other personnel in the criminal justice system, police officers have the opportunity to act as autonomous agents and exercise a great deal of discretionary judgment (WORTLEY, 2003).

Amid discussions about the necessity and desirability of police discretion, i.e., if it should be limited or even abolished, there are those who argue that it is a flexible and necessary way to deal with the unpredictability of social problems (DE LINT, 1998; GALLAGHER, 1979; KINSEY; YOUNG, 1982). Still, some has expressed concern about the possibility of a selective enforcement become an arbitrary and discriminatory enforcement (EGGER; FINDLAY, 1988; GOLDSMITH, 1990; GOTTFREDSON; GOTTFREDSON, 1988; PIKE, 1985; WALKER, 1983). However, “what all commentators agree upon is that discretion is an inevitable part of policing” (WORTLEY, 2003. p. 541).

Goldstein (1963; 2006) argues that discretion in law enforcement is exercised because the ‘full enforcement’ of the law is a myth that could even cause disorder and chaos if implemented. He states that it would be unfeasible to carry out the varied and often unpredictable tasks that police officers face without giving them a substantial discretionary power just because it is impossible to predict with any precision what should be done, since there could be an infinite number of possible circumstances. As stated by Kelling (1999) policing is complex and uses the criminal law to solve many problems, relying on enormous discretion that is at the core of police functioning.

Therefore, abolishing police discretion would be unwise in principle and impossible in practice.

As discretion is a fact of police work, the concern is whether it is used to fulfil procedural justice, an aspect that indicates if the police are behaving in a normatively justifiable way, treating citizens with respect and dignity, and acting in a fair, open and transparent manner (TYLER, 1988, 2008). Tyler & Jackson (2013, p. 06) argues that procedural justice is regularly found to be the most important predictor of legitimacy since “people’s reactions to law and legal authorities are heavily influenced by their assessments of the fairness of legal procedures”, i.e., people are more sensitive to whether authority is exercised in a fair, transparent, and unbiased manner, than to police effectiveness and the outcome of the encounter.

As Tyler & Jackson (2013, p. 14) state, “police legitimacy is a belief about the right of the police to possess and exercise discretionary power and influence”. According to Madon, Murphy & Sargeant (2017, p. 626), the concept of legitimacy in policing reflects three judgement about the police:

The first is public trust and confidence in the police. This is the belief that the police are honest, try to do their jobs well and are able to protect the community against crime and violence. Second, legitimacy reflects the public’s willingness to defer to the law and to police authority. Third, legitimacy involves the belief that police actions are morally correct and appropriate.

Researchers have demonstrated that procedural justice, police effectiveness and community engagement build trust, confidence, and legitimacy, and that there is a strong association between procedural justice, normative alignment, and duty to obey, i.e., procedural fairness encourages compliance and cooperation (MADON, MURPHY, SARGEANT, 2017; SUNSHINE, TYLER, 2003; TYLER, JACKSON 2013). According to Madon,

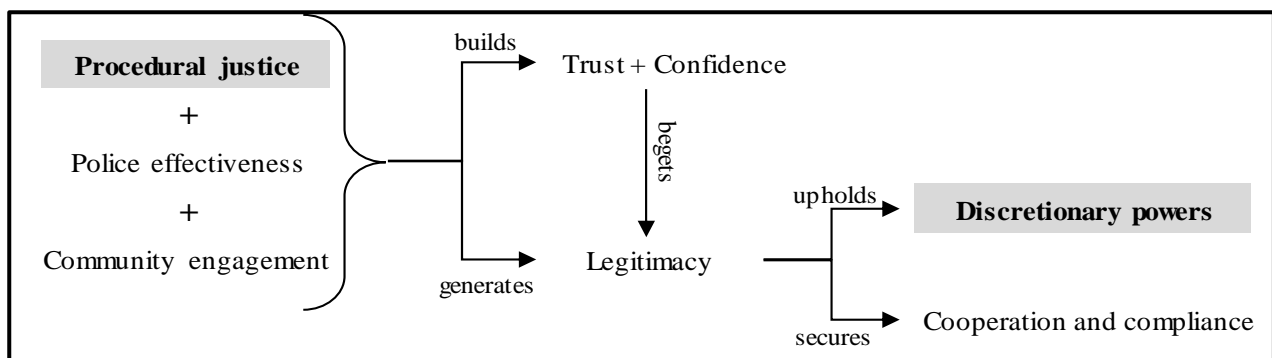
Murphy & Sargeant (2017, p. 624), “procedural justice is linked to enhanced perceptions of police legitimacy, while disengagement is associated with reduced perceptions of legitimacy”.

If the police are recognised for acting procedurally fair, people will become more willing to follow their orders and to agree with their actions because they are perceived to be acting in a morally justifiable manner. In summary, as Figure 1 shows, acting with procedural justice builds trust and confidence, and generates legitimacy, which, upholds the exercise of discretionary powers and secures cooperation and compliance from the public (BRADFORD, 2014; GOODMAN-DELAHUNTY, 2010; TYLER, 1988, 2008; TYLER, JACKSON, 2013).

opportunities for abuse and corruption. In fact, the misuse of police discretion jeopardises principles of equality and procedural justice, undermining police legitimacy. Frequently this results in negative reactions, unwillingness to cooperate and comply, and public outcry, especially among diverse communities, vulnerable persons and minorities.

In the 1981 Brixton riots in London, the police’s stop and search practices were the catalyst that sparked the riots (BRONITT, STENNING, 2011). In that occasion, for three days rioters, mostly young black men, fought with police officers, attacked buildings and set fire to cars in Brixton, district of south London, causing damage on the order of millions of pounds.

Figure 1: Linking procedural justice and discretionary powers in policing



Source: Author’s own development.

4. POLICE DISCRETION AND PROCEDURAL JUSTICE IN POLICING DIVERSE COMMUNITIES

Those who criticise the use of discretion by the police argue that it should be controlled more thoroughly or even abolished, and that the police are supposed to enforce the law equally. They have “great difficulty in recognising that discretion can be exercised without being partial” (Goldstein, 1963, p. 144), and consider that it gives too much power to police officers, offering

The violence was partly the result of bad and unfair police treatment of black people who felt they were being targeted by the police’s stop and search procedures, a practice that depends heavily on police discretion.

In the 2014 Ferguson Uprising in Missouri, the death of Michael Brown, an unarmed 18-year-old African-American who was shot after an encounter with a white police officer, was the last straw for the black community to revolt against police actions for weeks (GREENE, 2015). Recently, another African-American man was killed by a white police officer after being arrested

outside a shop in Minneapolis. Cases of police violence against black people in the United States of America are not rare, with young black men being “stereotyped as threatening, which can have grave consequences for interactions with police” (HESTER, GRAY, 2018).

All these cases exemplify the negative consequences of the misuse of police discretion and powers, particularly in relation to the over-policing of black people which had been going on for years, especially in countries that had socioeconomic systems based on the forced labour of black people. The police responses to those events were heavily criticised because their actions were not seen as procedurally fair and correct, since the police abused their power and did not act professionally, but in a biased manner. Cases like these erode the trust and legitimacy and worsen the relationship between the police and the community, which takes generations to reconstruct.

Examples like these are more common in police forces that have a focus on repressive policing. They end up focusing on those people considered to have the “criminal stereotype”. This type of action is based on a harsh response from the police authority and on increasing the efficiency of the surveillance apparatus through indicators such as the number of arrests. As demonstrated by Klockars (1986) and Walker (1984), when applied in unequal and fragmented societies, this opens up great risks of abuse, discrimination and violation of civil liberties and human rights. This situation can be extremely dangerous, especially in countries where democracy is not fully consolidated.

However, the wise exercise of police discretion can be leveraged in order to construct better relations between the police and vulnerable persons, diverse communities, and minorities, especially in cases of non-violent crimes. Interestingly, “procedural justice is more effective for building legitimacy for ethnic minority respondents who report being highly disengaged from police”, i.e., those disaffected communities

that have been dismissive and have little or no consideration for the police as a social institution “may place greater value on procedural justice because it communicates to them that they are respected and worthy of status” (MADON, MURPHY, SARGEANT, 2017, p. 624-628).

By “enforcing the spirit of the law, rather than the full letter of the law” (GOLDSTEIN, 1963, p. 143), police discretion allows greater flexibility to deal with situations that the law or principles of equality did not define clearly. The use of discretion also allows the police to assess the variations in the seriousness of offenders’ behaviour, making decisions considering the context and mitigating factors, not just the illegality of the offence. If agreed and well communicated to the community, such actions would manifest themselves as more socially concerned than using total enforcement, achieving the same desired result. In addition, the police should have well-trained and well-educated professionals that will wisely judge when, how, and why to use discretion, considering what they are trying to achieve and the potential effects of their decisions in the broader ‘public interest’. As stated by Goldstein (1963, p. 143):

It is the function of the police to demonstrate the impossibility of full enforcement to the community. [...] An appeal must be made to the public to accept the best judgment and efforts of the police in their approach to the total problem of criminal law enforcement. [...] Placed in these terms, the degree to which full enforcement can be achieved is a matter known not only to the police agency, but to the community as a whole. [...] public support is the key to the solution of most police problems.

Spalek (2010) and Dunn *et al.* (2016) provide examples of wise exercise of police discretion regarding the relationship between the police and Muslim communities in a context of community policing for counterterrorism. In both cases, the police had decided to form special units to police by consent and have “worked with Muslim

communities as partners rather than informants” (SPALEK, 2010, p. 791). They were open and transparent about what they were doing, developing trusting relationships and partnerships. This kind of approach has led to a good relationship between the police and the communities, which in the process of building trust and recognising the police legitimacy, is helping the police to develop counterterrorism activities. In these cases, the police placed

a certain amount of trust in community members to be able to sort out the issue themselves, only seeking direct police action as a last resort. It may also involve community partners tackling directly other forms of criminality within their communities, over and above terror-related offences, without involving the police (SPALEK, 2010, p. 804).

Police officers can also use their discretion to analyse a specific situation and conclude that a softer approach would result in minor damage. For example, when responding to a situation of domestic violence, the officer in charge could decide not to handcuff the violent husband in order to not tarnish his image in front of his children unnecessarily. This action will also avoid traumatising the children and prevent them from seeing the police as enemies. “If possible, police should not handcuff or otherwise subdue a parent in front of a child. Whenever possible, police should also avoid conducting investigative interviews with parents in the presence of children.” (BERKMAN, ESSERMAN, 2004, p. 10).

5. CONCLUSION

Policing democratic societies requires respect for citizens' rights, procedural fairness, minimum use of force, accountability, responsibility, citizen participation, equity, responsiveness and prioritisation of service (BRADFORD, QUINTON, 2014). The role of the police in society has been and continues to be the subject of controversies and challenges, and it tends to be increasingly questioned and widely debated as cases of abuse by the police reach the mainstream media, which in times of practically universal access to information has assumed gigantic proportions. In addition, people are more aware of their rights and concerned about issues related to violence and crime.

In summary, this essay discussed the police use of discretion and how it could be, if used fairly and transparently, a force for good, helping to improve community relations and enhancing police legitimacy, making a cogent argument for the wise use of discretion. Police officers have various opportunities to apply discretion when on duty, and their actions contribute directly to the regulation of the use of public spaces. So, the wise exercise of police discretion could help the police to gain the confidence of and to construct better relations with citizens, especially vulnerable groups, minorities, and diverse communities, and does not necessarily contradict principles of equality and procedural justice, but can be used to strengthen them and to secure cooperation and compliance from the public.

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DISCRICIONARIEDADE E JUSTIÇA PROCEDIMENTAL: policiando comunidades heterogêneas

RESUMO: Discricionariedade é uma característica importante e inevitável da atividade policial que levanta várias discussões entre acadêmicos e profissionais da área devido ao impacto significativo que as decisões policiais podem ter na vida dos cidadãos e na credibilidade das instituições policiais. Esse atributo polêmico do poder de polícia apresenta desafios ao exercício do policiamento em sociedades democráticas. O presente artigo argumenta que agir com justiça procedimental sustenta os poderes discricionários da polícia. Também apresenta exemplos reais de como o exercício da discricionariedade no policiamento de comunidades heterogêneas pode ser usado para contrariar ou endossar princípios de igualdade e justiça procedimental.

Palavras-chave: Discricionariedade policial. Justiça procedimental. Igualdade. Policiamento. Comunidades heterogêneas.