IJCRT.ORG ISSN : 2320-2882

INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

THE POLICE AND THE COURT

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ARA.

It is of the utmost importance for the understanding of the role of the police in modern society that its relations to the courts be set forth as clearly as possible. It is no exaggeration to say that much, perhaps most, of the present confusion about the police, and a great deal of empty polemic, are due to tha lack of clarity on this point. Most legal writers do not know enough about police work to understand how it might relate to what the courts do, and most authors familiar with police procedure do not have an adequate appreciation of the nature of the legal process to discern the proper connection. Having indicated everybody's lack of competence, we are compelled to confess that what will be proposed below will not be offered as a proven explanation. In-stead, the following remarks are offered as a possibly correct line of reasoning, in the hope that more extensive and more expert study along the proposed lines will help in casting light on what has thus far been left to loose conjecture. Though there still attaches a great deal of esoteric mystery to the administration of justice, not only in the minds of lay people but also among jurists, its historical development in the Western world has been a movement away from unaccountable oracular judgment to a method of operation that is in all its important aspects restricted by explicit norms deriving from substantive and procedurallaw.83 Indeed, there are good reasons for arguing that the modern penal law has become mainly, perhaps exclusively, a device for rationalizing courtroom procedure, and that its proscriptions and prescriptions are not addressed to anyone but the judges.84 Contrary to the Biblical Decalogue, for example, con-temporary penal statutes do not forbid or command any kind of citizen conduct. Instead, they merely stipulate that some proven actions and some proven omissions authorize and enjoin legal officials to proceed against the offending person. The powers to proceed are always set at a level of a fixed legal norm, which no legal official may exceed with impunity, regardless of circumstances. Moreover, when the presumed ~pplicability of a legal norm specifying the imposition of a penal sanction is challenged by an accused person's plea of not guilty, or some other defense or rebuttal of charges, then this challenge must receive deliberate-ly exhaustive consideration in open court. That is, the case the government opposes to the defendant's claim of innocence must be demonstrated by a method of reasoned proof which, in ciplecíple, calls for meticulous respect of the accused person's civil rights, even when such respect will defp,at an otherwise meritorious cause. The procedural norm that requires that every indictment be left open to debate in court and that facts introduced in support of it must not only be true, but also legally admissible, points to a reluctance to invoke sanctions on any but unimpeach-ably reasoned grounds. And reasoned justification is required not only to convict but also to acquit or to dismiss. It is only fair to admit two objections to the above description of the ways justice is administered in our courts. In the fiplacplace, the legalization of the criminal process is in reality not as complete as these remarks suggest. One can cite many examples of jurisdictions in which the legal rights of defendants are not only not observed in fact but to which the protections do not even extend under the law. Aside from such obvious instances of de-parture from the rule of law in the strict sense as the military and juvenile administration of justice, one need only point to the fact that jury deliberations are not really in accordance with the spirit of legality, if only because of their secrecy.35 In the

second place, and more importantly, it could be said that the version of the criminal process that was outlined is a mere facade. After all, the preponderant majority of cases that come before our criminal courts do not go to trial and, therefore, never receive the benefit of careful scrutiny and legal protection. Instead, they are disposed of by means of covert plea-bargaining which is based on considerations of practical expediency rather than legality.36 Though these objections are well taken, they can be set aside easily. As concerns the first, there can be no doubt that the progressive legalization of the criminal process has been the dominant trend for a long time and that this trend has accelerated in recent decades to the point where the rapidity of change be-wilders even seasoned jurists. This movement might suffer an occasional setback, but the possibility of a reversal is imponderable without assuming a radical change in our system of government, a consideration which is beyond the scope of this analysis. With reference to the second objection, it must be said to begin with that evasions of legal restriction always have and probably always will abound in the administration of justice ;37 it is diffi-cult to be so naive as not to recognize the fact and, indeed, its necessity. More important is that the scope, methods, and objectives of subterfuge are themselves determined by the official norm. No one can possibly understand the why, the what, and the what for, of the sub rosa bargaining between the district attorney and defense counsel without knowing what might happen in court if the case at hand went to triaL No district attorney in his right mind would offer a reduction in charges when he has conclusive and admissible evidence. And no responsible defense counsel will offer a plea of guilty in trade for a reduced charge when he knows that there is no legal case against his client. Considerations of expediency, such as the desire to save time and work, certainly play a part in the pleas bargaining, but only totally corrupt lawyers base settlements entirely on such considerations, though it must be admitted that totally corrupt lawyers are probably not quite as rare as one would hope. In general, however, the norms observable in open court reach down and govern even the prioresses of its evasion. In the criminal process, like in chess, the game is rarely played to the end, but it is a rare chess player who concedes defeat merely to save time. Instead, he concedes because he knows or can reasonably guess what would happen if 'he persisted to play to the end. And thus the rules of the end-game are valid determinants of chessplaying even though they are relatively rarely seen in action. It is for these reasons that we hold to our description of the criminal process against the objections.

Now, the flow of business of the criminal courts is virtually completely supplied by the police. According to the Common Law, judges were }lOt obliged, nor were they entitled, to inquire how the police secured this flow of business in the first place. That is, how the policeman learned about the delict, how he apprehended the putative culprit, and how he collected evidence to support his allegations had no bearing on the subsequent trial. While no judge would allow that a defendant be compelled to testify against himself during his trial, he cared not what the police did to obtain

the evidence as long as there were no compelling reasons for assuming that it might be false in substance. This rule was re-versed in the United States in 1914. Since then the United States Supreme Court has issued a series of rulings requiring the police to observe certain legal restrictions in questioning, detention, and search and seizure.SS To all appearances, therefore, the judges

phave become the custodians of the legality of police procedure, even as they are the custodian of the legality of court procedure. In point of fact, however, the appearances are deceiving and nothing could be furthel' from the truth. Our courts have no control over police work, never claimed to have such control, and it is exceedingly unlikely that they will claim such powers in the foreseeable future, al1 things being equaL30 Indeed, the courts have, today, even less control over the polic I;han they hav~ over attorneys in private practice.

Since the assertion that the courts have no power to compel the police to comply with norms of legality is a strong assertion that flies in the face of widespread assumption, it deserves further documentation. Let us begin with an example. It is generally correctly taken for granted that a policeman may, on tl1e basis of no more than intuited suspicion, stop a person in a public place (actually, he may effectively do so anywhere, but we let this point pass) and demand of this person that he identify himself and explain the nature of his business on the scene. It is also rightly assumed that the officer may place such a person under arrest if the answers he receives do not satisfy him. All this does not seem such an unreasonable power considering that evil stalks our streets under the guise of innocence, and considering that the cost of inconvenience and possible error might be a small price to pay for the prevention of a possibly much greater disaster. Yet it is remarkable nevertheless that such inquiries cannot be addressed anywhere in the entire criminal process by any official of theadministration of justice without the suspect's explicit consent. And that the legal norm forbidding inquiries without consent also forbids using the suspect's refusal to give an account of himself as grounds for a decision against him. In point of fact, not even the policeman himself is permitted to insist on questioning a suspect after he has arrested him and if he intends to see him prosecuted. The "if" emphasized in the preceding

sentence is of ab-solutely crucial importance. It signifies that in many instances of police intervention there exists the possibility, which in some in-stances becomes a virtual certainty, that the case at hand will become the business of prosecutors and judges. Only when and only insofar as this possibility is envisioned does the police come under the rule of some of the restrictions that bind the administration of justice. If the policeman fails to comply adequately with these restrictions then the courts will not accept the case. This and this alone will be the consequence of his failure. To be sure, having cases dismissed in court is no small matter. Many kinds of police activity have, after all, the sole objective of setting the criminal process into motion. What is the use of staffing a robbery detail that investigates robberies and arrests robbers who are subsequently released even though guilty, merely because the constable blundered? Thus, to say that the courts have no control over the police surely could not mean that what they say and do about police activity is of no consequence. Indeed, it is rather obvious that the series of United State Supreme Court decisions concerning admissibility of evidence has influenced police practices. :But there is momentous difference between influence and control. For example, it would constitute at least a small mefl,sure 0:E control if judges issued permanent injunctions against illegal searches and seizures, in which case every proven instance of it would constitute the culpable offense of contempt of court. But judges have not done this, nor is it likely that they will do it.40 Instea.d, the present arrangement between prosecutors and judges, on the one hand, and the police, on the other hand, isnot unlike that between any set of independent consumers and

suppliers of services. The latter are constrained to respect what the former want because this is the only way they can doInlbusiness. In the open competitive market, purveyors hue closely

to the demands lest they lose their source of revenue. But in the marketplace of public service there would appear to be need for another kind of coordinating mechanism. The prevailing form of coordination between public agencies in a receiving and supplying relationship to one another is the hierarchical control of the former over the latter. For example, if the Internal Revenue Service collected taxes in some such manner that would force their return to the taxpayer, then the Secretary of the Treasury would simply order a revision of the procedure. Nothing of the sort exists between the courts and the police. Since the judge is not the policeman's superior there is nothing that prevents the latter from doing as he pleases while forwarding cases on a take it or leave it basis. Nothing, that is, except two powerful considerations that put emphasis on the court's influence in the absence of control: the police really want to make use of the powers of the courts to punish, and they are fearful of scandals.Saying that the police really do want to see offenders punished probably does not do their case justice. Though it is probably true that there attaches a certain degree of punitive zealotry to what Skolnick called the working personality of policemen,41 coopera-tion with the courts is more than the product of occupationalpsychology. Most policemen do in fact conceive of their mandate as involving the law as it exists, and though they voice objections about the restrictions that this entails,42 they have even greater misgivings about disregarding the restrictions entirely. Their atti-tude is basically American. Like all of us, the police have a love-hate affair with the administration of justice; they distrust lawyers, including judges, profoundly and they nave an indomi-table faith in "The Law." 43 Thus, it is probably fairer to say that the police want to see offenders punished by the courts because they feel that this is in the public interest. With respect to this, it is interesting to note that every generation of policemen ap-pears to accept those legal restrictions as just and practical whichthe generation of their predecessors deemed unwarranted and destructive of police efficacy.44 As concerns the second consideration, the fear of scandals, it is a mixed blessing. Though it is undoubtedly true that it helps in bringing police work patterns closer to legality, it also can and often does have untoward consequences because the fear of scan-dal gives rise to hypocrisy, secretiveness, and mendacity. In general it is far easier to err on the side of overestimating, rather than on the side of underestimating, the influence of the courts on what the police do in their daily work routines. While it is probably true that judges exert strong influence on some kinds of police procedure-as in cases involving major crimes in which resolute defense is anticipated-its extent is quite limited for several reasons. First, it generally does not touch the vast domain of charges involving disorderly conduct and other minor offences. This is so because in such cases the merits of the police decision ordinarily are not questioned by either the defendants or the jUdges.45 Second, because the police are often exposed to strong pressures to take some action against conditions that offend the public, they sometimes have to proceed in ways that could not be sustained on grounds of legality. Police officials are quite frank about it, referring to public opinion as one source of their authority,46 Third, policemen in many jurisdictions pro-ceed against some types of illegal activity-notably those involving the so-called sumptuary crimes-with deliberate neglect of rules of legal restraint. In most of these cases arrests are made without intent to prosecute and primarily for harassment pur-poses. By such means they hope to make plying some unsavory occupation more hazardous and less profitable:17 Fourth, judicial influence is totally irrelevant for the immense variety of activities that have nothing to do with law enforcement or legality but is primarily oriented to easing some social strains.48 For

instance, no court has thus far presumed to inquire whether police service should be authorized and made available for helping to settle marital disputes.

In sum, the much heralded discovery that policemen are notmerely ministerial officers, applying the laws as interpreted by the courts, must be considered the understatement of the decade. In point of fact, they not only exercise discretion in carrying out the mandates of the law, but they do even that much only as an incidental part of their more general responsibilities.