



Police Discretion: A Power that Can Be Abused and Should Be Regulated

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Abstract. Under the authorization of the law, police officers have a high degree of discretionary power in their work. However, in practice, police discretion has overly broad coverage and is susceptible to abuse. Such abuse occurs throughout various situations including investigation, prosecution, and disposition of forces. Therefore, the innovation of the law should emphasize the regulation of police discretion. The courts' review of police decisions should be strengthened, and the entire process of exercising police powers should be made open and transparent to the public.

Keywords: Police discretion · Investigation · Forces · Prosecution · Regulation

1 Introduction

In every formal decision-making process, whether it falls under the purview of judicial or non-judicial proceedings the law can be applied flexibly, Officials, legal teams or other groups and individuals who are authorized by law to exercise legal power and represent the public interest or their own interests enjoy discretion in a wide range of decision-making powers [1].

Policing scholars point out that police work is inherently discretionary because it involves the exercise of choice or judgment [2]. The authoritative historian of policing, Mark Finanne, has noted that all aspects of policing, inevitably involve discretion [3].

This essay argues that police discretion is a wide range of power, easy to abuse, and should be regulated in the existing legal system. It expounds the definition, attribution, and importance of police discretion, and analyzes the contradictions and ways of regulating them.

2 Discretion

Since its “discovery” more than 40 years ago, discretion and its pervasive presence in criminal justice practice have now been taken for granted [4].

Discretion is the power granted by law to enable an authority or other official to make the most reasonable decision in the public and private interest, as he or she wishes, in a given situation. The development of government public power is grounded in institutions,

and different institutions have different requirements for political officials and authorities [5]. In societies where human and collective interests conflict with institutions, public power needs to be limited and taken responsibility for conflict resolution [5]. To adapt interests to power and to promote social development, discretionary powers are added to these rules and regulations for individuals and institutions of power.

Under the existing legal framework, decision-makers are given discretion by law and are explicitly authorized in legal texts, which must be exercised in a manner prescribed by law [6]. However, there are differences between practice and theory, and this legally prescribed method is controversial. In the authorization process, legal regulations may be influenced by the subjective intention of the legislator or a goal may be proposed without a clear path. This leads to the possibility of abuse of discretion [7].

Consequently, the discretion is not infinite, but effective within certain limits. The nature of discretion determines that its effectiveness is complex and that it is a power that needs to be regulated [8, 9].

3 Police Discretion

3.1 Connotation of Police Discretion

Police discretion to enforce the law was formally recognized in two pieces of Australian legislation in the early 19th century and in at least one judicial decision [10]. In 1810, armed policemen on night patrol were granted the authority to inspect any suspect or prisoner-related residences [10]. Over time, discretion spread across modern police and gained legitimacy. According to *R v Beaudry*, police discretion was socially acceptable and enables officers to enforce the law more equally [11].

Discretion is described as a legal decision made by the police that is based on logic and must consider the requirements of legality. Choice, boundaries, reason, and legality are stressed in every significant court case that outlines the legal aspects of this idea [10]. The decision of discretion must take into account both logical factors and dialectical judgments, but they are neither exclusive nor absolute [10]. This indicates that these choices must be made within the law and that the relationship between the discretion allowed to police by the law and the responsibility to uphold the law is what governs that relationship [5].

Police discretion has great authority in legal practice but is also quite broad and prone to misuse [12]. However, law enforcement discretion is not affected in certain circumstances [13]. For instance, the Metropolitan Police Commissioner or the Commissioner of Police may decide, on a case-by-case basis, whether to conduct an investigation, whether to make an arrest, or whether to bring criminal charges. He had to choose how to organize his police force and allocate resources to each given crime or region [14, 15]. Furthermore, no court may instruct him in any of these circumstances [14, 15].

Therefore, this essay argues that police discretion is an overpowering power that may overstep and even violate public rights. The extent of the use of police discretion will then be further discussed.

3.2 Scope of Police Discretion

3.2.1 Investigation

The police have the authority to decide how to investigate anyone believed to have committed a crime [10]. Generally, the severity of the alleged offense and the strength of the evidence will determine the course of action [16]. If there are no reliable witnesses, the police may decide to call off the investigation [16].

Police investigative discretion is regarded as a privilege rather than a responsibility. Justice Madgwick said: “It cannot be assumed that it is the duty of the police to investigate all cases and that they have no investigative responsibility for the overall existence of violations [17]. Instead, the police must determine whether a person will be found guilty if charged for the violations [17]. The judge’s ruling makes it quite obvious that police work to investigate violations of the law and to be accountable to the accused. The only time the police have discretion but are not accountable is during the early phases of the inquiry [18].

For instance, if charges of criminal behavior are taken into account and addressed by a court ruling, the court will not revisit the police’s refusal to investigate the matter. In *Garvey v. Australian Federal Police*, Garvey requested that the court order the AFP to investigate claims of wrongdoing at the Department of Social Security [19]. It was also shown that the matter had been resolved four years previously and that the police had acted lawfully in not opening an investigation since it was based on a previous court ruling [19].

On the other hand, the police are free to decline an investigation if they believe it is against the law or their interpretation of the law. In one instance, the power company attempted to lawfully occupy a private farm for a study to determine whether the area was suitable for a nuclear reactor [20]. The police opted not to become involved in the case despite the power company harassing them for six months, and the decision was backed by the law [20]. Thus, the police can only intervene if they are engaged in acts of non-peaceful sabotage or unlawful assembly in accordance with the law [20].

Lord Denning MR disputed the police’s interpretation of the law and vehemently maintained that notwithstanding the “obstructors” passive opposition tactics, the law had been breached [20]. Despite these opinions, he refused to give orders to the Chief Constable or his men because he believed that the police should make the final decision and because he hoped that the Chief Constable would change his mind after hearing his views [20]. The court held that it was unable to assess the level of unrest in the situation or to deal with the specific problems that might arise from the actions of the obstructionist, which was another reason not to authorize police intervention [20].

3.2.2 Disposition of Forces

How officers are deployed on the ground matters to the police because they have the right to choose how they use force [21]. In *Crisp v The King*, Crisp filed a lawsuit against the Tasmanian police in 1904 due to a chief of police operational choice, claiming that the police had failed to use their judgment to uphold the law, but it was dismissed [22]. According to Justice McIntyre, the Act now provided the police discretion, but they had to follow the Minister’s and the Governor General’s Office’s directives when using it.

It might be claimed that a higher authority supersedes the police's discretionary powers regarding military deployment [23].

Although it appears in this instance that police discretion is outdated and rigidly limited by other laws. However, the police have essentially complete discretion in deciding how to deploy police forces to deal with the special circumstances of a case.

In *R v. Commissioner of Police*, the court ruled that the police wrongly believed they had no other option when a police cordon on a public road barred access to an industrial site [24]. The court rejected the police's argument that they could only respond to an actual attack. Justice Wright scolded the police for their inaction harshly [24]. He maintained that only police officers formally authorized by legal authorities could restrict highways. The court explicitly said in its decision that the police officer who is on duty at the time must decide what the actual police reaction should be in any specific circumstance [25]. This decision recognizes the latitude and scope of police discretion in the deployment of police forces. As the police responded quickly, they raised the number of people at the Bernie, Tasmania, facility and dispersed the pickets in contrast to their prior reactionary behavior, which led to the arrest of 41 picketers [25].

Although higher authorities limit the use of police discretion, police authority nevertheless has a crushing effect on civil power.

3.2.3 Prosecution

The police have prosecutorial discretion, case law explicitly recognizes that the police have authority, and in most cases, the courts do not interfere [26, 27]. The possibility that a court may intervene in a police decision to prosecute for an unrelated legal purpose is one of the few explicitly specified circumstances in which judicial intervention will occur [28]. One may argue that the police will have almost complete discretion in bring charges. The prosecution of a particular case, however, may or may not be the responsibility of the police, as determined by the court [28].

In *Desai v. Keelty*, the court was petitioned to grant a formal request compelling the AFP to bring charges against seven alleged fraternity members [29]. These people were involved in crimes against the security of the international community in Mumbai. The court ruled that the police would not have a legally binding obligation under common law to file charges against the specified offenders [29]. The evidence provided in the case revealed that the police had determined after reviewing the complainants' evidence that no offenses against Australian law had been committed after 30 min [29]. Therefore, if the police make a simple allegation and then decide not to introduce any evidence because the material witness, the arresting officer and the complainant fail to appear in court, then a judicial review of that judgment will not succeed [30].

In summary, police prosecutorial discretion is subject to little interference from either party unless a court order requires them to be responsible for prosecuting a particular case.

4 Abuse of Police Discretion

4.1 Abuse of Police Reasonable Suspicion Power: Expanded Investigative Discretion

Reasonable suspicion at the investigation stage is one area where police discretion may be abused. However, the nature of discretion when people use their authority can lead to psychological aspects that affect the entire chain. And even if the suspicion turns out to be unfounded, it was still reasonable at the time it was expressed [31]. Due to this circumstance, the police are permitted to carry out searches and exercise other authority before any suspicion has been made [31].

In *R v Fortesque*, two young men, including Michael, were wandering around a nightclub with a high incidence of drug use [32]. It should be noted that when plainclothes officers approached and started talking to them, the officers did not initially try to stop them [32]. The police further tested his judgment by using his right to reasonable doubt [32]. This case demonstrates that a police officer can lawfully approach any suspect and that the suspect cannot “leave” if the officer starts to have suspicions about them. Although there is a period for suspicion and inquiry, the target is virtually halted when the cops show up.

All aspects of police power are open to abuse because of their broad authority and scope. The NSW Police have had numerous allegations of crossing the line in the areas of warrantless searches, reasonable suspicion, searches, and trespass [33]. Additionally, the subjective component of target discrimination by the police can result in abuse of power in addition to the procedural susceptibility to abuse in the exercise of authority.

4.2 Discretionary Abuse Against Indigenous People: Unfair Deployment and Prosecution

Statistics have repeatedly revealed that more police are assigned to areas with a large proportion of Indigenous Australians. For instance, Wilcannia, a tiny rural community with a significant Indigenous Australian population, had a police-to-population ratio of 1:73 in 1990, compared to a ratio of 1:459 for the entire state of New South Wales [34]. This pattern of significant police activity in places with a substantial Indigenous Australian population has persisted [34]. Discretionary policy deployment is involved here, with police using this power to place more law enforcement officers in Aboriginal communities [34]. This distribution is unfair, yet there are currently no laws or regulations to restrict such police behavior. Even if the situation improves through public outcry and anti-discrimination campaigns, the unjustified use of deployment discretion against indigenous communities should be evaluated.

Unfair deployment is outweighed by the fact that police discretion is more clearly targeted when it comes to prosecutions. The NSW Parliament introduced FCANs, which allows police to send a notice to appear directly without the need to arrest the person [35]. Police officers could issue notices at their discretion while out on patrol and charge the target directly after skipping the arrest process [35]. It would be a decision to limit the use of police arrest powers for minor offences. In addition, reducing the rate of detention of offenders was one of the reasons for the introduction of the system [34].

In *DPP v Carr*, the police issued an FCAN against Lance Carr merely because he offended the officer with profanity [36]. Based on the case history, Carr spoke so quietly that few people outside the police could hear his profanity [36]. It makes the cop feel like a victim. Others argued that such criminal accusations of using derogatory words towards Aboriginal people are unjustified. This is due to several similar cases in which the accused used terms often used by the police and charges were brought against Aboriginal people when they used those words [34].

Unfortunately, Lance Carr's experience is not unique. Police may prosecute indigenous people with minor offenses, an unfair and discriminatory form of criminalization. It is a gross abuse when police utilize their discretion to enforce the law against Aboriginal people.

5 Regulation of Police Discretion

5.1 Legislation to Regulate the Exercise of Police Discretion and Allow for Court Review

The law grants discretion, but legal policy still trumps discretion as a way of regulating police discretion.

In *Professional Shooters Institute (NZ) Inc v Commissioner of Police*, the Commissioner of Police prohibited the importation of semi-automatic firearms from New Zealand [37]. However, under Sect. 18 of the Arms Act 1983 (NZ), the importation of arms is permitted subject to an import licence [37]. Therefore, the Governor General's press release banning the importation of semi-automatic weapons is illegal and cannot conflict with existing legal policy. This action also affirms the role of the courts in limiting discretionary authority.

Police discretion should be overseen through legislation that allows it to be fully reviewed by the courts [38]. Because of the nature of discretion itself, legal policy should pay more attention to procedural law issues while reasonably limiting discretion [38]. In addition, while policy can directly affect police discretion, it cannot be the only influencing factor, and the circumstances of a particular case should still be taken into account [39].

5.2 Open and Transparent Implementation Process

Police discretion should respect the public's right to information, and any unclear decisions should be subject to judicial review.

The Suspect Target Management Plan (STMP) uses quantitative risk assessment techniques to detect and categorise the characteristics of individuals to assess their likelihood of reoffending [33]. Any police force in New South Wales can assess the results of a nomination on an individual basis [33]. At the same time, the STMP risk assessment criteria are not available to the public [33]. The state police have complete control over making and interpreting decisions, and the targets implicated are thereby pushed through the criminal court system in a low-visibility way.

In the UK, similar decisions are vulnerable to judicial review. *R (Stratton) v Chief Constable of Thames Valley Police*, an altercation in a bar involving a young person

was recorded in the criminal record system [40]. The police did not explain to her at the time of the incident how the warning would affect her life [40]. And this warning record ended up having a big impact on the young man's life. The court has since made it clear that this case should have been handled through the judicial review process [40]. The discretion of the police should be open to citizens and subject to the supervision of citizens and courts. When enforcing the law, if the police are to activate their discretion, they are obligated to inform the suspect of all consequences and current circumstances.

Consequently, if a policy can give police discretion over a particular legal action, it should be made public and the courts should be encouraged to review it.

6 Conclusion

As discussed in the article, police powers are mainly focused on the investigation, deployment, and appeal of law enforcement actions, and in practice, two extremes can occur. One is the complete violation of existing law, and the other is the rigid exercise of existing law. Both of these actions can seriously violate a suspect's rights and thus affect convictions. This means that people who are not otherwise involved in a criminal case may be thrust into the criminal justice system. Abuse of police discretion can have the pernicious effect of "creating crime."

In conclusion, to avoid the use of discretion as a tool to violate rights or as a rigid factor in the legal system. In the legislative direction, the appropriate scope of discretion and the procedural jurisdiction of discretion practice require further attention. In this way, the exercise of power will be more balanced and the purpose of rational decision-making can be better achieved.

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