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THE RIGHT TO REMAIN SILENT

ENGLISH POLICING AND THE CULTURE OF SECRECY

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It has long been an established legal principle in the UK that individuals arrested by the police have a right to remain silent when questioned¹. Yet in practice it is often the police themselves who behave as if they have a right to remain silent, cultivating a veritable culture of secrecy whereby the truth is manipulated in an attempt to protect the institution from public scandal. Despite recent attempts to improve police accountability and to give the public greater access to official information under the ‘freedom of information’ legislation, the institution remains opaque, as has been revealed by a number of recent inquiries into the deaths of 96 football supporters at the Hillsborough Football Stadium and into the police killings of Jean Charles De Menezes, Ian Tomlinson and Mark Duggan, not to mention investigations into the numerous deaths of citizens detained in police custody.

The term ‘culture of secrecy’ is used in this chapter to refer to the idea that secrecy is built in to the institutional practice of policing in the UK, rather in the same way as Sir William Macpherson found that racism was ‘institutionalised’, pervading ‘processes, attitudes and behaviour’ throughout the police service, when heading his inquiry into the police investigation of the racist murder of black London teenager Stephen Lawrence in 1993 [Macpherson, 1999]. The term does not just refer to the attitudes of individual officers who are often reluctant to break a code of silence where this may open fellow officers to criticism, but also to the very practice of police work itself. Of course, the surveillance aspect of policing is necessarily carried out in secret with very little public transparency. Yet, there are many other aspects of police work which do not have to be shrouded in secrecy but which nonetheless are. The idea of a *culture* of secrecy suggests that the police unthinkingly and reflexively engage in practices which entail the dissimulation of information and the spread of disinformation against the public interest.

¹ It should be noted that this right is qualified: following Section 34 of the Criminal Justice and Public Order Act 1994, a defendant’s decision to remain silent may in practice lead to an ‘adverse inference’ being made by the prosecution.

This chapter seeks to outline a number of concrete examples of the way in which a culture of secrecy can impact upon police practice. It examines various failed attempts to improve police accountability, showing how difficult it is to dislodge this entrenched culture. It is argued that police officers, wittingly or not, adopt a culture of secrecy not simply to protect individual officers from prosecution but also to serve a particular political agenda which entails the enforcement of state control over certain populations to the exclusion of others, highlighting the criminal behaviour of the powerless whilst diverting public attention from the extensive harms perpetrated by the powerful. Indeed, as Reiner [2000] underlines, policing must be understood as an inherently political action. The police help to construct a public narrative according to which the state and its institutions are justified in turning to authoritarian methods in order to provide physical security for the public at large. Current attempts on the part of the British state to 'police the crisis' [HALL *et al.* 1978], whereby the public feel increasingly insecure despite a significant police presence, are regarded here as a desperate attempt to stem the tide of unrest and to seek legitimacy by scapegoating the most marginalised individuals for contemporary problems. Yet, the strategy risks being entirely counterproductive as the institutionalised corruption within British policing is revealed to the public, undermining trust and confidence and calling into question the extent to which the police are actually capable of shoring up the power of the neoliberal state. Nonetheless, a brief look at the direction in which policing may head in the future suggests that secrecy will remain institutionalised within the English police.

Police secrecy/public ignorance

It is of course difficult to unearth the full extent of police secrecy. It takes many different forms, from the dissimulation of information, which may reflect badly on individual officers or on entire police forces, to the routine lack of transparency involved in everyday police work. At the time of writing (spring 2014), a Home Affairs Select Committee is continuing its long investigation into how undercover policing has been used in the UK following a series of revelations by *The Guardian* newspaper over the past two years. It has been alleged that a number of undercover police officers engaged in sexual relationships with women they were monitoring, in some cases fathering children. It was also revealed that undercover officers have been using the identities of deceased children. Scotland Yard has launched its own investigation into the controversy and there have been calls for a full public inquiry into undercover policing to be carried out.

This rather obvious example of police secrecy in practice is of particular note, not just because of the harm caused to members of the public involved, but also due to the fact that undercover policing is not only used to target known serious criminals but also peaceful environmental and political activists. Indeed, more generally, all forms of covert surveillance, whilst still focusing on serious crime, such as international terrorism, are increasingly used to target relatively minor illegal

activity, such as simple car theft [LOFTUS & GOOLD 2012]. A range of different kinds of surveillance may now be used by the police. The example highlighted above is known as Covert Human Intelligence and entails a police officer establishing a personal or professional relationship with a target in order to obtain information [*ibid.*]. But the police may also have recourse to intrusive surveillance, which may entail the monitoring of a private home or vehicle, and directed surveillance, aimed at gaining information for a specific operation without becoming intrusive.

The problem with these wide-ranging surveillance powers is that the safeguards normally accompanying overt policing practices are absent (even if the Regulation of Investigatory Powers Act 2000 attempted to provide some protections – see below). In addition, certain legal challenges to undercover policing operations, such as those brought by women claiming that their fundamental rights were breached when they were deceived into having an intimate relationship with undercover police officers², are to be heard in a secret court known as the Investigatory Powers Tribunal³. In this way, even investigations into police secrecy are themselves shrouded in secrecy.

Yet, there have been a number of public investigations which have revealed the extent of a culture of police secrecy. Most recently, the Hillsborough Independent Panel, appointed in 2010 to look into the circumstances under which 96 football supporters were crushed to death at the Hillsborough football stadium in South Yorkshire in 1989, found that senior police officers deliberately sought to protect themselves from criticism of their handling of the tragedy by altering police statements [HILLSBOUROUGH INDEPENDENT PANEL 2012]. It was revealed that, following legal advice, police officers present on the ground as the catastrophe unfolded were not asked to fill in formal statements on Criminal Justice Act forms since their recollections were ‘not required for the purpose of any criminal investigation’ [316]. Instead, they simply jotted down their personal recollections of the events of that day which were then passed on to senior officers. At this stage, there was ‘an extensive process of review and alteration of the recollections and their transition to multi-purpose statements’ [338] whereby statements considered to be “unhelpful to the Force’s case” were altered, deleted or qualified (rewritten by the SYP team)” [339]. As one of the members of the Panel commented elsewhere, this ‘amounted to a systematic, institutionalised process of review and alteration intended to remove all criticisms of the police’ [SCRATON 2007 67]. This dissimulation of the truth was compounded by the refusal, until the appointment of the independent inquiry, of the

² AKJ and others v. Commissioner of Police for the Metropolis and others [2013] EWHC 32 (QB).

³ The Investigatory Powers Tribunal was established in 2000 to investigate complaints against public bodies concerning their relations with the public (notably over the use of surveillance by such bodies). The evidence put forward by the State remains secret and those who seek redress from the tribunal have no right of appeal or automatic right to an oral hearing. It should be noted that not all these legal challenges to the use of undercover policing are to be heard by the closed Investigatory Powers Tribunal. Claims for damages under common law are to be heard by the High Court, the usual place of redress for harms in civil law.

authorities to grant access to primary statements and other evidence to the bereaved families. It took over 23 years for the truth to come to light; i.e. that, contrary to media and police reports, the Liverpool fans who died bore no responsibility for the tragedy which was instead caused by failings on the part of police, local stewards and emergency services.

Many other tragedies, however, remain unsolved due to police secrecy. For example, no independent public inquiries have been held into the deaths of Jean-Charles de Menezes, Ian Tomlinson or Mark Duggan⁴ at the hands of the police, or into the deaths of scores of people in police custody. In 2011, the Independent Police Complaints Commission (IPCC)⁵ estimated that over a 11-year period from 1998/99 to 2008/09, there were a total of 333 deaths in or following police custody. These are defined as follows:

...deaths of persons who have been arrested or otherwise detained by the police.

It includes deaths which occur whilst a person is being arrested or taken into detention.

The death may have taken place on police, private or medical premises, in a public place or in a police or other vehicles [IPCC 2009 3, cited by IPCC 2012]

These figures were criticised (see, for example, STICKLER, BELL & MOLE 2012 ; STICKLER 2012] for not having included those who were never arrested or detained by the police but who nonetheless died during or following police contact. An investigation for *The Independent* newspaper and The Bureau of Investigative Journalism found that a number of high-profile cases were not included in the statistics [STICKLER 2012]. This led to the government's chief statistician producing a report on the IPCC statistics. It found that whilst 'some confusion may have been caused' by not including these particular cases, there was 'no evidence... that cases that should have been included in either publication have not been' [GOVERNMENT STATISTICAL SERVICE 2012 8]. According to INQUEST, over approximately the same period as that covered by the IPCC (1998-2008), there were 476 deaths in police custody in England and Wales and additional 32 people shot by the police and 343 deaths in police pursuits and road traffic incidents involving the police [INQUEST 2013]. The huge disparity between these two sets of figures suggests reluctance on the part of the police and the official agencies charged with monitoring police actions to reveal the true extent of deaths in police custody.

There has been a similar reluctance to publicly discuss a number of high-profile police shooting incidents. De Menezes, aged just 27, was shot seven times at point blank range by special firearms officers from the London Metropolitan Police at Stockwell tube station in London in July 2005. The officers had been trained to shoot potential suicide bombers in the head as part of an anti-

⁴ These cases represent just a few examples. Other highly-publicised killings by police officers have included Kevin Gately, Blair Peach, Richard O'Brien, Shiji Lapite, Roger Sylvester, Harry Stanley and Mikey Powell.

⁵ The IPCC is discussed below. See p. 7.

terrorist shoot-to-kill policy known as Operation Kratos. They believed that De Menezes was planning to detonate an explosive device in the London Underground. Yet, despite reports by the Metropolitan Police Authority⁶ [MPA 2008], two inquiries by the IPCC [IPCC 2007a and 2007b] and three court trials⁷, the circumstances in which De Menezes was killed have still not been made clear to the public. Central to this lack of disclosure has been the refusal on the part of the police to openly discuss its counter-terror strategy. Indeed, they have consistently refused to admit that De Menezes was killed under Operation Kratos in order to avoid such public discussion [SMITH, 2012].

The case of Ian Tomlinson, a newspaper vendor who collapsed and died after being struck by a police officer on his way home from work during the G20 protests in 2009, is a clear example of police denial and dissimulation of the truth. Immediately after Tomlinson's death, the Metropolitan Police issued a public statement denying that its officers had had any contact with its officers prior to his collapse. It was only four days later that video footage handed over to the press by a member of the public revealed what had really happened: a Territorial Support Group⁸ officer, Simon Harwood, had struck and pushed Tomlinson immediately before he fell to the ground. In addition, it was later found that the Home Office-appointed pathologist, Freddy Patel, had failed to examine the possibility that Harwood's actions could have led to Tomlinson's death, instead attributing it to cardiac arrest. Harwood was later tried and found not guilty for manslaughter, although he was subject to a disciplinary hearing and sacked for gross misconduct. What was interesting about this case was that the public and the news media were able to lift the veil of secrecy over police practice [GREER & MCLAUGHLIN 2012].

Where inquiries have taken place, such as that into the police shooting of Azelle Rodney in Edgware, London, in 2005⁹, they have been delayed for years due to police and government resistance to hand over evidence relating to intercepted communications obtained during undercover policing operations. Rodney was shot six times at point-blank range by an unnamed police officer (known only as E7) in the course of a drugs-related policing operation. His family hopes that the inquiry will be able to determine exactly why the officer concerned believed this course of action to be necessary.

The family of Mark Duggan, the black man shot by the police in Tottenham, London, in August 2011, sparking riots across English cities, is having similar difficulties establishing the circumstances of his death. A formal inquest began in September 2013, more than two years after the

⁶ The MPA is the independent monitoring board for the London Metropolitan Police.

⁷ The Crown Prosecution Service's decision not to bring charges against individual officers was successfully challenged in an administrative court (see *R (on the application of da Silva) v DPP* [2006] EWHC 3204 Admin); the Metropolitan Police was successfully prosecuted for breach of the Health and Safety at Work Act 1974 by failing to provide for De Menezes' health, safety and welfare; a coroner's inquest jury found that the killing had been lawful.

⁸ The Territorial Support Group is a specially-trained police unit trained in dealing with public order and terrorist threats.

⁹ The inquiry's findings are due to be published in the course of 2013.

incident, but evidence provided by firearms officers has remained secret. The inquest reported in January 2014, concluding that Duggan has been lawfully shot, despite being unarmed. The IPCC, which continues its long investigation into the shooting of Mark Duggan, described this inability to disclose certain forms of police evidence, such as that gathered by the police during phone intercepts, as a hindrance to its own inquiry. In March 2012, it issued a formal statement declaring:

Our principal statutory duty is to secure and maintain confidence in the police complaints system and one way in which this can be achieved is by ensuring that there is proper public scrutiny when someone dies at the hands of the state. We are therefore extremely frustrated when anyone or anything attempts to get in the way of our ability to provide family members with information about an investigation into a death at the hands of the police or to ensure a full public examination of the facts surrounding the death. As a general rule we seek to find ways round any such obstacles. However, in some circumstances our hands are tied by the law. One such provision is s.17 of the Regulation of Investigatory Powers Act 2000. The impact of this is that not only can some information not be disclosed; we cannot even explain why we cannot disclose the information, as this itself would be a breach of the law. In our view this places investigatory bodies in the invidious position of being unable to provide families, and the public, with meaningful information on the investigation or even explain why that information cannot be provided. We believe this law needs to be changed. [IPCC, 2012]

In many cases, therefore, police secrecy is actually protected by the legal system. Yet, in recent years there have also been attempts to use the legal system to improve accountability which should in theory allow the public greater access to information held by the police.

Police accountability: lifting the veil of secrecy?

Efforts to improve police transparency are not entirely new. Already in the early post-war period, the Commissioner of the Metropolitan Police, Sir Harold Scott, alluded to the atmosphere of secrecy in Scotland Yard and thus sought to improve press and public relations to 'give the fullest and earliest information to the press on police activities' [SCOTT 1954 92, cited by MAWBY 2002 306]. This trend continued in the 1970s and through to the contemporary period, yet the policy of openness was counterbalanced by one of control of information. For example, whilst journalists were briefed more openly, they were forced to carry 'Press Identification Cards' which were issued at the discretion of the Metropolitan Police [MAWBY].

There has also been a series of legislative attempts to improve police accountability. In 1984 the Police and Criminal Evidence Act (PACE) counterbalanced a significant increase in police powers

(notably greater stop and search powers) with the introduction of a number of safeguards intended to improve police accountability. For example, it was at this time that the obligation on the police to contemporaneously record interviews was introduced [See REINER 2000 176-183]. Yet, whilst the Act forced police officers to comply with strictly drawn-up rules, breach of which can lead to serious disciplinary proceedings, it did little to change the overall culture of the police [182-3].

In 1998 the Human Rights Act (HRA) placed an obligation on police officers to ensure that their practices do not infringe fundamental rights as outlined in the Act. Yet, it would seem that the Act has failed in its aim to create a 'human rights culture' since although officers are now more aware of human rights issues, they have not fundamentally changed the way they operate. Indeed, compliance with tests laid down by the HRA serves to legitimise existing police actions. Relying on extensive field research, Bullock and Johnson found that the qualifications outlined in the Act were viewed as 'sufficient to give the police the powers that they need to do their job' (officer cited by BULLOCK & JOHNSON 2012 643). Whilst the HRA has increased police bureaucracy by obliging officers to keep reports in compliance with the Act, it has failed in practice to offer any direct challenge to the prevailing culture of secrecy.

In 2000 the Freedom of Information Act (FOIA) was passed, granting members of the public access to information held about them by public bodies, including the police. However, there are serious limits to the kinds of information which may be disclosed. The FOIA provides a wide exemption for information which pertains to a criminal investigation, provided that the public interest in preventing the release of information outweighs the public interest in obtaining it. Even once a criminal investigation is closed, the release of information pertaining to it continues to be blocked despite the recommendations of the Macpherson Report [FISHER 1999 20].

Rather like PACE, the Regulation of Investigatory Powers Act 2000 (RIPA) sought to balance increased police surveillance powers with increased regulation of those same powers. All powers are to be used in a way that is 'necessary, proportionate, and compatible with human rights'. Yet, in practice the balance of power under RIPA would appear to be very much in favour of the police. Under the Act, the police may, for example, demand data from telephone companies in respect of an account or an individual, and engage in covert surveillance operations themselves, intercepting communications, conducting covert surveillance and accessing encrypted electronic data. The Act has been relied on to prevent information sourced in such a way from being made public. Hence, the trials involving undercover surveillance operators cited above are to be held in secret. Some intercepted evidence cannot even be revealed in legal proceedings such as inquests. As mentioned above, this has hindered the IPCC investigation into the shooting of Mark Duggan. It also led to the inquest into the death of Azelle Rodney being abandoned.

Perhaps the greatest problem when it comes to police accountability is that bodies intended to open the police up to external scrutiny lack teeth. The Independent Police Complaints Commission (IPCC), created following the Police Reform Act of 2002, replaced the previous police complaints authority. The IPCC is meant to be an entirely independent body, investigating complaints and allegations of misconduct against the police in England and Wales. Yet, as highlighted above, it faces similar problems to any member of the public when it comes to gaining access to sensitive police records. In addition, it is only meant to investigate a small number of complaints, with the rest being dealt with by the ordinary police complaints departments – indeed, it was estimated in 2010 that the IPCC investigates less than 1 per cent of all complaints against the police [SAVAGE 2013 98]. Perhaps even more problematic is the fact that the body is liable to ‘regulatory capture’ meaning that those charged with regulation are likely to be too close to the police and largely dependent on police support [109].

There is often a feeling amongst members of the public that the police benefit from a certain impunity. Indeed, the officer responsible for the death of Ian Tomlinson, although he was eventually tried for manslaughter, was found not guilty. In his evidence to a Home Affairs Committee on the impact of the Macpherson Report ten years on, Duwayne Brooks, Liberal Democrat MP and friend of the murdered Stephen Lawrence lamented the fact that no police officer has been successfully prosecuted for deaths such as Tomlinson’s over the past 15 years and worried that officers ‘feel that they are above the law and can behave as so. Until the same employment and criminal procedures are brought to bear on them that are brought to bear on the rest of us, the real problems of police unlawfulness, whether it be racism or assaults will remain unchecked’ [Brooks, cited in HOUSE OF COMMONS 2009 29]. Indeed, whilst police officers feel that their secrets are protected by laws such as RIPA, there is a danger that they may appear to be above the law, harming their legitimacy before the public.

Policing the crisis

Even though it threatens to undermine police legitimacy, protecting a culture of secrecy within the police force can also be a way of preserving the myth of consensual policing whereby the police do no more than is necessary to protect the public from crime, assuming a ‘scarecrow function’, preventing crime largely via the presence of uniformed officers on the beat [REINER 2000 76]. Preventing the public from discovering the extent of police surveillance is perhaps one way of shoring up the myth of the ‘British bobby’ as an essentially benign force.

Yet, the police do not merely act to protect individual officers from prosecution or the police as an institution from shame. Whether intentionally or not, they serve a particular political agenda, justifying the state's authoritarian actions against certain populations who are regarded as troublesome or threatening: suspected terrorists such as Jean-Charles de Menezes; black youths like Azelle Rodney or Mark Duggan thought to be involved in drug dealing; protesters or those simply caught up in protests like Ian Tomlinson; rowdy members of the working class, such as the Liverpool supporters at Hillsborough football grounds... The protection of police secrecy allows the police and the state, often assisted by the media, to continue to depict these groups as problematic and the institutions of the state as virtuous. Indeed, it was only once the veil of secrecy had been lifted over these particular events that it became clear to what extent the police initially misrepresented the victims of their own professional errors in an attempt to justify their actions.

The demonisation of the social groups who normally bear the brunt of police power, those who Reiner describes as 'police property' [REINER 2000], enables the State to find suitable scapegoats for contemporary social problems, thus diverting attention away from its own powerlessness to prevent these same problems, be they social exclusion or terrorist attacks. Meanwhile, the public gaze is directed downwards, to those at the margins of society, rather than to the corruption which exists at the top.

Yet, such a strategy risks seriously undermining police legitimacy since, as Reiner points out, this is secured only when 'those at the sharp end of police practices do not extend their resentment at specific actions into a generalised withdrawal of legitimacy from the institution of policing *per se*' [Reiner, 2000: 49]. This is precisely what is occurring, especially when specific actions, such as the killing of Mark Duggan, can be seen as part of a wider trend towards the police victimisation of minority groups (black people, for example, are seven times more likely than white people to be stopped and searched by the police – MINISTRY OF JUSTICE 2010 26]. Furthermore, resentment of the police has spread beyond 'those at the sharp end', increasingly involving the middle classes who have themselves borne the brunt of authoritarian policing tactics such as kettling when attending public demonstrations. Blatant injustices and blunders such as the shooting of the innocent De Menezes also risk undermining middle class support for the police. We noted above how it was the largely middle class media which brought the real circumstances of Ian Tomlinson's death to light, thus undermining the official version of the incident.

The state's response has been piecemeal reform on the one hand (such as the creation of the IPCC) and a desperate attempt to protect police practices from public scrutiny on the other (via RIPA, for example). This suggests that secrecy is likely to remain institutionalised with the English police and the state on which it depends, regardless of attempts to give the police force a democratic gloss. It

is essential for the state that the police continue to police the crisis [HALL *et al.* 1978], diverting attention from its failure to provide either physical or economic security to its citizenry.

The future of policing: from accountability to populism

In order to confer legitimacy upon what is now an increasingly contested institution [REINER 2000], we have seen how recent reforms have attempted to make the English police more accountable to the public. Yet, a number of contemporaneous trends risk further blurring the lines of accountability. For example, the contracting out of some core police functions to the private sector may add yet more layers of secrecy to an already obscure institution. In March 2012, *The Guardian* revealed plans by West Midlands and Surrey police to hand the delivery of a wide range of services, such as patrolling the streets and detaining suspects, to the private sector [*The Guardian*, 2012]. O'Reilly and Ellison suggest that where the state uses the police to protect its own agenda, private companies providing security services will similarly seek to protect their own corporate interests, thus leading to an extension of what they describe as a 'secrecy complex' whereby the web of secrecy is reinforced by public and private actors [O'REILLY & ELLISON 2006 649].

More generally, the introduction of market principles into police services has placed immense pressure on the police to meet measurable performance-based targets, something which may oblige the police to cut corners or conceal errors which may prevent them from fulfilling such targets. Furthermore, accountability is not just to be shared with the private sector but also with the European Union, as joint security agreements are signed regarding international organised crime and terrorism, for example, further jeopardising police transparency vis-à-vis the public. Even reforms which may appear to be extremely democratic on the surface, intended to allow the public to hold the police to account, are unlikely to make the police more accountable. For example, recently elected Police and Crime Commissioners (PCCs)¹⁰ may lead instead to further politicisation if they are tempted to adopt populist policies and interfere in the running of local police forces.

Furthermore, it is hard to challenge the culture of secrecy within the police at a time when the government is seeking to extend such a culture within the legal system as a whole. Under the new Justice and Security Act, passed in 2013, secret court hearings may become a default measure, used not as a last resort, but as a routine practice when civil cases involve national security issues. The government may legitimately defend serious allegations against itself and its agents (such as serious violations of human rights) without ever having to reveal secret material to the claimant, the public or

¹⁰ The first PCCs were elected across England and Wales in November 2012. They have powers to appoint the local chief constable and ostensibly to hold police forces to account.

the press, thus exacerbating the problems of police secrecy highlighted above. Police secrecy may thus be regarded as just one aspect of a wider culture of secrecy entrenched in the state itself.

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