

## **Can the criminal justice system be made to operate equitably in relation to race?**

Conceptions of race within the criminal justice system have always been a controversial issue. Indeed, there is no denying that in terms of prison population ethnic minorities are grossly overrepresented: despite making up only 2% of the total population of Britain, black people still make up 15% of the population of prisons (Ashworth). If one assumes that these statistics represent overt racism within the administration of the criminal justice system then calls for reform and possibility of change will be high, however there has been a tendency to see these statistics as presenting the evidence of an irreconcilable problem, of deeper seated decay within, not just in the lower echelons of the criminal justice system, but society as a whole (Cheliotis and Liebling). If this is so then the answer to whether the criminal justice system can be made to operate equitably in relation to race may require a process of deeper reforms.

It is necessary to assess first the query of whether racism exists within the system and if so, to what extent. Bowling argues that there exists an 'either, or' debate; whether the overrepresentation in the prison population is the result of a higher rate of black people committing offences, or, conversely, the result of an accumulation of bias throughout the criminal process. Waters, in his early article *Race and the Criminal Justice Process*, suggests that the debate can be further defined as those that fall into the 'legal factors' camp, who believe that the reason for differences custodial sentence decisions are legal factors such as severity of offence and previous criminal record (which may in themselves be the result of broader structural and economic factors such as unemployment and poverty) and that these variables quite satisfactorily explain the predominance of black people in prison. On the other hand the 'extra-legal' factors camp argue that over and above the racial discrimination experienced in society as a whole, black people receive unfair and inferior treatment by virtue of the ethnicity at the hands of a predominantly white justice system.

The research conducted by Hood would seem to suggest that there are in existence some extra legal factors and therefore discrimination in sentencing. Hood found that after samples had been matched on variables predictive of custodial sentences (e.g. seriousness of offence, previous convictions, employment, and other pre-sentence report findings) there was a 5% greater chance of being handed a custodial sentence if you were black, and that this difference (which also resulted in black defendants being sentenced for 3 months longer and Asians 9 months longer where a not guilty plea was entered). However Ashworth highlights the fact that Hood's research does not account for the fact that more black people enter guilty pleas, choose to come to the crown court where sentences given are often harsher and may disproportionately become involved in more serious crime. Thus the study is not conclusive that there does not exist a whole host of other factors why ethnic minorities may come to be within the system in the first place. Indeed, Von Hirsch and Roberts in their reflections on the Hood study highlight the problems inherent in the assumption of a 'level playing field' of the variables chosen. For example, with employment: there is evidence that black people suffer from disadvantage in the labour market, so to take this into account when sentencing would amount to an indirect form of discrimination. Thus there are clearly deeper roots of discrimination which cumulatively result in the discrepancies seen. Cheliotis and Liebling argue that differences in levels and patterns of offending may result from a vicious crime circle of stereotyping black people as more crime prone. This leads to over-policing ethnic minority neighbourhoods, thereby drawing more ethnic minorities into the criminal justice net, consequently extending their criminal records and meaning they are more likely to be sentenced severely. They are also therefore more likely to be re-targeted by the police, resulting, again, in increasingly punitive sentencing when they are reconvicted. Thus it would seem the problem is not merely in the overt form of discrimination, but exists throughout the system, perhaps even worsening the lower the visibility level becomes.

One only needs to take a look at the stop and search statistics to see this borne out, black people being 6.5 times more likely to be stopped and

searched than white people, and Asians twice as likely (Home Office 2005), given that the majority of these initial stops do not lead to any further action (87%), it would seem to suggest that this is merely evidence of discriminatory racial profiling and stereotyping. Whilst the basis of such actions is of s1 of PACE (which permits police to stop and search with only reasonable suspicion) and s60 CJPOA (which permits searches without suspicion where serious violence is anticipated or to search for weapons), and therefore essentially legal, its exercise can be seen as targeted (Quinton), leading to Reiner's comment that ethnic minorities are "over policed and under protected". However, once again the picture is not so clear cut; it can be argued that what the figures actually represent is differences in the type of crime committed, with ethnic minorities being more involved in 'street crime' such as drug offences and therefore more likely to be stopped and searched in suspicion of such relatively visible activity. This is further exacerbated by social and demographic factors and by differences in work and leisure life which mean that not only are minorities in greater numbers in areas and at times where searches occur, but that more searches occur in the urban areas in which they live, in which unemployment and social deprivation are high (Philips). Nevertheless the wide discretion accorded to police in such cases means that the prevalence of minority groups in the figures suggests some form of racism.

Indeed, the Macpherson Inquiry into the Stephen Lawrence affair was elucidatory on the existence of institutional racism within the police system, defined by Macpherson as "the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin, it can be seen detected in the processes, attitudes and behaviour which amount to unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages ethnic minorities" and therefore would account for the disproportionate representation of blacks in the system and for the high level of racist incidents detected (police recorded racist incidents have increased dramatically from 4,383 incidents in 1988 to 52,694 in 2004 – Home Office). Whilst Lea highlights that Macpherson's discussion on institutional racism fails to locate with sufficient precision its roots within the structure of operational policy and the relationship between police and minority

communities, Lea too asserts that institutional racism does exist, and that it stems not only from the occupational culture of the police and the particular forms of contact they have with ethnic minorities, but also from the belief that they are “dangerous classes”. Stopping and searching therefore represents a form of generalised surveillance of those who they believe to have little political capital. In these ways Lea argues that racism does arise from the normal functioning of the police system, a sentiment that was echoed by a comment from the Director General of the Prison Service 2001 when he said that “the prison is an institutionally racist institution which reflects an institutionally racist white society”(Lea).

Thus it can be seen that a complex interplay of socio-economic, demographic, institutional, structural and cultural factors, alongside direct and indirect racial discrimination (Philips) are responsible for the overrepresentation and discriminatory outcomes evident in the system. Edgar and Martin concur, suggesting that in the context of discussion on discriminatory treatment within prisons, the experiences of ethnic minorities should be seen in the context of expectations which might have arisen from contact with other criminal justice agencies. Further, Wacquent notes that prison confines groups endowed with negative symbolic capital, and that their stigmatisation constitutes part of the relationship between the confined and those in authority. Just as the prison, he argues, may mirror external macro-social trends, “so too can it lead to their existence by stigmatising and curtailing the life chances of ethnic minorities further”. Thus once again, discrimination can be seen to be a deep-seated issue, and one which is not necessarily adequately addressed by combating the administration of the laws. Waters, in his article, expresses the need to distinguish between concepts of equality and equity. Indeed, it can be seen that equality between treatment of black and white offenders does not necessarily equate to fairness or appropriateness, and we should strive for justice rather than equality per se in recognition that society is not equal. This is a comparative exercise where quality means that sameness is not necessarily desirable, and justice may demand some differentiation on grounds of race in order to treat all people *equitably* (Pinder). For example, in relation to the employment point above, recognising the inequalities in the labour market

and therefore not unduly discriminating against those who are unemployed during sentencing may help to further fairness overall. As Van Dyke notes, the challenge for the criminal justice system is to discover at what point negotiated differentiation becomes an imposed discrimination. We need to distinguish between notions of process and outcome; justice and fairness in the way laws are administered does not necessarily make them fair in and of themselves. Thus, there exists discrimination on a broad level within the criminal justice system, which needs to be recognised and addressed at the decision-making level. As Von Hirsch advocates, it is necessary to address both the administration of the system with regard to race, but also the policies themselves, and what is necessary to ensure that treatment throughout the system is fair.

The fact of the matter, however, is that ethnic minorities do not care what reasons underpin the discrimination they are suffering, whether it be due to broader socio-economic factors or whether it issues directly from the person they are dealing with (Waters). The result is a lack of legitimacy in their eyes, attributed to the criminal justice system as a whole, resulting in black defendants being more likely to plead not guilty and to opt for the Crown court (Von Hirsch), thus further increasing their propensity to be sentenced severely. The problem becomes perpetual: if the justice system is viewed as inequitable it will breed defiance among those who feel they are not being treated fairly, resulting in a further hike in the overrepresentation of ethnic minorities within the system. If the system is to be made to operate equitably in relation to race it will require a tall order of reforms. Whilst direct and institutional racism can be addressed by ethnic minority recruitment drives within the police force, and racial awareness training for all criminal justice officials, the broader social-economic issues will require change in political and social policy (Hood and Shute). What is clear is that race is a covert issue; a difficult problem to attempt to address as so few are willing to acknowledge its existence outright (Bosworth). Thus perhaps most pertinent would be to increase awareness of the prevalence of broader forms of indirect discrimination and social inequality and to attempt to keep these concerns in

mind so that decisions at all stages can, at least as much as is possible, be made equitably.

