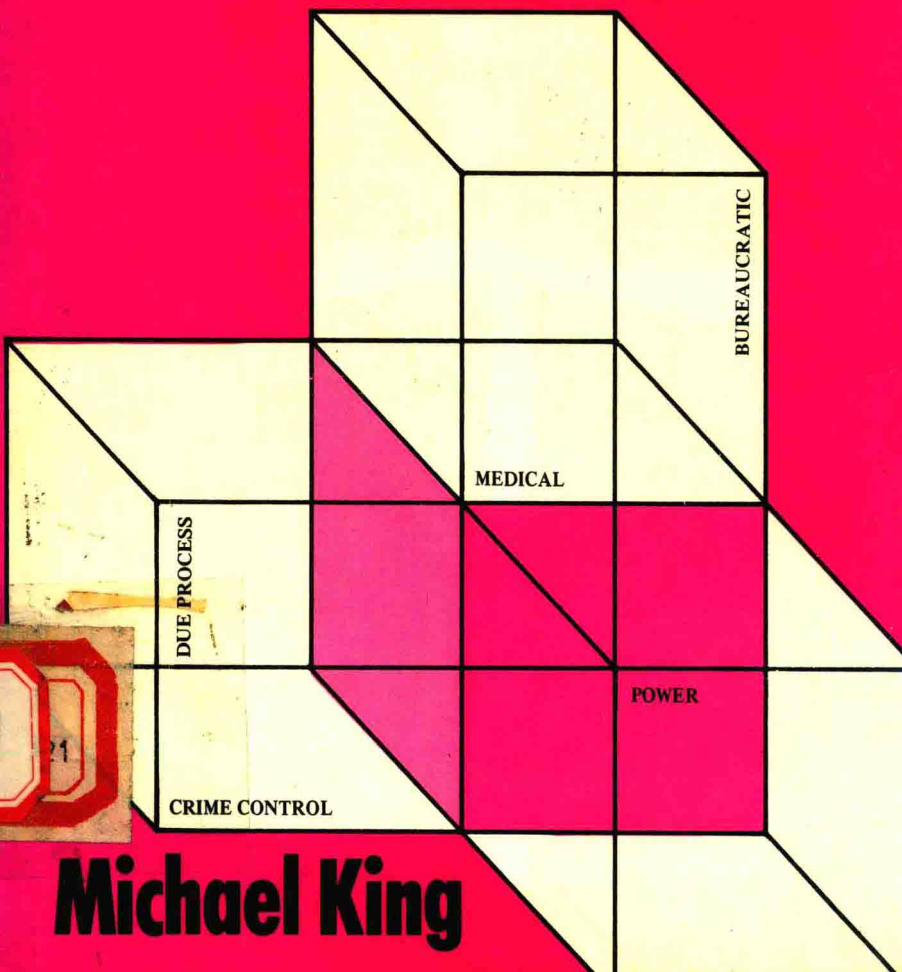
The Framework of Criminal Justice



Michael King

THE FRAMEWORK OF CRIMINAL JUSTICE

MICHAEL KING

CROOM HELM LONDON

Croom Helm Ltd, 2-10 St John's Road, London SW11

British Library Cataloguing in Publication Data

King, Michael
The framework of criminal justice.
1. Police magistrates — England
2. Criminal justice, Administration of — England
I. Title
345'.42'05 KD8309

ISBN 0-7099-0430-4
ISBN 0-7099-1500-4 (Pbk)

Reproduced from copy supplied
printed and bound in Great Britain
by Billing and Sons Limited
Guildford, London, Oxford, Worcester

THE FRAMEWORK OF CRIMINAL JUSTICE

'Every human institution (justice included) will stretch a little, if only you pull it the right way.'

Wilkie Collins

Acknowledgements

I should like to thank Andrew Ashworth and my colleagues William Twining and Sol Picciotto for their helpful comments on various parts of this book. My thanks also to Al Katz at Buffalo for some useful ideas in the early stages of the book's conception. Finally, much of the credit for Chapter 3 must go to Malcolm Nicholson's hard work as my research assistant, although the final version with any errors it might contain is entirely my responsibility.

Contents

1
Understanding the Criminal Justice Process

The popular image of the criminal justice system fostered by fiction writers, films and the broadcasting media is of courtroom drama following courtroom drama as lawyers for the prosecution and defence relentlessly do battle with one another. Policemen catch criminals through brilliant detective work; witnesses break down under cross-examination and justice is done. Unfortunately, reality rarely lives up to this image, as anyone who has any experience of magistrates' courts will testify. Most defendants have confessed to the police and so made unnecessary all but the most basic detective work. Full-blooded trials in these courts are a comparative rarity. Most of the court's time is spent deciding what should happen to people who either have pleaded or will eventually plead guilty. Yet, it is not by chance that the quest for truth and justice personified in the popular images of the detective who always 'gets his man' and the defence lawyer who always 'wins his case' have become part of the mythology of criminal justice. In a society which claims to value truth and justice we would all like to believe that it is these values which predominate in those social institutions which determine who is guilty and who should be punished. However, if this were the case, there would be no need for this book. One could simply accept as reality the romanticised versions of criminal justice that abound in the popular culture. In concentrating attention upon the usual rather than the exceptional, the ordinary rather than the extraordinary, in focusing upon the daily routine business of policemen, lawyers, court clerks, probation officers and magistrates as they process all those defendants who plead guilty, one of the things I hope to show is how the concepts of truth and justice, far from providing any absolute standards for the conduct of the actors, are often used in a rhetorical manner to legitimate the pursuit of institutional and social objectives. These objectives may well appear just to those who strive to achieve them or who sympathise with them and the version of reality presented in order to attain these objectives may appear to them to be truthful. However, to those who do not

share or sympathise with these objectives, or who positively oppose them, that version of reality might seem a complete distortion of the truth and the outcome of the case a total perversion of justice.

To a large degree the popular myths concerning criminal justice were, until quite recently, reflected in the specialist literature. Textbooks on the English legal system by focusing their attention on the rules and regulations governing the system's operation tended to present a totally idealised account of the criminal justice process. Similarly, the staple diet for aspiring criminal lawyers has been, and still is in many law departments and colleges, the criminal law and the rules of evidence, with little or no consideration of police interrogation practices, the role of probation officers, the legal aid system or the sentencing powers of the magistrates' courts. Perhaps this is not so surprising when one considers that until the late sixties few practising lawyers ever set foot in the lower courts and when they did it was usually in circumstances far removed from the routine handling of minor offenders set on pleading guilty. The growth of criminal legal aid and the emergence of duty solicitor schemes changed all that. Alongside these reforms there began to appear a body of literature which was specifically concerned with the plight of defendants. They ranged from studies of the bail, legal aid and sentencing decisions in the lower courts to interviews with prisoners about their experiences at the hands of the police and magistrates and analyses of the roles of courtroom 'professionals' or the use of courtroom language. Much of this work was inspired by a genuine concern for the poor, the inadequate, the underdogs of society. It found expression both in a liberal reformist approach which attempted to identify the failures and injustices of the present system and the application of a neo-Marxist ideology which saw the criminal justice process in class conflict terms, with defendants as the representatives of an oppressed class and those who prosecuted, represented and sentenced them as instruments of repression. For reasons which should become clear during the course of this study neither of these approaches has proved entirely satisfactory. Moreover, the ideological differences between them, seemingly irreconcilable, has tended to divide researchers and writers from both law and the social sciences into two distinct camps. Theory has become almost synonymous with neo-Marxist theory, while the task of reforming the system has proceeded in a pragmatic, piecemeal manner with very little regard to social policy and the broad objectives of a criminal justice system. I make no claims to offer in the ensuing pages a peace formula to reconcile these two camps, but what this book does attempt to do is

to provide a coherent analysis of the workings of the criminal justice system using both ideological and strategic perspectives rather than applying one to the exclusion of the other.

What it also attempts to do is to develop a framework for the understanding of the relationship between rules and behaviour within the criminal justice system, for without such a framework it is fruitless to talk of reforming the system by changing the formal rules. In the past there has been a tendency, particularly among lawyers, to assume that changes in the law and legal procedures will result automatically in desired changes in the way the system operates in practice. Too often the good intentions of reformers have been thwarted by the capacity of interest groups to interpret and adapt would-be reforms so that they fit neatly into existing patterns of behaviour. On other occasions reforming the rules has led to unforeseen and undesired changes in the behaviour of those who operate the system. More recently some sociological researchers have proceeded on the basis that the only valid subject for study and analysis is the behaviour of the actors. The law and the rules of evidence and procedure, as far as they are worth considering at all, merely legitimate the conduct of the actors. Adopting one of these approaches to the exclusion of the other not only limits the capacity for understanding how the present system works, but it also tends to give a false impression, either over-optimistic or unduly pessimistic, as to what it is possible to achieve through reform of the formal rules. I have attempted in this book to bring an extra dimension to this particular problem. After analysing the routine processes of criminal justice in terms of their possible social objectives, I have gone on to look at the process of law reform in an attempt to examine the response of politicians and civil servants to proposals for changing the formal rules.

It is necessary at this stage to explain why I have chosen to limit this study to guilty pleaders in magistrates' courts rather than tackling the whole of the criminal justice system. The principle reason for selecting only those defendants who plead guilty lies in the fact, already mentioned, that it is only a very small proportion of defendants who contest the case against them. Through sheer weight of numbers, therefore, it is these defendants or rather the problems in dealing with them that tend to dominate the criminal justice system, at least at the magistrates' court. It would, of course, have been possible to consider all defendants whose cases ended at the magistrates' courts. The problem with this approach, however, is that the element of conflict engendered by that small proportion of defendants who plead not guilty would tend to attract much more interest than either their number or their

importance to the objectives of this study would justify. The routine processing of defendants before and during the court hearing would tend to vanish from view as the reader concentrated his attention on issues of guilt and innocence, the very quest for truth and justice which characterises the popular image of the courts and detracts from any consciousness of the system as it operates for the majority of defendants.

There are three reasons why I have chosen not to go beyond the magistrates' court stage. In the first place the English system of criminal justice is so organised that a clear division exists between magistrates' courts and Crown Courts. In the magistrates' court the majority of defendants plead guilty, are unrepresented by lawyers and are sentenced by part-time lay justices. Of the comparatively few defendants who reach the Crown Court, by contrast, most start at least with the intention of contesting their cases; almost all are represented by barristers and those who are found guilty are sentenced by professional judges. Although it is not directly relevant to guilty pleaders, it is also worth noting that in the magistrates' courts most contested cases are tried by the lay justices, while at the Crown Court it is jurors who determine the factual issues and judges who interpret the law. These fundamental differences make it difficult to generalise about the criminal justice process, for the way things are done in the Crown Court is often very different from the magistrates' court. One would need two separate studies in order to do justice to the complexities of the two systems. Having made this point, however, it is also worth commenting that on the more general level of social theory concerning the relationship of the courts to society at large, rather than that of detailed descriptive evidence, many of the points concerning the nature and purpose of the process which I shall be making during the course of this study of magistrates' courts could apply equally to the Crown Court, or for that matter, to the Court of Appeal.

Secondly, as a solicitor, it is with the magistrates' courts that I am most familiar. Indeed, I have practised off and on in magistrates' courts in the London and the Midlands for more than ten years. Furthermore, almost all the research studies I have conducted have been on the subject of magistrates' courts. Although, admittedly, it is possible for social researchers to write interesting studies on aspects of the social system which they have observed from the outside, such studies often resemble slow journalism rather than providing any penetrating insights into the phenomena and observation. I would suggest that such insights are much more likely to come from people who have acquired first-hand knowledge and experience over fairly long periods

of the phenomena under analysis.

Finally, few other English institutions have been subjected to so much adverse criticism over the past 25 years as have the magistrates' courts. These criticisms have been directed against almost every aspect of the courts and against the constitution and characteristics of the magistracy. The courts have been taken to task for their archaic buildings, their lack of facilities for lawyers and the public, the apparent police domination of proceedings and the long delays experienced by many defendants. The magistrates have been attacked for their class and racial exclusivity, their lack of training, their lack of legal knowledge, the harshness of their decisions, the 'softness' of their decisions, their lack of concern for the victim and their lack of direct experience of the living conditions and mores of those on whom they pass judgement. They and their clerks have also been severely criticised by different commentators for their arbitrary handling of bail and legal aid applications, for the perfunctory manner in which they reach some decisions and the inordinate length of time taken in reaching others, for the variations and inconsistencies in their decisions, for their arrogant and humiliating treatment of defendants in the courtroom.

Often the criticisms are the spontaneous responses to specific situations. But even where they are the result of long and detailed studies of magistrates' courts by careful researchers or lawyers and magistrates with considerable experience of their operation, it is almost unknown for the critic to consider what social function magistrates' courts are performing and to relate this criticism in any specific way to a failure in the achievement of functional objectives. Almost always these functions are assumed rather than spelt out and almost always the assumptions reflect the ideological perspective of the critic, be he a policeman, a politician, a defence lawyer, a sociologist or a probation officer. The validity of any criticism is relative only to the objectives the critic believes the courts should be seeking to achieve.

Moreover, these criticisms have tended to emphasise the uniqueness of the magistrates' courts as social institutions. If they are not functioning properly, then the explanation must lie, for example, in their amateurishness or in the fact that they are too close to police stations or lack proper facilities for lawyers. The corollary of such criticisms is that if these matters were only put right, if, for example, magistrates were paid and trained, if the courts were separated from police stations and housed in modern buildings, then all would be well for criminal justice. Unfortunately, as we shall see, things are much more

complicated than that. Magistrates' courts might be uniquely English (and Welsh) institutions, but their uniqueness should not mask the fact that they share much in common with many other institutions within our society. They exist in the same cultural, economic and political environment as these other institutions and cannot therefore satisfactorily be understood by regarding them as if they were located in some sterile social vacuum, isolated from everything else that goes on in society by the twin ideologies of justice and community participation. In this study I have tried through the use of process models as a method of analysis to capture some of the unique properties of magistrates' justice while at the same time relating what happens in the criminal justice process to the wider social structure and to those economic and political forces affecting the form and operation of institutions within our society.

The following short summary of the ensuing chapters should help to give the reader an idea of the approach that this book takes and of the sort of issues it covers. With the exception of Chapter 3, which may be omitted by lawyers and others familiar with the law, the book should be read from cover to cover in the order in which it was written, rather than 'dipped into'. Since the chapters and sections of chapters are for the most part interdependent, the 'dipping' reader is almost certain to miss the main thrust of the analysis.

Chapter 2: Theoretical Approaches to Criminal Justice

This chapter sets out the theoretical basis for the subsequent analysis of the criminal justice process. It explains the need for theories and the advantage of using theoretical models as a method of analysis. It also describes and defines the six process models to be employed in the present study.

Chapter 3: The Formal Process

This chapter summarises the formal rule structure within which the participants to the criminal justice process in magistrates' courts operate. It is not intended as a definitive statement of the law, and should not be used as such. Rather, it is designed to give those readers unfamiliar with the law some understanding of the way in which the relevant legislation, case law and procedural rules set out the powers

available to the participants and the restraints on their actions. It also considers the statistical evidence that is available concerning the operation of these formal rules.

Chapter 4: Scenes in the Criminal Justice Process

As the title suggests, this chapter describes eight scenes occurring between the arrest of a suspect for questioning by the police and the sentencing of a defendant by the court. These descriptions are supported by evidence, both statistical and anecdotal. During the course of these descriptions, it gives an account of the relationship between the suspect/defendant and the regular participants to the criminal justice process, policemen, lawyers, probation officers, court clerks and magistrates.

Chapter 5: Making Sense of the System

Here the process models described in Chapter 2 are applied systematically to the evidence, both formal and informal, as to the system's operation presented in Chapters 3 and 4. The chapter ends with a series of impressions gained from the analysis which carry implications for the understanding of the criminal justice process and for its reform.

Chapter 6: Getting the System Right: The Process of Law Reform

The final chapter examines two recent attempts to reform the criminal justice process, the Bail Act 1976 and two sections of the Criminal Law Act 1977. The chapter compares an ideal model of law reform based on principles of rationality, impartiality and democracy with the actual process of law reform as it occurred in these two examples. The book ends with a concluding section which draws attention to the similarities and connections between the criminal justice system and the machinery for reforming that system. It explains how real reform must ultimately depend upon real understanding of the criminal justice system, the effects of the formal rules and of the economic and political movements which underlie both the processes of criminal justice and law reform.

2
Theoretical Approaches to Criminal Justice

1. Social Theories

Throughout this book I shall use the term 'theory' to refer to many general principles or set of principles formulated to explain the events in the world or relations between such events. The theories I shall refer to are social theories, that is those theories which attempt to account for social events. Not only do such theories provide explanations for past social behaviour, but they also offer predictions as to the future. Social policies are based upon theories of social behaviour, since those who formulate the policies make certain assumptions about the policies and the social objectives they seek to achieve through political actions derived from such policies. To take a well-documented example, policy emphasises the importance of free education from kindergarten through to university level, the desired objective being not merely that education should be free to anybody who wishes to take advantage of it but, more importantly, that free education should bring about social mobility and equality of opportunity. The casual relationship between the concepts of free education and those of social mobility and equality of opportunity is based upon a theoretical assumption about the way society works.

Although many of the social policies put into effect by political parties are related to explicit social theories, this is not always the case. Policies may be implicit or intuitive or they may be pragmatic, in which case no *a priori* general principles or set of principles have been set out which explain and predict the relationship between the political acts and their objectives. This does not mean that these policies have no theoretical underpinning, but merely that the terms of the theory have not been made explicit. Often political commentators will, in the absence of any clearly defined policy objectives, speculate about the motivations of particular politicians or political parties, basing their speculations upon their interpretations of various political actions. In other words, they attempt to construct a theory which will explain

social policies. This is a very similar exercise to the one undertaken for much of the remainder of this book, for it will examine in the light of the available evidence theories which attempt to explain the way in which the legal process affecting guilty pleaders operates. From this exercise it should be possible to construct a framework for interpreting the relationship between social policy and the actual practice of the law in magistrates' courts.

All of the theories discussed in this chapter could be described as 'explicit theories', in that the general principles or set of principles which each of them encompasses have been set out in a formal or semi-formal manner by different writers. This does not mean to say that everyone who is responsible for the operation of the criminal justice process in magistrates' courts would have read one or more of these theories and will consciously be applying its principles in his actions and decisions. It is much more likely that these principles will in varying degrees correspond to what the various actors regard as 'common sense', 'human nature', or 'the way things work'. In other words they may well be incorporated in the taken-for-granted, conventional wisdoms of the actors.

Yet it may be that some of the ideas to be discussed are far removed from these common-sense notions or conventional wisdoms. This does not make them any the less valid as possible explanations of social events. The test of their validity is not whether practising lawyers or policemen agree with them but the extent to which they offer useful insights into the operation of the criminal justice system in magistrates' courts.

We shall return later in this chapter to discuss the relationship between the different theoretical perspectives which we shall be applying. Before doing so, let us consider the value of using theories in the analysis of social phenomena.

2. Why Use Theories?

A fundamental dilemma facing many social scientists is that 'social reality' exists only in the mind of that society's members. It is real for them, because they have, through the process of socialisation, acquired a conceptual framework which allows them to attribute meanings and values to social phenomena and thus to interpret events occurring in their social world. One cannot, for example, see, hear or feel a legal system. One may, of course, see a courtroom where groups of people gather together; one may watch them moving and hear them

talking, but this tells the observer little about the social situation and nothing about the institution, its rules, the assumptions of the participants and their attitude towards their roles, or about the power or authority structure which allows one group of people to make decisions affecting the future action of other groups. It is the meaning of social phenomena which is important to the social scientists rather than mere physical characteristics. While he should approach each new social situation without prior assumptions or preconceptions, this is impossible, since his own socialisation has caused him to attach meanings and values to the social phenomena he is investigating.

Another complication is that members of the same society do not necessarily draw similar meanings, make identical assumptions, or attach the same values to social phenomena. Socialisation is not merely a matter of stamping 'reality' upon the mind of each new member of society. In internalising social reality the individual imposes his own interpretation upon events. As the individual matures he defines his social experiences in a repetitive manner and his internalised model becomes increasingly less susceptible to change and adjustment; it becomes, in effect, the taken-for-granted world of that individual. Social researchers are not immune from such processes. Their values and beliefs will influence the framework in which they operate, including attitudes towards their subject, the questions they ask, the way in which they ask them and the interpretations placed upon the answers they obtain.

Some have naively attempted to escape from these problem by limiting their presentation of data to description. These writers may either portray aspects of proceedings in one court or a number of specific courts and offer these portraits as being typical and comprehensive of behaviour in magistrates' courts in general.[1] They are still, however, presenting a subjective account of the way the courts operate, since there is no such thing as pure description of a social system. Any description involves interpretation and selectivity. What is selected and why it is interpreted will depend to a large extent upon the values and preconceptions which the observer brings to the social situation. The social scientist using descriptive approaches usually fails to make explicit his own theoretical perspective. In the same way that different readers may feel the need to attach varying degrees of credibility to the differing reports of the same political event which appear in different newspapers depending usually upon the extent to which the reader shares the journalist's political perspective, readers of social research also face a similar problem. For them, however, the problem is made