Justice undermined

Jacqueline Hodgson examines recent legislative reform.

The areas and ways in which justice is undermined are many and complex and several of them are considered in the articles which follow. Most obviously, injustices can arise as a result of the actions of agencies of the criminal justice process and the legal actors within them - police malpractice in fabricating confessions; failure on the part of the prosecution in disclosing relevant material; inadequate defence preparation; conservative trial judges reluctant to exclude evidence obtained in breach of the Police and Criminal Evidence Act and Codes of Practice. This requires change at the level of education and training in order to alter the expectations and practices of police, magistrates, judges and defence lawyers.

However, in addition to issues of 'cop culture' and the policing of certain groups, or the non-adversarial ideologies of defence lawyers who process clients towards a guilty plea (McConville et al, 1994), the structure of the criminal process itself needs to be addressed, both in understanding the ways in which justice is undermined and, therefore, in addressing issues of reform. I will consider here some of the recent legislative changes which have been introduced and their negative impact upon the structure of the criminal justice process.

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The Royal Commission's review

The Royal Commission on Criminal Justice, reporting in 1993, was appointed to review much of the criminal process at a time when public opinion of it was at an all time low. A number of high profile convictions had been overturned, revealing serious police and prosecution malpractice and more cases were to follow before publication of the final Report. The establishment of the Commission, therefore, presented an important opportunity for detailed examination of the structure and operation of the criminal justice system notably through the commissioning of relevant research. The final Report, however, was a huge disappointment and the subject of widespread criticism. Both in the terms of reference set down and in the way the Commission chose to interpret them, attention was deflected from the conviction of innocent persons to the importance of avoiding the acquittal of the guilty and, above all, improving the efficiency of the criminal justice system. In this way, the original problem was turned on its head and the recommendations which followed did not tackle the routine injustices suffered by citizens and the malpractice of police and prosecution, but were designed instead to widen state powers of investigation and evidence gathering, placing the accused in an increasingly weak position.

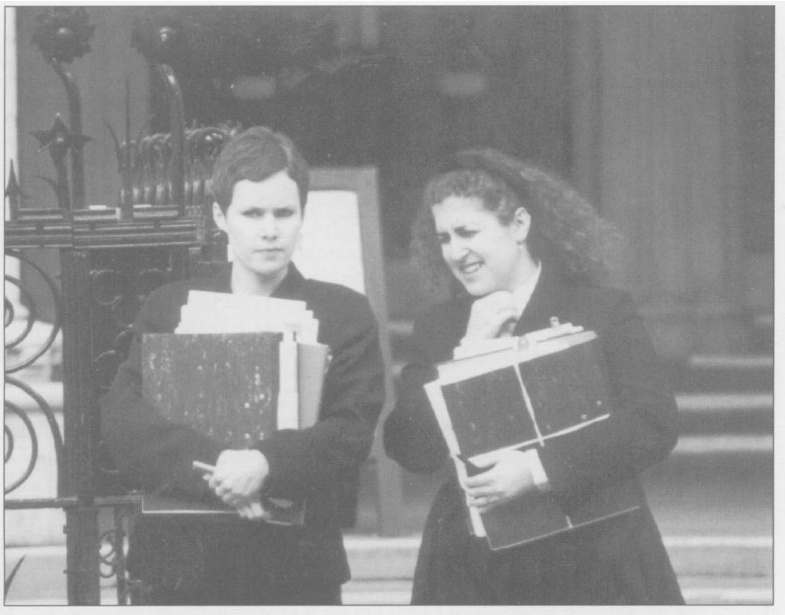
Improvements in the system were now about efficiency in the form of saving time and money and allowing the police to gather new forms of evidence more easily. Commentators have identified this changing criminal justice rhetoric as moving away from a discourse dominated by 'crime control' and 'due process' towards one of risk management and system surveillance (Ericson 1994) where the accused has all but dropped out of the picture.

Reform

The Government endorsed the Commission's efficiency drive and warmly took up proposals such as those to increase police power in the taking of body samples, both intimate and non-intimate, including reclassifying saliva as non-intimate, in order that it might be taken by force (ss.54-59 Criminal Justice and Public Order Act - CJPOA - 1994). Instead of requiring greater openness on the part of the prosecution in revealing evidence gathered by the police, (who are after all in a superior position in terms of investigative powers and resources), full prosecution disclosure is now conditional upon the accused revealing the nature of the defence case (ss.1-11 Criminal Procedure and Investigations Act 1996). This measure reduces the accused's ability to test the prosecution case and represents a serious inroad into the right to silence. It is noteworthy, however, that calls (primarily from the police and the Crown Prosecution Service) to further curtail the right to silence were rejected by the Commission. The Government, not inconvenienced by this, simply implemented its original plan in the form of the CJPOA 1994, which allows adverse inferences to be drawn at trial if suspects fail to answer questions in police interview, or to testify in court. Of especial concern here is the position of vulnerable suspects - juveniles, the learning disabled and the mentally ill. Section 35 of the Act provides for adverse inferences to be drawn where the accused does not testify in court, but this provision does not apply to juveniles, or if it appears to the court that the defendant's physical or mental condition makes it undesirable for her to give evidence. There is no such exemption during police interviews, where vulnerable suspects are likely to be more susceptible to police pressures and at risk of providing unreliable admissions. Their protection is left to judicial discretion in holding that vulnerability may be a relevant circumstance in determining the unreasonableness of their failure to answer police questions.

Structural implications

The immediate effect of these legislative measures such as the curtailment of the right to silence, is that suspects will feel under greater pressure to answer police



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questions and defence lawyers will have to anticipate how the defence case will be run at court whilst still at the police station. But there are also serious structural implications to the reforms. The balance of the criminal process has shifted further away from the public trial where evidence is tested orally, towards a greater emphasis on the out of court pre-trial resolution of issues, where the accused is expected to provide more and more of the evidence against herself. A wider range of evidence will be available (body samples leading to DNA testing) and the restraints upon the admissibility of evidence are reduced (abolition of mandatory corroboration warning and curtailment of the right to silence). Many of these measures have a distinctly inquisitorial flavour, designed to identify key issues through written submissions and minimising the importance of the trial in establishing evidence - but they are tacked on piecemeal to what is basically an adversarial structure.

This has a distorting effect. Despite making such recommendations, the Royal Commission demonstrated only a superficial interest in inquisitorial jurisdictions, concerned only at the potential for immediate reform. No attempt was made to learn wider lessons about the institutional structures of these systems, nor of the role, training and relationships between actors within them which might have allowed for a more sensitive approach to the adaptation of foreign ideas and the shaping of reform proposals. The tendency of inquisitorial systems to have a wider pre-trial investigation in the most serious and complex cases may be regarded as beneficial, but such systems are structured and staffed in a way which supports this. Greater investigative powers and the inclusion of a wider range of evidence than might be allowed in this jurisdiction, exist within the context of external investigative supervision by a judicial officer and statutory guarantees concerning the exclusion of evidence obtained in breach of statutory criminal procedure.

But this is not typical of inquisitorial investigations, representing the procedure of only a minority (in France, around 8%) of cases. In addition, the process is structured so as to allow the two opposing parties less opportunity to determine the relevant issues at trial and a reduced role in the selection and presentation of evidence - for example witnesses are questioned by the president of the three judges trying the case.

This is not to argue that systems such as the French are superior to that in England and Wales, nor that they operate in practice in a way which more closely reflects official goals and rhetoric. Rather, that the pre-trial identification of issues and a less restricted approach to evidence gathering are embedded in a structure quite different from our own. To mix aspects of the two risks creating a creature which reflects neither and subverts the checks and balances designed to safeguard the accused. As the police are dispensed with ever increasing powers, the accused is not afforded additional safeguards - external supervision of the police investigation, for example, has been repeatedly rejected.

In skewing the criminal process in this manner, recent reforms have failed to address the structure of the system in positive ways. For example, the dominance of the police in criminal investigations has been criticised both before and since the Police and Criminal Evidence Act, hierarchical supervision has been shown to be inadequate whether in the form of the custody officer authorising the detention of suspects and controlling the detention period, or the monitoring of stop and search and the conduct of investigations generally by superior officers. The absence of any external supervision results in over dependence upon police accounts by the Crown Prosecution Service. Yet, the new provisions continue this trend. For example, defence application for secondary disclosure is made to the prosecution, but she in turn will determine the relevance of evidence to be disclosed on the basis of information provided by the police disclosure officer.

What remedy?

Another area in which the structure of the criminal process has not altered fundamentally, despite the time taken for convictions to be quashed in many high profile miscarriage cases, is that of remedies. Many have welcomed the establishment of the new Criminal Cases Review Commission (CCRC) with its greater personnel resources, as an improvement on the old system of Home Secretary referred appeals. However, problems remain in that it will continue to be police officers re-investigating cases for the CCRC and it seems doubtful that the Court of Appeal will be more receptive to cases referred to it by the CCRC, than it was to those referred by the Home Secretary.

In relation to police discipline, there has been great concern at the difficulty in bringing a complaint against officers, especially where deaths in custody have occurred. It is rare for complaints to result in action being taken against officers and the whole process is shrouded in secrecy. Cases are re-investigated by the police and despite the Police Complaints Authority itself calling for the burden of proof in disciplinary tribunals to be reduced from beyond reasonable doubt to the balance of probabilities, this was rejected by the Home Secretary in March of this year, in cases where the outcome of the hearing carries

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the threat of terminating the career of a police officer. In the view of the PCA, "in practice, this will mean the retention of the criminal standard of proof for all but minor misconduct cases" (PCA Annual Report 1996/7: 45-6).

Having glimpsed the structural implications of recent reforms, I return to where I began, the importance of a twofold approach. In any process of reform, consideration must be given both to the procedural framework and how it fits within the existing legal structure, and to ways of ensuring that the legal actors operating within that framework do not subvert the process in practice. Establishing the role of custody officer to oversee the police detention of suspects may be positive in principle, but failing to make that person independent of the police makes it less effective in practice. Rules which require confessions to be voluntary on pain of mandatory exclusion at trial signal a clear protection for the suspect. The Court of Appeal in the Cardiff Three case (*Re Paris, Abdullahi and Miller,* 1992) did not hesitate to exclude as oppressive 19 separate interrogations (many of which were extremely aggressive) amounting to 14 hours, over a four day period, in which the suspect made over 300 denials. They did not consider it necessary even to hear the entire interrogation tapes, so shocked were they at the officers' behaviour. The trial judge, however, saw no reason to exclude the interrogation evidence. This is the real challenge for reform. ■

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Discovery in criminal proceedings and The Criminal Procedure and Investigations Act 1996

Background

On 14 March 1990 the convictions arising out of the two bomb explosions in public houses in Birmingham, in November 1974, were quashed. The immediate response of the Government was to establish a Royal Commission to review the criminal justice system. So far as prosecution disclosure was concerned the problems were self evident. Operating under informal guidelines the prosecution were withholding material evidence from the defence. In some cases the evidence withheld could completely exonerate the defendant.[1] In many other cases, the material would have revealed serious flaws in the prosecution version of events.[2] Notwithstanding important decisions of the Court of Appeal imposing requirements on the prosecution to make full disclosure of all the evidence in its possession[3] the problem continued.

The 1996 Act

As an attempt to rectify the problems concerning disclosure in criminal proceedings the Act will fail. The prosecution retain the right to determine the material that should be disclosed under what is described as its 'initial duty of disclosure'. Section 3 of the Act requires the prosecutor to disclose any material which in his opinion 'might undermine the case for the prosecution against the accused.' During the parliamentary debates the Opposition tried to increase the scope of material that fell to be considered for disclosure, at this stage, but met with stern resistance from the Government. Significantly, the Act for the first time introduces provision for disclosure by the defendant. Section 5 of the Act requires the defendant to serve a case statement setting out the general terms of the defence, indicating the matters on which he takes issue with the prosecution and setting out, in the case of each such matter, the reason why he takes issue with the prosecution. The defendant is encouraged to file a defence by the imposition of two very important sanctions in the event of a breach. The first is that the prosecution have a secondary duty of disclosure which is directly linked to the defence as disclosed in the defence case statement. Failure to serve a defence will mean that the defendant will not receive additional discovery. Second, should the defendant fail to serve a defence, serve an inconsistent defence or a defence that is different from that revealed in the case statement, an inference can be drawn against him.

No one expects the law on disclosure to be reviewed for at least another ten years. In the meantime litigants must seek assistance from the European Convention on Human Rights. Certainly Article 6 of the Convention makes it clear that one facet of a fair trial is that the prosecution must disclose to the defence all material evidence for or against the accused. The English courts have adopted the view that the Convention is only of assistance in resolving ambiguities. This narrow view has been rejected by the Government who have recently published a Consultation Paper on the incorporation of the Convention into English Law. This cannot come too soon.

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Notes:

1. R v Kiszko (1992) Unreported
2. R v Maguire 94 Cr App R 133
3. See for example R v Ward (1993) 96 Cr App R 1