

# **Are magistrates' courts really a 'law free zone'?**

*Participant observation and specialist use of language*

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## **Abstract**

My research assesses the impact of changes to legally-aided representation in magistrates' courts operating in East Kent (a designated court area) in the context of structural change driven by neoliberal forms of governance. This paper presents some findings following periods of observation at the relevant court area. Past socio-legal studies of magistrates' courts, largely conducted when most defendants were unrepresented, suggest that the technical nature of proceedings excludes defendants from effective participation in the process. My preliminary findings support the view that court processes tend to marginalise defendants despite greater levels of representation. However, there also appear to be some differences between this study and findings seen in earlier studies. I suggest that marginalisation is exacerbated by implicit references to legal provisions that a non-lawyer would struggle to identify. This paper considers the issue from three angles – sentencing, bail and case management.

**Key Words:** magistrates; law; participant-observation; marginalisation

## **Introduction**

This paper sets out some preliminary findings in relation to the broad topic of the impact of neoliberalism on access to justice. The empirical research identifies and examines trends in summary justice which appear to have been influenced by neoliberal political ideology, and considers how those trends may have affected the ability of those charged with criminal offences to access the information which enables them to participate effectively in the proceedings.

The observations from which these findings emanate form part of a broader concern about the impact of changes with respect to access to

publicly funded representation in summary criminal proceedings. These changes are set within the context of politically driven concerns about criminal case progression in an era that requires austerity and efficiency in publicly funded institutions. The research draws heavily on the findings of earlier socio-legal studies of summary justice, most notably Carlen (1976), Bottoms and McClean (1976), McBarnett (1981), Morgan (2000) and Sanders (2002).

This paper focuses on one of the issues that arose following observation of magistrates' court proceedings in late 2012 and early 2013. It explores how law is used in summary criminal proceedings and highlights how the researcher's own experience can affect the findings generated, and is therefore important to acknowledge. In that context, the paper highlights how a different epistemological approach to a topic can illuminate hitherto neglected issues. Other important matters that remain, here, part of the background, include levels of and funding for legal representation, the well documented differences between how magistrates and District Judges process cases and the use of forms as a manifestation of bureaucratic decision making processes. It is important to keep these issues in mind as it would be extremely difficult to isolate causal influences that have an impact on summary criminal proceedings.

The paper begins with a discussion about method and methodological issues that arose, followed by examples of how those issues manifested themselves during the research process. Finally, these issues are located in a broader socio-political understanding of processes of summary justice.

## **Method**

The empirical research began from the premise that it was important to understand the way in which summary justice is administered, and it was against this background that observation was performed. Twenty days of observation was conducted at the four magistrates' courts in East Kent - five days at each court. I observed a range of hearings including sentencing, bail applications, trials and case management hearings. I remained in the public gallery of the court both while magistrates were sitting and while they were in retirement, which enabled me to observe some of the negotiation and more informal conversation that took place between advocates. I made notes about the cases and how the defendant was treated both while court was sitting and while magistrates retired. I typed up the notes into a diary at the end of each day when matters remained fresh in my mind. I subsequently analysed the diary to identify themes and then drew out examples in support of those themes.

The research takes the form of a case study which "is concerned with the complexity and particular nature of the case in question" (Bryman, 2012: 66) and is generally associated with a specific organisation or community - in this case, magistrates' courts in East Kent. The area in

which the courts are located is not the main focus of the research, but it is something which is of potential significance to the findings because the socio-economic make-up of the area may affect how the court operates. As such, the findings are not necessarily generalisable. The research therefore takes an idiographic approach in which the findings cannot necessarily be applied regardless of time and place (Bryman, 2012).

The case study combines a critical approach and an exemplifying approach and is based on a theory about court processes that "will allow a better understanding of the circumstances in which the hypothesis will and will not hold" (Bryman, 2012: 70). The hypothesis is that the court has become one area in which neoliberal practices manifest themselves, and that this has increased the marginalisation of defendants in the proceedings - see, for example, Wacquant (2009) and Bell (2011). It is also an exemplifying case study because it aims to encapsulate the circumstances of routine organisational situations in order to examine vital social processes (Bryman, 2012). Magistrates' courts are part of vital social processes in the sense that they administer the criminal law in the vast majority of prosecutions. As McBarnett notes:

the criminal justice process is the most explicit coercive apparatus of the state and the idea that police and courts can interfere with the liberties of citizens only under known law and by means of due process of law is thus a crucial element in the ideology of the democratic state (McBarnett, 1981: 8).

The equivalent of twenty days observation was conducted at the four magistrates' courts which operate in East Kent. A total of 184 cases were observed, ranging from applications for arrest warrants, cash seizures, administrative hearings, pleas, trials and sentencing. The aims of the observation were to identify:

1. Levels of legal representation
2. How representation was funded
3. Differences (if any) in case handling and outcome between represented and unrepresented defendants
4. Patterns of behaviour (if any) which tended to exclude defendants (whether represented or not) so that they remain only dummy players (Carlen, 1976) in the proceedings.

It is the fourth of these aims to which these findings refer.

An issue that is of methodological importance is my role within the institutions observed. I am a practising criminal defence advocate with seven years post-qualification experience. I regularly appear in the courts that I was observing and was easily identifiable by members of the Bench, court legal advisors and advocates, all of whom showed some degree of interest in my presence as a court observer. This placed me in the role of

“participant-as-observer” (Bryman, 2008: 410), which has two wider-reaching implications for the research:

1. My ability to conduct impartial observations which may affect my ability to identify issues which are significant but seem mundane to someone familiar with the setting
2. The recognition of nuanced behaviour which may not be obvious to a non-participant observer.

So far as those points are concerned, Bryman notes:

The researcher’s prolonged immersion in a social setting would seem to make him or her better equipped to see as others see ... also, he or she participates in many of the same kinds of activity as the members of the social setting being studied (Bryman, 2008: 465).

While the researcher’s immersion in the environment may lead him/her to take significant behaviours for granted, that immersion carries with it certain other benefits which could alter the understanding of the topic concerned.

The most relevant issue so far as benefits are concerned relates to “learning the native language ... it is also very often ... the special uses of words and slang that are important to penetrate that culture” (Bryman, 2008: 465). As a result of my previous experience, I was familiar with the meaning and significance of particular phrases used by court personnel. Further, while the presence of a participant observer can result in reactive effects, several advocates (both prosecuting and defending) commented that, although my presence as observer was unusual, they did not pay a lot of attention to what was being done because I was already an ‘insider’ or ‘on their team’. One prosecutor commented that, when an unknown observer is present, advocates must be on their ‘best behaviour’ – a formality which seemed to be unnecessary with me. This point does, however, have to be balanced against the risk of over-identification with the research subjects. It is therefore important for the researcher to retain reflexivity about his/her role and recognise potential bias that his/her role entails.

By far the greatest advantage that the practitioner-researcher/participant-observer role gave me was my location in the same epistemic community as the subjects. This enabled me to identify and analyse how law is used in summary proceedings. My observations suggest that points of law arise much more frequently in magistrates’ courts than has previously been estimated. Methodologically, this assertion holds because I am familiar with the language of the court and provisions to which implicit reference is often made. I intend to demonstrate this by reference to three instances in which advocates appear to make implicit references to law with relative frequency. Such references appear to be

common when defendants appear to be sentenced, for bail to be considered and during the course of case management.

## **Uses of law: Sentencing, bail and case management**

This section considers how points of law manifest themselves in the four magistrates' courts studied. It considers the ways in which law is referred to in summary proceedings and situates the construction of legal issues in contemporary trends in criminal justice.

Socio-legal scholars have regarded magistrates' courts as venues in which proceedings are processed quickly, with minimal due process protections, and give the impression that those advocates who refer to points of law are dismissed as inexperienced and/or time wasting (Carlen, 1976; Bottoms and McClean, 1976; McBarnett, 1981). This theme appears to persist in summary criminal proceedings, as, according to Darbyshire (2011), lawyers who raise so-called spurious legal issues are still regarded as a threat to what Carlen (1976) described as the uncomfortable compromise which typifies the working relationships that exist between professional court personnel. As a result, one gains the impression that points of law are seldom referred to or, alternatively, that when legal issues are raised, they are treated as an inconvenience; as something which delays the volume processing of cases because legal ideology has been subordinated to bureaucratic requirements (McBarnett, 1981). As recently as 2011, Darbyshire (2011) reported that District Judges took the view that legal argument should not be raised in magistrates' courts, because the magistrates' court is the place of common sense, describing it as a "law free zone" (Darbyshire, 2011: 171). Notably, when Carlen (1976), McBarnett (1981) and Bottoms and McClean (1976) conducted their studies, defendants tended to appear without the assistance of a solicitor and the police (rather than qualified lawyers) were the prosecutors. The Crown Prosecution Service took over state led prosecutions in 1986 and, by 1986/87, four-fifths of defendants appearing in magistrates' courts were legally represented (Legal Action Group, 1992). Kemp (2010) noted that 82% of defendants in her magistrates' court sample were legally represented, nearly all via public funding.

It is possible that the professionalization of representation in summary criminal proceedings has led to increased reference to legal provisions in such cases. Indeed, Darbyshire (2011) reported the dismay expressed by one District Judge that more people were attempting to raise legal arguments in magistrates' courts. My observations suggest that there are frequent references to particular points of law during the course of summary proceedings in both implicit and explicit terms. Particular points of law seem most likely to be referred to during the course of sentencing proceedings. Furthermore, the provisions of the Bail Act 1976 are often implicitly referred to, while both implicit and explicit reference to the construction of charges and required evidence are also relatively common

in the course of case management. The significance in the use of implicit references to law are that they at least perpetuate, if not exacerbate, practices which exclude defendants from active participation in the proceedings. These practices manifest in the ways that advocates support the representations that they make to the court. The best evidence of references to points of law or legal provisions tends to arise when a particular outcome is sought such as a particular sentence or release on bail. I will therefore turn to particular ways in which legal issues arise in the course of such proceedings.

So far as sentencing proceedings are concerned, points of law seem to manifest via sentencing guidelines. Providing sentencing guidelines to magistrates is an example of measures designed to combat inconsistent decision making practices (Darbyshire, 1997; Davies, 2005). The Sentencing Council states:

It is important to ensure that courts across England and Wales are consistent in their approach to sentencing. Sentencing guidelines, which set out a decision-making process for all judges and magistrates to follow, play an essential role in this (Sentencing Council, 2012).

The sentencing guidelines are based on statute, case law and policy documents, and are therefore based on particular legal provisions according to rules of precedent. Thus, while the guidelines are not strictly points of law, they represent a distillation of legal opinion about what factors are important in determining the severity of offences. According to the Coroners and Justice Act 2009, the use of sentencing guidelines is mandatory unless it is not in the interests of justice to follow a particular guideline. Therefore, in order to determine the most appropriate sentence in any case, a working knowledge of the guidelines is advantageous - either to highlight specific aggravating and/or mitigating features or to argue that it would not be in the interests of justice to apply a particular guideline. The sentencing guidelines also suggest categories into which offences can be placed to determine their seriousness and therefore the most appropriate sentencing range. On several occasions, the court indicated to the defence solicitor that it was minded to consider an offence within a certain category, but the court did not explain what this meant to the defendant.

Of thirty-seven references observed to the sentencing guidelines, nearly half were made implicitly - for example, stating that a theft was opportunistic or an assault was provoked, which are matters specifically recorded as mitigating features (Sentencing Council, 2012). Defence advocates also appeared to suggest particular sentencing options to the magistrates by reference to the sentencing range and aggravating and mitigating features of offences. In those courts where a District Judge sat, he demonstrated a tendency to discuss the sentencing options with the defence advocate by reference to the specific aggravating and mitigating features contained within a particular guideline, but without stating that he

was specifically referring to the sentencing guidelines - that was something which was taken for granted.

The sentencing guidelines provide the magistrates with what are considered to be appropriate sentencing ranges on the basis of aggravating and mitigating features and are based on a first time offender who has been convicted following trial. As a matter of course, both prosecutors and defence advocates appeared to refer to the point at which defendants had pleaded guilty in the proceedings when dealing with cases to be sentenced. This provides another example of implicit reference to statutory provisions which entitle the defendant to a sentencing discount if a guilty plea has been entered at an early stage in the proceedings.

Sentencing guidelines in their present form did not exist until 2003, when the Sentencing Guidelines Council was created under the Criminal Justice Act 2003. The Sentencing Guidelines Council became the Sentencing Council in 2010. As that agency notes,

Guidelines are a relatively new innovation in sentencing so there aren't guidelines for every offence yet, and where they don't exist, judges look at previous similar cases for guidance on appropriate sentencing levels (Sentencing Council, 2012).

The sentencing guidelines therefore represent a coordinated effort to ensure more consistency and thereby appear to introduce a greater degree of specialised legal knowledge into summary proceedings than has previously been noted.

In terms of issues relating to bail, the fact of being placed on bail (with or without conditions) allows any criminal court to prosecute an individual who fails to attend court while subject to bail under s.6 Bail Act 1976. Therefore, every time a defendant is released on bail, at whatever stage in proceedings, he or she is effectively put on notice that there will be further charges if s/he fails to attend court as directed. The provisions of the Bail Act 1976 state that bail may be refused or bail with conditions may be imposed to ensure attendance at court, to ensure the defendant does not commit an offence while on bail or to ensure that the course of justice is not obstructed. Those exceptions to the right to (unconditional) bail appear to be referred to in implicit terms when prosecutors make applications to remand defendants into custody and when defence advocates apply for bail to be granted with conditions, because any conditions that are suggested are designed to meet concerns about the statutory exceptions to the right to bail. Examples include suggesting a condition to report to the local police at designated times to ensure a defendant does not abscond, or a condition not to enter retail premises to limit the risk of further offending.

Furthermore, provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which came into force on 3 December 2012 now state that the prosecutor can only apply for a remand into custody if there is a realistic prospect of a custodial sentence on conviction. Not only does this suggest that knowledge of sentencing guidelines is

advantageous, but also my observations suggest that it is now not uncommon to hear prosecutors address the court simply by stating that there is or is not a realistic prospect of a custodial sentence when making representations about a defendant's remand status. For example, on one occasion, the prosecutor indicated that he was not applying for the defendant to be remanded into custody because the case involved a low level breach of an order and that custody was not a realistic prospect in the event of conviction. This is an implicit reference to particular legal provisions, the significance of which may not be understood by a non-lawyer. It should also be noted that particular provisions state that the decision to grant bail based on the fact that a custodial sentence is not a realistic sentencing option does not affect the power of the sentencing court to ultimately impose a custodial sentence. Again, these are matters that appear to post-date earlier socio-legal studies of magistrates' courts proceedings, and are particular legal provisions, of which knowledge is advantageous in framing submissions to the magistrates. The implicit use of legal provisions is therefore significant in summary proceedings, and could result in misunderstanding to the untrained ear. The implicit use of those terms highlights, and perhaps more recently exacerbates, the paradox of summary justice in that it requires knowledge of procedural propriety but denies access to that knowledge by the implicit and unexplained use of legal provisions. Carlen (1976) identified a similar issue in relation to the use of jargon and signalling between advocates in magistrates' courts but increased reference to legal provisions appears to have intensified this problem.

A third type of hearing in which increased implicit reference to particular points of law appears to be made is during the course of summary case management. Case management hearings have evolved from Narey's (1997) suggestion that pre-trial review hearings may alleviate the volume of ineffective trial listings that occurred in magistrates' courts. Auld (2001) was concerned about the number of Pre-Trial Reviews that occurred, and believed that the parties should take a more co-operative approach to case management. In 2005, the *Criminal Justice: Simple Speedy Summary Justice* initiative (which sought to reduce delay in summary proceedings) proposed the abandonment of pre-trial reviews in favour of more proactive case management outside the court (Department for Constitutional Affairs, 2006). However, case management hearings remain in place in East Kent.

The forms used in Case Management have both administrative and legal roles in magistrates' court processes. They require the parties to state the matters that are in dispute, the witness requirements (and reasons why witnesses are required), any further evidence to be served and any legal argument that is envisaged. As such, they require the parties to narrow the contested issues at trial so that court time can be used in the most efficient manner. The forms are also used to prevent the Crown being 'ambushed' at trial, which has the effect of focusing the Crown Prosecutor's time and resources only on those matters that are disputed.



As such, during the course of my observations, the defence solicitor was often asked by the court to clarify the exact nature of the defence with reference to the level of intent or the factual issues in dispute. The discussion that occurred between advocates and the court would make reference to issues such as the concept of recklessness in general without further explanation in open court. On one occasion, the court clerk simply said 'it's down to *mens rea*' without any further discussion. The concepts of *mens rea* and recklessness are very specific legal terms which are unlikely to be understood by a non-legally qualified participant or observer.

Case management forms are part of the executive's desire to increase efficiency under the Criminal Procedure Rules and therefore have an administrative function. Case management forms do also, however, have a role in potential legal argument about how evidential burdens are discharged and whether it would be just for trials to proceed. The form requires a defence advocate - the wording of the form assumes that the defendant has received advice - to indicate that a defendant has been advised that a trial can proceed in his or her absence if the defendant fails to attend court as directed, which is relevant to whether proceedings should continue in the absence of a defendant and whether a charge of failing to attend Court as directed can be laid.

Furthermore, the answers provided on Case Management forms about the issues in the case can be used as evidence during the course of a trial as implied admissions to particular elements constituting an offence, such as presence at the scene.

The completion of Case Management forms represents an important convergence of law and bureaucratic measures designed to ensure consistency and efficiency, as questions are reduced to a series of tick box answers - such as a yes/no answer as to whether the defendant has been advised about provisions which allow a reduction in sentence for entering an early guilty plea - with limited space to explain the issues. There is a specific section of the Case Management form which asks whether the parties can agree a basis of plea or plea to an alternative charge. Thus the form becomes a way of demonstrating that the parties are acting in an efficient, co-operative manner, as well as a document which, in order to be completed appropriately, requires knowledge of both the nature of the charge and the evidential burdens which the Crown must satisfy to prove its case. The case management form asks the parties to specifically confirm whether any issues surrounding hearsay or bad character evidence are likely to arise. My observations suggest that this often occurs in a very informal way - simply by the court saying to the advocates, for example, 'no bad character?' and the parties answering either 'yes' or 'no' without further explanation. Again this provides evidence that points of law are often referred to in a way that tends to ostracise defendants.

## **Explanatory factors**

It seems therefore that points of law arise more frequently in summary proceedings than has previously been observed. This seems to result from the increased legalisation of summary proceedings in terms of a welter of new offences and legislation relating to the criminal justice process. Levels of legal representation have consequently increased, and that representation has been increasingly professionalised. Many of the new offences created are designed to avoid proceedings being transferred to the Crown Court as part of the government's desire for magistrates to retain jurisdiction in cases in the name of efficiency (Darbyshire, 1997). Furthermore, neoliberalism's embrace of management techniques has focused that efficiency drive on performance management techniques and statistics (Jones, 1993). This has resulted in the enactment of legislation which allows a number of low level, uncontested offences to be diverted from the criminal court process (Morgan, 2010), meaning that the cases which do come before the court are more likely to be complex or contested in some way.

There has been a desire for magistrates' courts to retain cases rather than send them to the Crown Court since the late 1990s (Darbyshire, 1997). So, while Darbyshire (2011) asserts that lawyers who wish to raise legal argument will, where possible, try to have the case dealt with in the Crown Court, there are bureaucratic measures which seek to deter committal to the Crown Court - not least the removal of committal fees and reduced guilty plea fees for advocates (Legal Services Commission, 2011). This desire has resulted from the government's hope to accelerate the processing of criminal cases as magistrates' courts tend to deal with cases more quickly than Crown Courts. Sanders (2010), and Ashworth and Zedner (2008), note that a significant number of new offences created in the last two or three decades are strict liability matters, which are usually confined to summary only proceedings and are easier to prove than those offences requiring *mens rea*.

In relation to those offences that remain in the summary criminal courts, case complexity has increased (Cape and Moorhead, 2005). The removal of low level, uncontested offending from magistrates' courts via diversionary processes was designed to increase efficiency in the criminal justice process, as were co-operative practices encouraged by the Criminal Procedure Rules (from which case management hearings are derived) (Auld, 2001). Not only do those co-operative practices discourage defendant's participation in the proceedings (Carlen, 1976), they encourage the parties to focus more on the legal and evidential issues involved in trials. The research observations suggest that of the 40 hearings in which defendants were unrepresented, 11 included references to points of law. There were 143 hearings in which defendants were legally represented, which included 105 references (either explicit or implicit) to points of law. Furthermore, the routine provision of case papers - also designed to

improve co-operation - has enabled cases to be analysed in greater detail at an early stage in proceedings (Cape and Moorhead, 2005). Therefore, somewhat ironically, measures designed to speed up the process of summary justice may have also encouraged more explicit references to points of law. Given that most defendants are legally represented - only 40 of the 184 defendants observed were not legally represented - it is arguable that those references to points of law would be less likely to arise if defendants were unrepresented, which may, in turn, further increase the pace of proceedings. However, evidence suggests that the presence of lawyers actually increases efficiency by negotiating pleas (Mulcahy, 1994) and co-operating with proceedings (Goriely, 1996).

In conclusion, it seems that the frequency with which points of law arise in summary proceedings has been previously underestimated. It appears most likely that increased levels of representation, alongside new legislation and procedural requirements have increased references to points of law in summary criminal proceedings. Earlier socio-legal studies of summary justice have drawn attention to marginalisation which is consequent to courtroom layout and signalling between personnel (Carlen, 1976), as well as issues regarding the efficacy of legal representation (McBarnett, 1981; Bottoms and McClean, 1976; McConville et al., 1994). However, recent government interest in the criminal justice process has resulted in more legislation which creates new offences, amends criminal justice procedure or alters evidential provisions. This appears to add another dimension to the nature of marginalisation experienced by defendants, particularly given that many of the references to recent legal provisions are made in implicit terms.

Given that this type of marginalisation is often identifiable only by reference to implicit use of legal provisions, the researcher's understanding of those provisions is of significant importance. A non-legally trained observer may not be able to immediately identify such implicit references and may thereby remain as marginalised from the proceedings as defendants. It is therefore clear that the researcher's location in the field is extremely important, and while it may carry risks of over identification with research subjects, these findings demonstrate how immersion in the research field can highlight hitherto underestimated issues.

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