A rebalancing act?

Ed Cape and **Nony Ardill** ask whether victims' rights can be enhanced by reducing the rights of defendants.

With the possible exception of the Human Rights Act 1998, it would be difficult to identify any initiatives in the past ten years that have had the effect of improving the rights of those who have been accused of crime. On the other hand, plenty of measures have been implemented to reduce defendants' rights, most recently through the *Criminal Justice Act 2003*. The government has justified these changes by appealing to the interests of victims; the White Paper on criminal justice – published in 2002 in advance of the criminal justice bill – described its policy aim as being "to rebalance the (criminal justice) system in favour of victims, witnesses and communities".

The Prime Minister, Tony Blair, presented the government's mission more starkly: when interviewed by the Observer on 10 November 2002, he commented "Justice [is] weighted towards the criminal and [is] in need of rebalancing towards the victim..... Offenders get away too easily." Behind this statement there lay a clear objective – to increase the number of offences that result in a conviction. The Justice Gap Project, launched in 2002, is one initiative designed to deliver this policy aim. Through this project, the government has set itself an ambitious target of reducing by around 20 per cent the discrepancy between the number of recorded offences and those resulting in a conviction.

This scorecard approach to criminal justice raises a number of important issues and concerns. First of all, it is important to be clear why defendants need rights. Many would agree that the main purpose of criminal proceedings is the conviction and appropriate punishment of the guilty and the acquittal of the innocent. From this starting point, it follows that the defendant must remain at the centre of proceedings and that the wrongful conviction of the innocent is one of the main risks that the system must avoid. After all, it is the accused whose alleged conduct is under scrutiny by the court and who is facing the prospect of punishment – in many cases involving loss of liberty. And it does not serve the interests of victims or their communities for the wrong person to be convicted of an offence while the true offender remains undetected.

So it is not surprising that many of the traditional safeguards within the trial process are rooted in the need to avoid wrongful convictions; for example, the important presumption that the accused is innocent, the requirement on the prosecution to prove its case beyond reasonable doubt, and the rule against double jeopardy. Stripping back these protections to make convictions easier not only exposes defendants to miscarriages of justice; it is also a strategy that does individual victims no favours and makes no contribution whatsoever to community safety.

Nonetheless, the erosion of defendants' rights is one of the main features of the *Criminal Justice Act 2003*. On the day that the bill was published, Home Secretary David Blunkett pledged to "refocus the system around the needs of victims to bring more offenders to justice", and commented that "antiquated rules with arbitrary effects and unpredictable consequences must be reformed." There are a number of examples of how the Act has changed these so-called "antiquated rules". First, it has lifted restrictions on the use of evidence of the defendant's previous misconduct; in doing this, the government has chosen to ignore research demonstrating that both juries and magistrates are unduly prejudiced by knowledge of previous convictions. When these provisions are brought into force, such evidence can be admitted almost routinely – leading to real fears that it will be used to prop up weak cases, giving the police a strong incentive to round up 'the usual suspects' instead of carrying out a proper investigation.

These measures appear to stand in direct contradiction to the principle that the burden of proof falls on the prosecution to prove its case, rather than on the accused to prove his or her innocence.

The Act also requires the defence to give more detailed advance disclosure of its case than previously – including any legal arguments and authorities that it plans to rely on and an advance list of the names and addresses of its witnesses. In cases of non-compliance, the accused can be penalised; the judge may invite the jury to draw 'adverse inferences' from his or her failure to disclose the information. The defence is therefore placed at a disadvantage compared to the prosecution. These measures appear to stand in direct contradiction to the principle that the burden of proof falls on the prosecution to prove its case, rather than on the accused to prove his or her innocence.

The double jeopardy rule has been part of the English common law since the 12th century. Behind it lies the idea that the state should not abuse its power and resources to bring repeated prosecutions against

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an individual for the same criminal offence. The Act has now amended the rule to allow an acquitted person to be tried again for the same offence, provided that the Court of Appeal gives permission for the case to be re-opened on the basis that 'compelling new evidence' has become available. There is a major difficulty with this approach: it will be difficult, if not impossible, for the jury at the retrial to deliver an acquittal in the face of new evidence that the Court of Appeal has already ruled to be compelling. Effectively, the burden of proof at retrial will fall on the defendant to prove his or her innocence.

Properly understood, none of these changes does anything to 'rebalance' the criminal justice system in favour of victims. However, this does not mean that the position of victims should be ignored. There is no doubt that victims have an important role: without their willingness to report crimes and testify as witnesses, many prosecutions would not get off the ground. They also have interests that must be recognised. But victims are not parties to proceedings; it is the state that brings criminal prosecutions. Arguably, the most significant tension in the system is not between victims and defendants, but between victims and CPS/police in relation to whether charges are brought, what the charges are, whether and how the case is taken through to conclusion – and how effectively victims are kept informed.

But what rights should victims have? There is an important distinction to be made between so-called 'service rights', such as the right to be treated with respect and to be kept up to date about the progress of cases; and 'procedural rights' that give victims a particular role or status in relation to the criminal justice process itself. Rights in the latter category are more problematic, carrying a risk of unfairness to defendants. One example is the special measures that allow vulnerable witnesses to give evidence by video link – a facility that has not been extended to vulnerable defendants. The right of victims of serious crimes to be consulted on the release of 'their' offender from custody gives rise to fears that decisions could be influenced by irrelevant or subjective factors. Allowing victims to make personal statements to the court is also problematic: research shows that these statements in fact have little impact on the severity of sentences; however, they often have the effect of raising victims' hopes that their views can influence the judge. But if victim personal statements were used in this way by the court, effectively as unchallenged evidence, this would clearly undermine the fairness of the process.

On the other hand, giving *service* rights to victims generally has little impact on the position of the accused – and several measures have already been successfully introduced. For example, there are court-based support services provided by Victim Support, a national telephone helpline, and a Victims' Charter giving guidance on how victims can expect to be treated. The Charter is set to be replaced by a statutory code of practice, giving the right of complaint to the Parliamentary Ombudsman in the event that it is breached. There are also possibilities for victims to receive financial compensation, either as part of the court's sentence or through the Criminal Injuries Compensation Authority.

There is no doubt that service rights for victims could – and should – be strengthened. One of the main challenges for criminal justice policy is to ensure that victims are treated with respect by everyone involved in the system, that they understand what is going on and are not 'revictimised' by their experience of the criminal process. By pursuing a misguided rebalancing act in the name of the idealised victim, the government is sabotaging the rights of defendants without delivering any real improvements for real victims in real cases.

This article draws on the papers presented to a series of four seminars organised by the Legal Action Group in summer 2003, as part of a project funded by *Rethinking Crime and Punishment*. The collected papers have been published as book: *Reconcilable rights? analysing the tension between victims and defendants*, edited by Ed Cape (Legal Action Group, London, 2004)

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