Adversarialism 'lite': developments in criminal procedure and evidence under New Labour

There is a real difference between New Labour's claim to be 'bringing offenders to justice' and ensuring that justice is done, writes **Ed Cape**.

No one wants to see the justice system in Britain damaged. No one wants to see anyone rip up the justice system and start again. The rule of law is paramount; no one wants to see the law as anything other than the law. But, at the same time, the need for reform is clear. The view that change is required is widespread. The law needs to be done; but the way we do law needs to change. We need to do law, but we need to do law differently.
Lord Falconer, *Doing Law Differently* (DCA, April 2006)

In this somewhat prolix fashion, Lord Falconer, then Lord Chancellor, explained the government's approach to criminal justice. The criminal justice system was in need of 're-engineering', and the catchphrase was 'speedy, simply, summary'. The approach was developed in a second paper, published three months later, *Delivering Simple, Speedy, Summary Justice* (DCA, July 2006). The aim was to improve the speed and effectiveness of Magistrates' courts, improve the performance of the Crown Court, and to move more low-level offences out of the court system altogether.

Thus the Criminal Justice Speedy Summary Justice (CJSSS) policy – 'a new way of working to encompass a simpler set of processes and procedures' – was born, and in the years since then the various criminal justice agencies have been required to implement it. It is reflected in the Criminal Justice Strategic Plan for 2008–2011, and supported by Public Service Agreement (PSA) 24 which requires the relevant government departments to '[d]eliver a more effective, transparent and responsive criminal justice system for victims and for the public'.

In attempting to improve efficiency the CJSSS strategy was, of course, not new. For two decades or more successive governments have sought to increase the throughput of criminal cases, initially in response to a rising crime rate and increased numbers of arrests and latterly, during a period in which the crime rate has declined, to reduce costs and increase public confidence. In some respects this has been successful. Generally, criminal cases are dealt with much more quickly in England and Wales than in many other jurisdictions including others in Europe. The speed with which cases are dealt with not only brings, at least potentially, economic savings and benefits for the victims of crime, but can be to the advantage of defendants, especially those who are remanded in custody.

However, speed and efficiency also carry with them dangers in terms of ensuring fairness and securing justice for all interested parties. The dangers are particularly acute when a policy of speed and efficiency is coupled with that of increasing the number of convictions, and even more so at a time when the crime rate has been declining. The Narrowing the Justice Gap strategy, launched by the government in 2002, set a target of increasing, in absolute terms, the number of offences brought to justice to 1.25 million by 2007/8. The Home Office *Departmental Report 2008* (CM 7396, Home Office, May 2008) reported that between 2002 and 2007 crime had fallen by 16 per cent, whilst the number of offences brought to justice had increased to 1.45 million in 2007, exceeding its targets in both cases. The number of arrests, on the other hand, had only increased marginally over the same period.

As has been noted elsewhere, one way of squaring this circle has been by increasing the number, and proportion, of non-court disposals such as cautions and fixed-penalty fines – a strategy that has been the subject of increasing critical scrutiny. Another, complementary, approach has been to make convictions easier by adjusting rules of evidence. Both strategies have fundamental implications for the adversarial nature of the criminal justice process in England and Wales. Since the creation of 'modern policing' in the nineteenth century, the adversarial tradition in England and Wales has been premised on the basis that criminal proceedings involve a contest between the individual and the state. The individual is to be presumed innocent unless and until the prosecution can establish their guilt before a neutral judicial tribunal. In recognition of the fact that, in terms of powers and resources, this is an unequal contest, the prosecution have to establish guilt to a high standard of proof, and are subject to an obligation of pre-trial disclosure that exceeds that of the accused. Furthermore, since those who decide the facts at trial are normally lay people, certain evidential rules are necessary to insulate them from evidence that, whilst prejudicial, is not necessarily probative.

Such principles do not sit easily with the managerialist objectives of

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speed, economy, and efficiency. However, rather than recognising those tensions, the government has chosen to ignore them. One can look in vain for evidence that they have been considered in the mountain of consultation papers, strategy documents, performance indicators, etc., that has accumulated since the current government came to power. Despite his ambition to 're-engineer' the criminal justice system Lord Falconer made no mention of the challenges to adversarial principles, and neither did the subsequent document establishing the CJSSS. The criminal justice strategic plan emphasises the need for efficient mechanisms for 'bringing offenders to justice', a very different thing from ensuring that justice is done, and none of the five performance indicators against which PSA 24 is measured are concerned with ensuring respect for the rights and interests of those accused of crime.

In this brief article, three examples of the abandonment of adversarial principles, and the consequent damage to the prospects of fair trial, will have to suffice although many more could be cited. First, using the motif of 'rebalancing the system in favour of victims, witnesses and communities', the powers of the police in respect of citizens who have not been convicted of any crime have continually increased. In 2006 police powers of arrest were extended to all offences (Police and Criminal Evidence Act 1984, s. 24, as amended by the Serious Organised Crime and Police Act 2005, s. 110). As a result of a series of enactments since 2003, the police now have the power to release an arrested person on conditional bail at any time without them having been charged with any offence. Such conditions, which could include a curfew, a condition of residence, and/or reporting to a police station on a regular basis, are almost unlimited in scope. There is no time limit on the period for which bail can be imposed (and it is not uncommon for bail to be imposed for repeated periods of six months), and whilst the conditions can be challenged in court the decision to place a person on bail cannot (see *R (C) v Chief Constable of A and A Magistrates' Court* [2006] EWHC 2352 (Admin)). The courts have repeatedly confirmed that the threshold of suspicion for a person to be arrested is very low. Thus the police have the power to limit the freedom of people in respect of whom there is little evidence that they have committed an offence for extended periods of time without adequate judicial oversight. The presumption of innocence rapidly wears thin, and the potential pressure on a person to accept an out-of-court disposal is self-evident. The adversarial balancing mechanism, which places an unequal obligation of disclosure on the prosecution, has all but been dismantled. This process was started by the previous Conservative government which, by the Criminal Justice and Public Order Act 1994, effectively abolished the right to silence of suspects and accused and by the Criminal Procedure and Investigations Act 1996, requiring the accused to disclose their defence prior to trial in the Crown Court. The former has been enthusiastically enforced by certain members of the judiciary who have embraced the managerialist agenda and effectively equated silence at the police station with guilt (see *R v Howell* [2003] EWCA Crim 1, *R v Hoare and Pierce* [2004] EWCA Crim 784 and, more recently, *R v Essa* [2009] EWCA Crim 43).

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The second example is the increased pressure on suspects to disclose their defence to the police at a time when the latter are under no obligation to disclose anything to the suspect other than the grounds for their arrest. This abandonment of adversarial principle has been given a significant further thrust by the Criminal Procedure Rules 2005, created under the authority of the Courts Act 2003. The Rules have, in effect, extended the obligation of pre-trial disclosure by the defence to magistrates' court cases but, even more importantly, require defendants and their lawyers to assist in the efficient management of the trial process including by early identification of the issues (Criminal Procedure Rules 2005, rules 1 and 3.2). The Court of Appeal has gone so far as to hold that a defendant is now under an obligation to give advance notice to the prosecution of weaknesses in the prosecution case (see *R v Gleeson* [2003] EWCA Crim 3357).

The third example is the change made to the power of the prosecution to introduce evidence of a defendant's previous misconduct, introduced by the Criminal Justice Act 2003 Part 11. Previously, the jury or magistrates were not permitted to know of a defendant's previous convictions or other misconduct

during the course of a trial because it was understood that this may interfere with evaluation of the evidence regarding the alleged offence (although there were exceptions where there was an evidential nexus between that previous misconduct and the offence charged). The previous misconduct provisions are complex but they can result, for example, in a person who pleads self-defence or who, in the charged atmosphere of a police interview, accuses the police of assaulting them, of having their previous convictions – or even simply previous arrests – used against them at trial.

So we have now what may be described as 'adversarialism lite'. The police have extensive inquisitorial-style powers over suspects but with none of the safeguards, such as judicial oversight, found in many inquisitorial jurisdictions. A person can be arrested on the basis of scant evidence and subjected to months of restrictions reminiscent of control orders. Even before the prosecution is obliged to inform them of the evidence against them they must disclose their defence or risk their silence being used as evidence of guilt. They must assist the prosecution by pointing out errors and weaknesses in the case against them, and frequently their previous misconduct – widely defined – may be used against them even though its relevance is tenuous. As with other 'lite' products, the criminal justice process continues to have the form of adversarialism, but it is increasingly devoid of many of its essential ingredients. ■

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