CRIMINAL JUSTICE REFORM IN ENGLAND & WALES

THE RIGHT HON. LORD JUSTICE AULD*

Despite the general heading given by the programme to my talk, "Criminal Justice Reform in England & Wales", I do not think it would be of value to this conference to attempt in half an hour even an outline of my work on the Criminal Courts Review. Its terms of reference were wider than those of your Working Group. There are significant differences between our systems in constitutional terms, in the way in which our systems of criminal justice are structured and organised and, I believe, in the intensity of the political debate attending proposals for reform.

As to the last, I may be wrong, but I sense that here the subject does not engender so much passion. Maybe that is because your Constitution gives you a stability and security that deters the constant and restless urge to change that seems to beset us.

Another reason why I should stray from my brief is that much has happened since I submitted my report some 15 months ago. There has been a further period of public consultation. I took little or no part in that. Last July the Government produced a White Paper indicating its acceptance of the majority of my 300-odd recommendations and its further consideration or rejection of others. Yesterday, the Home Office published a Criminal Justice Bill, some 360 pages long and to which there are already–I am told–over 1,000 proposed governmental amendments. And there is, I believe, a draft Courts Bill, for which the Lord Chancellor is responsible, to re-structure part of our system of criminal courts. But I have not seen that. Like Sam Goldwyn, I never prophesy, especially about the future. There is certain to be a

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rocky passage in both our Houses of Parliament for whatever criminal justice reforms are proposed.

For those reasons, I hope that you won't mind if I use this slot as a warm-up act for this first, essentially comparative law, session, "Fixing the Jurisdiction"–the small bore before the big guns, who will shortly tell us how criminal work is allocated in Northern Ireland, Scotland and England and Wales.

It is flattering of you to invite us all here to compare notes on the different ways we go about it. But we should, of course, be cautious about the comparisons. Each of our systems is in large part a prisoner of its own constitutional, juridical and cultural traditions. I have already touched on the fact that the Republic of Ireland is unique among the four of us in having a written constitution, one moreover that contains an entrenched provision for trial by jury for all but minor offences or those triable by special courts or military tribunals.

In England and Wales, we also are unique, not just among the four jurisdictions represented here–but, I believe, throughout the world–in the extent to which we rely on lay magistrates to deal with minor criminal offences. There are over 30,000 of them, handling, alongside District Judges, the vast bulk of criminal cases coming before the courts. Another important difference is the strong survival in England and Wales of the tradition, once common to all of us, of High Court Judges regularly covering the country on circuit. As I shall mention in a moment, that has a profound effect on the way in which both High Court and circuit judges are deployed and the allocation of work among them.

Quite apart from such differences, tread warily in your comparisons with us, because we are far from sure that we've got it right.

And yet exchange of information on specific procedures or mechanisms can be valuable, as I found in my Review. The composition of courts, including that of juries and the way in which they work, is a fruitful area for

comparison. So also is the possible scope for trial by judge alone, as in your Special Criminal Court and in the Diplock Courts in the North, or at the defendant's option, as in many states of the USA and in Canada and New Zealand.

The subjects of some of the following sessions in this conference might also even benefit from comparison with some civil law systems. That is not so airy-fairy as it may seem. European systems and ours are closer than is commonly recognised The judicial styles are undoubtedly different, but there is a gradual trend of convergence in procedures. I should mention a study, hot off the Cambridge University Press, *European Criminal Procedures*, by Professors Delmas-Marty of Paris 1 and John Spencer of Selwyn, Cambridge. It is a highly practical and detailed comparison of procedures in Belgium, England and Wales, France, Germany and Italy. It demonstrates, as the authors say, that:

> ... the history of criminal procedure in Western Europe is in a sense the story of each tradition borrowing the other's ideas, either with or without attribution; and … by a series of conscious refroms, the different systems in the Romano-Germanic tradition have swallowed larger and larger doses of the common law.[1]

Returning to "Fixing The Jurisdiction", I am not going to pre-empt Christopher Pitchers' talk by attempting any orderly description of our system of allocation. He is far better qualified than I to talk about it, not least because he has had to work within it both as a senior circuit judge responsible for a busy Crown Court centre and now, happily, as a High Court judge. Nor, for the reasons I have given, shall I bore you with a general account of our fumbling attempts at comprehensive criminal justice reform in this field. It would be largely irrelevant to allocation of work as it is or might be in Ireland.

Perhaps the best thing I can do is suggest what seem to me to be general purpose aims of any system of criminal

[1] Delmas-Marty and Spencer, *European Criminal Procedures*, p. 3.

justice in the way it allocates work between judges. Some of them are complementary to each other and some are capable of conflicting with others. Here is my list, in no order of priority: 1) a proper match of judges to work; 2) flexibility; 3) simplicity; 4) consistency in procedures and sentencing; and 5) a judicial career progression and the provision of a suitably experienced appellate court.

1) and 2). I can take the first two together. There should be a proper match of judges to the type and importance of the cases they try. This is another way of saying that there should be sufficient flexibility in the system to achieve that goal. I shall spend most time on this aspect because our experience in England and Wales is that it is extremely hard to get the right balance. The aim should be to allow for overlap at the margins of jurisdictions as to the capabilities of judges and as to the importance of categories of cases, so as to achieve, on a case by case basis, a proper match of judges to work. Paradoxically, in England and Wales, as a result of our blurring of the lines between the jurisdictions over the years, we have both inflexibility and too much flexibility, either of which variously results in match or mis-match of judges to work.

This phenomemon manifests itself in an over-rigid divide between Magistrates' Courts and the Crown Court, often making the defendant rather than the court the arbiter of where he is to be tried. More relevantly to the Irish system, it affects the types of cases that High Court judges, circuit judges and part-time judges (recorders) can try in the Crown Court and as to where and when they can try them.

In a system in which the same judges may try, according to the demands of the list, crime, civil and family work, this can also have a harmful knock-on effect on the latter two jurisdictions. There are, in addition, difficulties in projecting workloads and how many judges of what level or experience will be needed to deal with them. Under-estimation of both or either, failure because of Treasury constraints to budget sufficiently for either, or

inability, because of undue rigidity in the appointments process, to time new appointments to meet workloads, all add to the problem. These are areas, vital to efficient case management, in which close liaison between judges nominated for the purpose and administrators is vital.

You, like we, have three main levels of first instance courts for the trial of crime. Now, it may assist an orderly and administratively efficient operation of the system to permit some judicial overlap at the margins to meet the variations in the flow and concentration of work. But if such "operational considerations" begin to dominate the working of the system, it can, as I have indicated–perversely–result in a mis-match of judges to work.

Unless the judges keep a firm eye on the way things are working, the system can be driven by administrative imperatives of listing targets and key performance indicators, which often have more to do with quantity than quality of justice. Most usually this takes the form of tying up the more senior judiciary on work that could perfectly well be done by judges at a lower level. Or it can result in judges trying cases for which they are not suited or sufficiently experienced, thereby lengthening trials and/or engendering unnecessary appeals. Both are not only a waste of judicial resources, but also put justice at risk.

A further consequence may be a neglect of judges' normal jurisdictions. A worrying example of this in our system flows from the widespread authorisation of experienced circuit judges to try rape cases and public law child care cases, which would otherwise require High Court judges. The result is that many of them have a non-stop diet of sex–at the expense of medium to heavy crimes of violence and dishonesty, for the prompt despatch of which they are primarily responsible. Others may similarly be distracted from their mainstream work by months on end trying heavy and complex cases that the High Court judges should, but have not time to, try.

This is a problem in all criminal jurisdictions because of the volatility in criminal work loads of the courts and because many of our criminal judges sit in civil and/or family as well as crime. It has certainly been a problem for us, with our relatively rigid circuit system for Queen's Bench judges. The aim is to provide them with suitably heavy criminal or civil work to justify their visit to any particular court centre. But it needs to be of sufficiently short duration to ensure that they do not overrun their allotted period there, normally a maximum of about six weeks.

Murder cases, the staple diet of High Court judges, are often no more difficult to try than the average case of grievous bodily harm handled daily by circuit judges, the only difference being that the assault has resulted in death and there is mandatory life sentence on conviction. We now have a system of release, by circuit presiding judges (that is, High Court judges appointed for the purpose), of murder cases to specially authorised circuit judges, on a case by case basis, which is widely used.

But outside London, much very simple and straightforward murder still takes up the time of High Court judges when they could be better employed doing heavy and complicated crime of a different sort, or dealing with civil and administrative law work of importance, either on circuit or back in London. Only at the Old Bailey, technically a Crown Court centre on the South Eastern Circuit, do all the judges have an authorisation to try murder, and routinely do so, leaving only the very high profile or particularly difficult cases for the High Court judges who visit it as if on circuit.

I believe that in Ireland, in the north and the south, and in Scotland, there is not the same circuit system for High Court judges as we have and that, in the Republic at any rate, High Court judges, without exception, presently try all cases of rape. So the potential for remedying or worsening any mis-match of judges to work in such cases may be more predictable and controllable. Nevertheless, loosening jurisdictional rigidities, or the way in which work is allocated

on a discretionary basis within them, may still have a number of knock-on effects of the sort that I have mentioned.

On the other hand, such loosening, at least on a discretionary basis, can become a useful engine for more general and formal jurisdictional change. Rather like the discovery shortly after Suez that Egyptians could pilot ships through the Canal just as well as the British, so judges at a lower level may be or, with training, become, just as competent as their formal superiors in trying certain sorts of crime, if given the chance. Good examples of this, as it happens, are in the trial of murder, rape, and also in complicated fraud and smuggling cases.

On the strength of that experience, I recommended in my report that there should be a formal and significant shift in the balance of heavy circuit work from High Court judges to the more experienced circuit judges. I proposed that all work within the jurisdiction of the Crown Court should be triable by a circuit judge unless, on referral to a circuit presiding judge, he specially directed a case to be tried by a High Court judge. I am not sure how popular that will be with those High Court judges who enjoy their regular trips on circuit. The Government's response, in its White Paper, has been to accept the recommendation in principle and pass the buck to the Lord Chief Justice.

I should not sit down without touching briefly on the other and more straightforward general aims of a system for fixing jurisdiction.

3) Simplicity–This is potentially an enemy of flexibility and proper match of judges to cases because the simplest way, certainly administratively and for those exposed to the system on a day to day basis, is the rigid way. Certain types of cases go to certain courts and types of judges, and that's that. However, since the commodity here is justice, that sort of rigidity is no longer an option. But, whatever changes or relaxation in jurisdictional boundaries are contemplated, the aim should, of course, be to keep it as simple as possible–for everybody's sake.

4) Then there is consistency, particularly in procedures and sentencing. As I understand it, in 1991 the Irish Circuit Bench lost their jurisdiction to try rape and cognate offences, in part because of concern as to their sentencing practices, including lack of consistency.

I do not know whether you have a system in which your Court of Criminal Appeal uses certain appeals as a means of issuing general sentencing guidelines. We do. They are normally given by the Lord Chief Justice or the Vice-President of the Court of Appeal, Criminal Division, and they form a prominent part of our Judicial Studies Board's training of new judges and periodic refreshing of judges in post. We have one for rape and there are others for other offences. The scheme is to indicate a normal starting point on a conviction–in rape it is five years–and suggested scales of increase for certain aggravating circumstances.

In addition, as Christopher Pitchers will tell you, it is now a condition of authorisation of every circuit judge to try rape and serious sexual offences that he or she has received specific training from our Judicical Studies Board in such work. There is also an extensive sentencing encyclopaedia available to all judges trying these cases, containing not only the guideline cases but many cases illustrating their application. And, of course, excessive or unduly lenient sentences are policed by the Court of Appeal.

One way or another, the result is a reasonable level of consistency in sentencing in such cases by the circuit bench, who now deal with most of them, and by High Court judges. Without knowing what special problems you may have had with your Circuit judges' sentencing in this regard before 1991, my instinct is that, with appropriate training and guidance and suitable control by your Court of Criminal Appeal, the same could be achieved here. However, I am conscious from paragraph 6.2 of the helpful aide-mémoire prepared by Finbarr McAuley for this conference, that there are suggestions that the lack of "permanence" of that Court has led to inconsistencies in its jurisprudence.

5) That leads me–but from a different view-point–to the last of my main aims of a proper system of allocation of work, a judicial career progression and a competent Court of Appeal. It is vital that such a court, as the final court of appeal for most criminal cases, should be manned by judges all or most of whom have had experience at some time or other of trying and sentencing crime of all levels of seriousness.

For almost all aspiring judges in England and Wales, such experience will have begun at an early stage on appointment to sit as a part-time judge–a recorder or deputy District judge–a necessary first step on the ladder for anyone, whatever their specialisation and ability, for consideration for permanent appointment at any level.

Experience in trying and sentencing heavier crime comes the way of most circuit judges and all Queen's Bench judges. Each of the latter spends half his or her working year on circuit. Most Queen's Bench judges also gain considerable appellate experience in crime by sitting for a further quarter of each year as "wingers" to a Lord Justice in the Court of Appeal, Criminal Division. In addition to the Lord Chief Justice and Vice-President of the Criminal Division of the Court of Appeal, each Lord Justice who sits in crime also spends one quarter of his sittings in that Division of the Court of Appeal. I should add that we also have highly experienced circuit judges sitting as "left wingers" in some constitutions of the Court, bringing to it much valuable practical and up-to-date working experience of the trial and sentencing process at all levels of seriousness.

I say all this not to extol our system; there is much scope for improvement. But it is a way of structuring the career progression and jurisdictional patterns of criminal judges at all levels so that, if and when they sit in the Court of Appeal, there is a reasonable chance that they know what they are talking about.