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Reference Code:	2016/22/2178
Creation Dates:	28 October 1986
Extent and medium:	5 pages
Creator(s):	Department of Foreign Affairs
Accession Conditions:	Open
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Paper prepared for Nally/Armstrong meeting
London 29 October 86

Possible changes in the Northern Ireland Courts system
excluding three-judge courts

Changes in Mode of Trial

Like mixed courts and three-judge courts, all of the changes suggested below affect the mode of trial. None of them has yet been proposed on our side at official level and the order in which they are given does not necessarily indicate preference. Any one of them would have political advantages (their legal advantages or disadvantages need study). The return of jury trial in Northern Ireland has also been recently re-proposed in the Greer and White Book "Abolishing the Diplock Courts". However, we have recognised that this is a practical impossibility for the time being; and indeed the proposal for three-judge courts was based on that premise.

cc Hunter Mr Ward
Secretary Mr Russell
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London

Two-Judge Courts

Advantages:

This could be portrayed as a reform more in keeping with Northern Ireland tradition - courts of two magistrates or more were authorised under the Special Powers Act of 1922; fewer judges (half as many) would be needed; judgements would have to be unanimous and there would be less reason for speculation; Paisley's amendment to the EPA in 1973 was initially in favour of two judges - it was withdrawn in favour of the Rees amendment proposing three judges.

Objections:

The British would still see speculation as a problem, as well as procedural difficulties. Most important, the Lord Chancellor would be likely to see this proposal also as

reflecting adversely on the performance of members of the Judiciary. The lack of a third judge could result in deadlock and in the need for retrial in more cases, thus increasing delays in the court system. From our point of view, two judges are less satisfactory because there is less likelihood of a nationalist presence in the court.

Lay assessors

Advantages:

Lay assessors would help to counter unconscious prejudice in the judge. Presentationally, they could be seen as a "mini-jury".

Objections:

Lay assessors would be subject to intimidation, like jurors, but would provide an even more concentrated target. Considerable thought would have to be given to the method of selection, role, responsibilities and power of the assessors vis-a-vis the judge (lay assessors would be likely to be overwhelmed by the judge).

Magistrates

Advantages:

Magistrates would be less likely to be overwhelmed by the judge than lay assessors. Being magistrates, they would be less subject to intimidation than lay assessors.

Objections:

Few magistrates have experience of criminal trials on indictment. The magistrates' solution might be a very unsatisfactory half-way house between lay assessors and senior judges.

Temporary Judges

Advantages:

Temporary county court judges include serving senior barristers in Northern Ireland. These are people with the necessary experience and expertise. Appointment of new judges would not arise.

Objections:

The senior Bar in Northern Ireland is much too small to permit the use of senior barristers as temporary judges on an extensive basis. Moreover, senior barristers would find it very difficult if not impossible to combine such duties with their practice. Their present service as temporary judges is strictly occasional.

Other Possible Changes in the Courts

There are other proposals which do not affect the mode of trial, but which, if undertaken, would have an impact on the nationalist population and on international opinion as efforts to correct the imbalanced nature of the present senior bench in Northern Ireland. The changes below have been proposed at official level and have met a negative but not a final response.

Appointment of more Catholic judges

Advantages:

We have already proposed this; the British official attitude was negative but we have had no decision at British political level. At present, the Diplock Court is composed of 10 High Court and 13 County Court judges. Three of the High Court are Catholic, but only one of the County Court is Catholic. Thus, only four of the 23 man Diplock Bench are Catholic. New Catholic appointments would correct this imbalance. Nationalists would see the courts in a more acceptable light. The present argument that a nationalist is unlikely to get a fair trial in the Diplock Courts would be diminished. An increase in the number of judges would help in any event to reduce delays in the court system.

Opportunities could be taken as retirements arise to appoint Catholics to the High Court. At present, there is only one Catholic among the top four (Lord Justice and three Lords Justices of Appeal). This should be increased by one, which would bring the total ratio of Catholics:Protestants in the High Court to 4:6. Any absolute increase in the size of the High Court would require a statutory change which would take some time. No statutory change, however, is required to permit additional appointments to the County Court. This is where Catholics are most disadvantaged and where appointments should be made immediately. It is agreed between both sides that there is no shortage of meritorious Catholic senior barristers (although the British may argue that they are not likely to accept for financial and security reasons).

Objections:

The British have argued at official level that there is no objective need for additional judges - which is at odds with their own concern about delays in the system, which is reflected in Mrs. Thatcher's message to the Taoiseach.

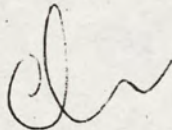
Second Senior Judicial Post

Advantages:

The Northern Ireland system is unusual in that the judicial control is exercised exclusively by one office, that of the Lord Chief Justice. (In the South and in Britain by contrast control of the judicial system is exercised by a number of judicial offices). This has led to the accusation that the system is controlled by unionists, since the office of Lord Chief Justice has been a unionist preserve. The Lord Chief Justice exercises the presidency of the High Court and the County Court under the Judicature Act, 1978. Why cannot these posts, or one of these posts, be allocated to a second judicial officer? It is our information that the lack of another judge to supervise the lists in Northern Ireland is causing delays and other problems in the system. Recently, in fact, Mr. Justice Carswell complained about these problems and announced that a High Court judge would be assigned to supervise the lists. Assuming this would happen, what Carswell was admitting was there was a need for something which could be described as a second senior judicial office.

Objections:

The Lord Chancellor and Lord Chief Justice would regard the change as politically directed.



Anglo-Irish Section,
28 October, 1986.