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Attached is a list of suggested reforms in the administration of justice in Northern Ireland which has been compiled in the Department of Foreign Affairs on the basis of recent contacts with a variety of legal sources on the nationalist side. This list is by no means exhaustive and can undoubtedly be extended and refined. It is suggested that the Cabinet Sub-Committee, which will meet on the afternoon of Thursday 6 February, may wish to look at this paper and to consider what instructions it wishes to give to officials in advance of the meeting of officials under Article 8 of the Agreement which is scheduled for London on the morning of 7 February.

We understood that, at the last meeting of the Cabinet Sub-Committee, the Attorney General undertook to prepare a memo on the subject of the Convention on the Suppression of Terrorism.

Eamon O Tuathail
Anglo-Irish Section
5 February 1986.

SECRET

Proposed reforms in the Administration of Justice in Northern Ireland

The possibility of introducing mixed courts in both jurisdictions for the trial of certain offences has been signalled in Article 8 of the Agreement and will be pursued in the Working Group on the administration of justice.

The following are a number of other proposals for reforms in the administration of justice which have been assembled from legal sources on the nationalist side in Northern Ireland as well as from the Baker Review, the SDLP document on justice and the review of the EPA carried out by the Standing Advisory Commission on Human Rights.

1. Introduction of three-judge courts

The essential purpose of introducing three-judge courts would be to respond to the widespread concern, voiced in particular in the minority community but also elsewhere, that a one judge Diplock Court is inherently unsatisfactory. There is no assistance to or qualification of the judge's assessment of evidence, witnesses etc. Judgements can appear intuitive in method and subjective in result.

The three-judge court would deliver a single judgement (as in the Special Criminal Court in the South). A variation on the three-judge proposal would be to have lesser offences tried by a two-judge court and the more serious offences by a three-judge court.

It has been suggested that the additional judges which this reform would call for should be provided by increasing the number of judges in the High Court. (Under the Judicature (Northern Ireland) Act of 1978, the maximum permissible number of High Court judges is ten. With the appointment of Michael Nicholson, this figure has now been reached). An increase in

the number of High Court judges is probably not in itself a complete answer to the problem. The High Court has a very substantial workload on the civil side which new appointees would have to share, thereby limiting the scope for assigning them (often for months on end) to Diplock Court work.

The best option would seem to be to draw judges for three-judge courts on a mixed basis from the High Court and the Crown Court, with a High Court judge presiding in each instance. This would require an increase in the number of judges in both the High Court and the Crown Court.* In the former instance, two extra ordinary judges and two extra Lords Justice of Appeal might be aimed at, i.e. a total of four extra judges. Thus, there would be a total of fourteen judges in the High Court - eight ordinary judges and six Lords Justice of Appeal. In the case of the Crown Court, there may also be a need to supplement the existing total of twelve. A possible increase could be of the order of three.**

It may be noted that the option of using Magistrates is less favoured as the present magistrates are seen by nationalists as overwhelming unionist and prejudiced: some, indeed, are regarded as being in the "hanging judge" category. There is a further possibility, that of using lay assessors. However, lay assessors, like jurors, could be seriously open to intimidation.

2. Descheduling of offences

The purpose of this reform would be to narrow the range of offences currently tried in the Diplock Courts by excluding certain lesser categories (common criminal offences without an obvious terrorist motivation) and by having the latter tried by jury.

Some progress is already evident in this respect. The British Government announced on 16 January the de-scheduling

* Crown Court = criminal division of County Court
** It is intended that the figures in this para. should be presented in an exploratory fashion rather than in categorial terms.

of certain lesser offences. This action was taken in the light of the Baker Review of the operation of the EPA. It was also indicated that changes in relation to other aspects of the EPA would follow during the lifetime of the present Parliament.

At present it is a matter for the DPP in "borderline" cases to determine whether or not an alleged offence should be regarded as scheduled and to recommend accordingly to the Attorney General. The defendant has no right of appeal to a judge in this matter. In future the defendant could perhaps be given the right to contest any decision made by the DPP with which he is unhappy by making a personal application for de-scheduling.

3. Reduction in the length of time spent on remand

Control over the remand period should be tightened by refusing adjournments and by guaranteeing bail within a specified period and without surety. The specified period should be in the region of six to nine months (Baker has proposed one year and the SDP/Liberal Alliance have proposed 110 days on the Scottish model).

A modification in the bail procedure which would have symbolic value (even if its practical effect were slight) would be to transfer to the prosecution the onus of proving the case against granting bail. At present, it is statutorily provided for under the EPA that the defence must prove the case in favour of bail. (This is a feature of the Diplock Courts only and does not apply under common law). In order to obtain bail for his client, Counsel for the defence must prove that the following conditions are satisfied:

- the defendant will turn up for trial;
- he must undertake not to interfere with witnesses;
- the offence is not a very serious offence.

A decision to apply in the Diplock Courts the principle of 'innocence until proven guilty', by transferring to the

prosecution the onus of proving the case against bail, would be a useful gesture in improving the atmosphere of the Northern judicial system.

4. Reduction in the length of time spent awaiting trial/appeal

The frequent delays in the bringing of a case to court in Northern Ireland are due primarily to the shortage of judges and to administrative problems such as the availability of suitable courts. We are aware that there may be other causes of delay such as the defendant's wish to be represented by a particular counsel (e.g. Desmond Boal in the case of many Provisional IRA defendants).

An increase in the number of judges (as proposed above) would help to relieve congestion.

The desirability of granting requests for adjournments only in the most serious and pressing circumstances might also be emphasized. Allegations have been made in the past that adjournments have occasionally been granted in Diplock trials for blatantly political reasons.

[Proposals of particular relevance to "Supergrass" trials:]

5. Suspension of present practice of prosecuting on the basis of uncorroborated accomplice evidence.

The practice of prosecuting cases which depend solely on uncorroborated accomplice evidence should be quietly suspended.

This could be a matter for administrative decision by the DPP rather than for legislation. The difficulty with legislation is that there could conceivably be occasions when the evidence of an accomplice, even if uncorroborated, could amount to proof beyond a reasonable doubt and would be seen as such by the public. The best approach would be for the present administrative practice of prosecuting on the basis of such evidence to cease save in very exceptional circumstances.

In the event that this suggestion is not acted on, there should be, as an absolute minimum, an indication that there will be no further grant of immunity to supergrasses who have committed murder or other serious crimes.

6. Avoidance of practice whereby judges take both the preliminary hearing and the trial itself

In some "supergrass" cases (e.g. Kirkpatrick), the judge has taken both the preliminary hearing and the trial itself. In other cases, the preliminary hearing has been taken in a Magistrate's Court. The latter formula is preferable as it allows some element of a second opinion to be introduced into the proceedings.

7. Reduction in the number of defendants

The introduction of a ceiling on the number of defendants in a given trial is in principle desirable, as it is questionable whether judges presiding over trials involving 20-40 defendants are in a position to exercise in every instance the care and discrimination required in order to ensure that justice is done. There is a danger of judges becoming "case-hardened". (Note: A ceiling would also tend to inhibit the use of "supergrasses" (since involvement in a large number of trials would expose the latter to greater strains).

However, too hard-and-fast a rule in this regard it might prove problematic. A legislative provision limiting the number of defendants to, say, six would run into difficulties if, say, eight defendants were charged with the same offence and in relation to the same incident: there would have to be two separate trials and a similar outcome in each could not be guaranteed. It would be better to introduce a ceiling purely as an administrative practice. This ceiling could be in the region of six (as recommended in the SDP/Liberal Alliance report), though higher figures of 10 (Lord Gifford in 1984) and 20 (Baker Review) have also been mentioned.

Another approach would be to limit each trial to one incident only. The "supergrass" trials have been unsatisfactory not merely because they involved so many defendants but also because they have involved in many cases a multiplicity of incidents which have ranged widely in time and type of offence. Separate trials for each incident would, of course, impose an additional burden on the court system but the appointment of additional judges should take care of the problem.

8. Appointment of more Catholic judges

Our information (which has not been exhaustively checked) is that the highest proportion ever achieved by Catholics on the High Court has been one-third of the total at a given time. The proportion has usually been much lower, e.g, as low as 1:8.

With the appointment of Michael Nicholson to the High Court, the number of Catholic members will stand temporarily at three but will fall to two within a few months following the retirement of Lord Justice O'Donnell. In the present court of 10 High Court judges,four Catholic members would be a fair number. If four additional places were to be provided on the Bench, making 14 in all, six Catholic judges would be a fair proportion with two of these serving as Lords Justice of Appeal. Despite suggestions in the past that senior Catholic QC's would be unwilling to serve (for a mixture of financial and security considerations), it is understood that there are quite a number of suitably qualified Catholic barristers who are not merely ready, but eager, to serve. Catholics constitute about 50% of the senior bar and several of the leading candidates for the High Court are Catholic. We are reliably informed that, following the Anglo-Irish Agreement and notwithstanding the undoubted security problems, Catholic barristers will serve on the Bench if properly asked.

At present, one of the four High Court judges who comprise the Court of Appeal is a Catholic (O'Donnell, - who will be

retiring soon). As indicated earlier, the membership of the Court of Appeal should be increased by two and of the new total of six Lords Justice of Appeal, as suggested, two should be Catholics.

If more Catholics were appointed as ordinary judges of the High Court and as Lords Justice of Appeal, other Catholic barristers would hopefully be encouraged to take up posts on the Crown Court (where there is only one Catholic judge at present). As indicated earlier, the present total of 12 judges on the Crown Court could perhaps be increased by three. Of the new total of fifteen, six Catholics would be a fair proportion to aim at.

9. Shared control of the Court system

The Lord Chief Justice is President of the Appeal Court, High Court and Crown Court. In this triple capacity, he effectively controls the administration of the entire system. In our view, the appointment of a separate person as President of the High Court (as in the South) would be a very justifiable reform if it were understood that, in the event of the Lord Chief Justice being Protestant, the Presidency of the High Court would go to a Catholic. In terms of control of the Court system, the Presidency of the High Court could well be the more important post from a nationalist viewpoint. The President could, for example, decide which judges take which cases and could have a say in relation to future appointments to the Bench. (At present, all appointments are made by the Lord Chancellor following advice by the Lord Chief Justice).

The possibility could also be considered of having a third personality as President of the Crown Court (as in our President of the Circuit Court) and this would allow further flexibility in arranging for balanced representation of both communities in the judicial area.

10. Oaths and symbols

Northern QCs upon appointment, take an oath and make a declaration. The oath is an oath of allegiance to the Queen, while the declaration relates more to the proper performance of the office. In the view of several legal sources, there is no reason for maintaining the oath since QCs are no longer (as in the past) regarded as servants of the Monarch. It is understood that the oath is simply a practice which would be dispensed with, i.e., that legislation would not be required to abolish it. The declaration is not as sensitive an issue but nevertheless causes resentment as it contains archaic references to "truly serving the Monarch". While there may be a legislative requirement for the declaration, it could possibly be redrafted without amending the law.

Secondly, jurors and coroners are sworn in with an oath which refers to "our sovereign Lady the Queen". The terms of this oath should be modified.

The judge is introduced in court by his crier who calls out "all stand - God save the Queen" at the opening and closing of the day's session. The reference to the monarch could be dispensed with.

Anglo-Irish Section
5 February 1986.