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Prime Minister
Useful support
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PRIME MINISTER

ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

file with CDP

I have seen the Lord Chancellor's Memorandum to you dated 22 September. For the reasons he gives both I and the Solicitor General agree that the administration of criminal justice in Northern Ireland would be seriously harmed if the Northern Ireland Secretary's proposal were adopted. We also think that public confidence in the system would be lessened rather than increased, for the reasons given by the Lord Chief Justice of Northern Ireland in his Memorandum to the Lord Chancellor of 4 August and his letter to the Northern Ireland Secretary dated 11 September, both of which were copied to me. I attach copies. We fully concur with each of these.

already seen

I wish to add that in my view the Black case is irrelevant to this issue. If there are serious disadvantages for the administration of justice in three-Judge courts (and there are), they are not lessened by the judgment in that case. Black illustrates the fairness of the present appellate system (the delay in hearing the appeal was due to the immense scale of the proceedings, the appeal hearing itself lasting from 13 January to 1 May and the judgment at first instance running to 423 pages). As the Lord Chief Justice himself said in the Appeal Court's judgment: "... experience in Northern Ireland has shown how much greater in a Diplock trial are the appellant's opportunities of persuading the court to interfere than when the appeal is from the sphinx-like verdict of a properly directed jury, which does not have to give reasons for its verdict." If the case points in any direction other than towards that fairness, it may be towards eschewing further prosecutions

/where

where the case depends mainly on the uncorroborated evidence of an informer. But that is a quite different issue.

I agree that we have to take account of what are nowadays called "perceptions" about the administration of justice. It is our opinion, however, that if this proposal is adopted, a most adverse "perception" will become widespread; namely, that notwithstanding the considered opinions of Diplock, Gardiner and Baker (the latter quite recent) the British Government in order to tempt the Republic into doing what they have already undertaken to do, and not for juridical reasons, has yielded up the principle of three-Judge courts in advance. And with the implication of more to come, for the proposed limitation to certain scheduled offences will apply only "in the first instance".

From our close acquaintance with those responsible for prosecutions in Northern Ireland, and with the Judiciary, we are sure that to adopt the proposal would have a very bad effect on morale - and therefore efficiency - in both quarters. We endorse in particular what is said by the Lord Chief Justice about the feelings of the Judges, upon whose steadfastness so much continues to depend.

I am copying this minute to the Lord President, Lord Chancellor, Foreign and Commonwealth Secretary, Home Secretary, Northern Ireland Secretary and Sir Robert Armstrong.

MH

25 September, 1986

MEMORANDUM FROM LCJ OF N. IRELAND TO LORD CHANCELLOR

Non-jury trial of Scheduled Offences

INTRODUCTION

1. The mode of trial since 1973 has been by a single judge without a jury. Two-judge or three-judge courts ought to be resisted on three grounds, judicial, administrative and political, as set out below. I also refer to the following appendices:

1. Diplock Report 1972 paragraph 39;
2. Gardiner Report 1975 paragraphs 30-33;
3. Baker Report 1984 paragraphs 109-126;
4. Note dated 23rd May, 1973;
5. Note dated 15th November, 1983;
6. Copy letter L.C.J. to P.U.S., N.I.O., dated 4th August, 1986.

JUDICIAL GROUNDS

2. Our system is unsuitable for collegiate trial of fact, including rulings on admissibility and procedure. This drawback is greater if the presiding judge, as he should be, is merely first among equals.

3. Single judge trial is accepted in civil cases, where serious imputations are often made and very important issues must be resolved on a balance of probabilities, which increases the difficulty.

4. In a jury trial one judge already takes sole responsibility for two issues which may decide the outcome:

1. the existence of a case to answer; and
2. admissibility of evidence, including the statements of the accused.

He should continue to do so in a non-jury trial.

5. The different views which the members of a plural court could take on the matters in paragraph 4 would create irreconcileable difficulties in considering the evidence.

6. The need for the "safeguard" of a plural court is negatived by the paucity of examples of allegedly wrong or doubtful convictions and also by the unfettered right of appeal.

7. The argument of "safety in numbers" applicable to a lay jury, does not apply to a judge whose full-time duty is to reach conclusions upon evidence.

8. There is no true parallel between trial and appeal, where the matters for decision are legal propositions and the trial judge's performance.

9. Sole responsibility for a conviction is probably a greater protection for the accused than shared responsibility.

10. Trial by a plural court could result in superficial treatment of some issues or, alternatively, agonising and lengthy discussion, and could make it difficult to produce a judgment based on reasoning in which all or a majority concur. This could also lead to less detailed written judgments which would be less open to analysis on appeal to the detriment of appellants.

ADMINISTRATIVE GROUNDS

11. To provide enough plural courts would place an intolerable strain on judicial resources and eventually on the quality of the Bench. Nearly all the appointments would of necessity be in the High Court, since not enough competent persons would be available for the county court. This fact would accentuate the depletion of the Senior Bar and would imperil its ability to provide adequate representation for those accused of scheduled and other offences. Good cross-examination is a crucial factor in relation to admissibility of confessions and to the evidence of informers.

12. With the great increase in civil business, the manpower situation is even worse than when Diplock, Gardiner and Baker discussed the problem.

13. Trials would take longer and this would exacerbate the problem.

14. To remove some offences from the schedule would not help, unless they were made summary offences, because the same judges, counsel and courts would be required. And the kind of offence which might be descheduled is at present the subject of a short trial or a plea of guilty.

15. The suggestion that plural courts would be safer for judges is unwarranted and, with regard to cases which may involve special risk, it would be pointless to endanger more than one judge.

16. To confine plural courts to a limited category would not make sense, since the political demand would centre on the complex or

important case, which would be just the least suitable for this mode of trial.

POLITICAL GROUNDS

17. Plural courts would not increase public confidence (assuming for the sake of argument that confidence is lacking in persons whose confidence could by any means be either won or restored). Their adoption would promote argument as to whether cases had been properly tried up to the present and would lead to speculation as to the motives inspiring the composition of each judicial "team" and about the real or supposed differences of opinion among the judges constituting each court.

18. It would be a political mistake to use plural courts as a means of "reassuring the minority" while disregarding the effect on the majority and also a mistake to think that, because Mr. Paisley in Committee voted for three judges in 1973, the majority would be politically content with that now, having regard to the clamant demands of Mr. Mallon and the Government of the Republic for three judges.

19. To acknowledge a deficiency in the one-judge system, and thereby to admit that H.M. Government was wrong in 1973 and 1975 (and indeed in 1978 when renewing the Northern Ireland (Emergency Provisions) Act), would be a pointless concession of which full advantage would be taken.

20. "Public confidence" (an elusive concept) could actually be reduced by the judicial and political shortcomings of the plural method which I have listed.

21. It would be confusing the shadow with the substance to concede three-judge courts in the hope of winning a supposedly valuable benefit from the Government of the Republic. They will confer no benefit (since it is scarcely in their power to do so) that would not be far outweighed by the detriments listed above.

CONCLUSION

22. Single-judge trial has served us reasonably well for 13 years. It could be regarded as folly, both judicial and political, to change it in the face of the decision in 1973 and the advice consistently tendered to H.M. Government.

23. The administrative arguments, even if not the most important, are by themselves well-nigh conclusive against a change.

24. No judge has asked to be relieved of the "burden" of sitting alone. There is, indeed, acute awareness of the different burdens which sitting in a plural court would involve.

25. The justice of the present system, having regard to the usual level of acrimony of political argument here, has scarcely been called in question, but a change would not only put its justice in issue but lead to a whole new set of complaints and problems.

LOWRY

LORD CHIEF JUSTICE
NORTHERN IRELAND

ROYAL COURTS OF JUSTICE
BELFAST
BTI 3JF

SECRET

11th September, 1986

Dear Secretary of State,

I would first repeat my thanks for the frank and courteous way in which you told me on Tuesday evening of your intention to propose to Cabinet colleagues the adoption of 3-judge Diplock courts either generally or in selected cases.

I took the opportunity of reminding you of the view of the Lord Chancellor and the Law Officers, which had in each case been confirmed to me last week, and of my own unqualified opposition to the change. As promised, I sent you yesterday a copy of the file which on 4th August I submitted to the Lord Chancellor. There are, however, some important points which I wish to emphasise.

None of the judges wishes to have his burden "lightened" by sharing it at first instance. We all consider that the intellectual, emotional and political strain in any worthwhile case would be increased by 3-judge courts. If we are thought to have done adequately so far, the best way to acknowledge this and to refute the arguments of our detractors would be to maintain the system which has worked for 13 years. No matter what language is used to introduce a change, this will be generally seen (and felt by the judges) as a humiliation and a recognition that something is amiss. The standing and morale of the Bench will suffer. I believe I could endure this more easily than most, and at least I would know that I had done my best to prevent it. But it would be worse for the others: they would feel thoroughly let down by the Government and perhaps to some extent by me. Human considerations apart, this will react on their efficiency and team spirit, which are exceptionally good. One reason for feeling ill used would be that the change would have been made at the behest of those who have persistently and shamefully questioned our integrity. They, for their part, would regard the change as a political triumph.

3-judge courts have been regularly in the papers for a year, with different stories every week. Yesterday (ironically enough) the "Irish Times" was pessimistic because "officials" said there were not enough judges for 3-judge courts. Never a week passes without judges asking me anxiously for news. Two asked me yesterday if I thought the danger was over. I could not disclose our talk (nor will I), but merely said that 3 judges were in my opinion still very much a live issue. They were much concerned, as always. The surprising depth of feeling betokens an insight into the consequences which should not be disregarded by the Government.

/The

The ostensible reason for change is to enhance community confidence, but only self-appointed theorists and certain politicians claim this; the truth is that those who distrust the courts will still do so. The main push is from the South; for the present they have almost shelved every demand in favour of this one, so vital do Fine Gael consider it to make a political breakthrough. The P.U.S. was frank about this at dinner on 28th July, speaking of a "symbolic political success for the Irish Government". If we assume this to be a desirable object, I submit that the cost at which it would be attained is out of all proportion.

The grounds of opposition in my note are judicial, administrative and political. Although conceding that points can be made in favour of 3 judges by reference to isolated examples, I feel that it is not realistic for N.I.O. to oppose the views of the Lord Chancellor, the Law Officers and Diplock, Gardiner and Baker on judicial or administrativ grounds. The shortage of numbers is prohibitive and I wish it to be clear that to allow resident magistrates and deputy judges to sit is out of the question. It would also be very foolish to have 3-judge courts for only the complex and multi-defendant cases: these would actually be the most unsuitable.

This leaves the political considerations, as to which, admittedly, N.I.O. have the leading interest. But there is great danger in thinking on narrow lines and leaving out of account the political disadvantages likely to flow from the interaction of the public and 3-judge courts. To avoid tiresome repetition, I refer to my letter of 4th August to the P.U.S. (Appendix 6).

On this (largely mythical) question of confidence, the courts have actually suffered more from the supergrass trials than anything else. In 15 years I have received about 3 letters of complaint about judging generally and about 30 about Diplock (nearly all recent and nearly all about supergrasses). Despite some first instance acquittals and successful appeals, we are closely identified with a "system" which (however lawful, necessary and reasonably well conducted) is greatly disliked and despised by ordinary people and particularly repulsive, I surmise, to Irish people, because it depends on the use (and on the rewarding) of the hated class of informers. The potential value of this kind of evidence is, of course, recognised and there are quite strong arguments against making changes in this field. In any event, we shall continue to judge according to law.

You have kindly encouraged me to consult with the Lord Chancellor and the Law Officers, and I am sending them copies of this letter.

/May I

May I, however, conclude by saying that I am writing to you in the confidence that you will give my points most serious consideration and in the anxious hope that you will be persuaded.

With best wishes,

Yours sincerely,

Robert Lowry.

Rt. Hon. Tom King, M.P.,
Secretary of State for Northern Ireland,
Stormont Castle,
Belfast,
BT4 3ST.

IRELAND Situation PT21