Reforming Justice

There is almost no part of the Justice System which is not at breaking point. The number of prisoners, the number of offences, the number of criminal cases failing because of non-disclosure, the delays in civil justice cases, the backlog of repairs to court buildings, the number of litigants in person denied a publicly funded advocate – all are at a record high. So too is public disquiet. The number of knife-killing is the highest since 1946. By contrast, the resources allocated to relevant agencies – law centres, legal aid lawyers, the CPS and the police – have all declined sharply. No sector of government spending has withstood a more severe reduction of spending. Austerity cuts have hit the justice system hardest.

As public understanding of the failure of policy has grown, so too has government embarrassment. Stop-gap money has been found providing emergency funding for the police to combat knife crime and to repair dilapidated court buildings. But the government's plodding review of the Legal Aid and Sentencing Act 2012 is proof enough that there is no serious determination to meet the real challenges facing the Justice System. Its accompanying Action Plan to deliver better support to people experiencing legal problems is a plan for inaction – a medley of promises for further reviews sometime in 2020.

The justice system cannot wait so long; nor can the people caught up in it: victims and witnesses, litigants and practitioners, probation officers, police officers, prison officers, defendants and persons wrongly convicted – all of them deserve a better deal.

Only a radical policy can succeed.

The aim of this paper is to set out such a policy, to show that it has a theoretical basis and that its costs are likely to be significantly less than the system we have now.

- The paper commences with a short account of policy development and a summary of the current literature – in the main policy documents prepared by practitioners with a case to advance.
- There then follows a comparison with other jurisdictions – particularly with jurisdictions whose criminal procedure is inquisitorial. It is submitted that such procedure is less costly in part because within inquisitorial procedure there is a tighter focus on the area of contest and therefore less distraction with disclosure of unused material, because the court assumes some of the responsibilities which adversarial procedure allocates to defence, but also because inquisitorial jurisdictions tend to have smaller prisoner populations per hundred thousand inhabitants.
- It is suggested that there are two linked reasons for inquisitorial systems being less incarcerative. First inquisitorial systems do not suffer from what Langbein[1] describes as the truth deficit, and secondly because the higher conviction rates affect the marginal rate of deterrence[2].
- Further it is submitted that miscarriages of justice are less probable where procedure is inquisitorial.
- It is common ground that the provision of essential legal services for people who cannot afford them is a public good. It is further submitted that generally speaking such public goods – education, health and within the Justice System, probation services prison services

[1] *The Origins of Adversary* Criminal Trial John H Langbein OUP 2003

[2] *Crime and Punishment: An Economic Approach* Gary S Becker Journal of Political Economy, The University of Chicago Press 1968

and forensic science – are better provided by salaried professionals working within the public sector rather than by the private sector paid for on a fee basis. A salaried National Legal Service would cope better when dealing with advice deserts or offering a guarantee of essential legal services for people who cannot afford them.

- Proceedings involving Lord Lester in the House of Lords offer an example of how inquisitorial procedure might work and how such procedure would create a new right for witnesses such that they might be sure not to have to testify or stand up to cross-examination unless the court regarded it as necessary.
- Developments over the last 20 years have already taken us away from the adversarial archetype; similar fact evidence, bad character, inferences from silence, defence statements and the Criminal Procedure Rules, they have moved us on from the trial procedure that let Bodkin Adam escape to that which caught Harold Shipman. It is time to consolidate the shift towards inquisitorialism. Judges should have the power to direct the process of investigation.
- There are practical steps we could take to secure these advances. Comprehensively applied they will enable savings to ensure all citizens had better access to justice.

Background

Legal aid came into being at the end of the Second World War at about the same time as radical restructuring of health and education services together with other reforms implementing the *Beveridge Report*[3] recommendations. Never regarded as a service which lay at the heart of the welfare state, legal aid was considered by many to represent a mechanism for re-adjusting the scales of justice to ensure that poorer litigants' interests were properly presented. The Rushcliffe Report [4] and the following Legal Aid and Advice Act 1949 marked a decisive step in the provision of legal aid – initially for civil aid only. For criminal cases remuneration for lawyers was under the Poor Prisoners Defence Act 1930 until 1963.

There is no recent commentary on the state of legal services that does not recognise that resources have not become woefully inadequate. The *Bach Commission Report*,[5] and the *Manifesto for Legal Aid* [6]were both issued in 2017. Their analyses and recommendations overlap to a considerable degree. Sir Henry Brooke, former Court of Appeal Judge, collated the evidence that was submitted to the Bach Commission and produced a *History of Legal Aid* issued as an Annexe to it. The *Manifesto* quotes the *Bach Commission's Report* with approval. The thrust of the argument in *The Secret Barrister* [7]is identical, and replete with anecdote – both amusing and horrifying – but entirely credible to lawyers who have worked in the criminal courts, all of whom will have as many stories to tell.

All these publications cite numerous examples of injustice. Their authors cannot be simply written off as shroud waving. Anyone who has been involved in delivering legal services to the marginalized members and the excluded will know why the authors see more money as the primary solution.

The problem of resources and how much to allocate has a long history. Rushcliffe had frankly conceded there was difficulty in estimating what the cost of legal aid but made a guestimate on the basis of experience. In 1944 the Poor Persons Schemes cost £42,339 of which £30,789 was

[3] *'Social Insurance and Allied Services'*. November 1942
[4] *Report of the Committee on Legal Aid and Legal Advice in England and Wales* Cmd 6641 May 1945
[5] *The Final report of the Bach Commission.* Fabian Policy Report. September 2017
[6] *Manifesto For Legal Aid* – Legal Aid Practitioners Group 2nd Edition 2017
[7] *The Secret Barrister – Stories of the Law and How It's Broken*. Macmillan 2018

expended on the Services Divorce Department.[8] The Divorce Department was a salaried service set up to deal with the explosion in matrimonial cases towards the end of the War. Rushcliffe guessed that the cost of administration his proposed scheme; which would include full-time salaried lawyers in large population centres and part-time lawyers working for set fees elsewhere, and which would cover both civil and criminal cases, would cost slightly under £200,000 pa. Inevitably the figures increased as the years passed by and demand increased. By 2009 legal aid was costing over £2 billion per annum.

In 2009 the legal aid Minister, Lord Bach asked Sir Ian Magee, a former permanent secretary at the Department of Constitutional Affairs to assess the delivery and governance arrangements of the legal aid system and to make recommendations for change. Bach said:

> 'It is 10 years since the Legal Services Commission was established. In that time there has been considerable change in the type of legal advice and services the public needs… I believe the time is right to review the channels through which legal aid is delivered to ensure we are getting the best value for taxpayers' money. It is also a good time to re-examine the best ways to deliver this vital service to ensure a healthy future for legal aid.'[9]

Neither the *Bach Commission's Report* nor the *Manifesto for Legal Aid* deal with the awkward fact that year on year – until comparatively recently without exception – legal aid expenditure remorselessly increased. Not so the authors of the *Justice* report, *Delivering Justice in an Age of Austerity* which predated *Bach* and the *Manifesto*; it was issued in April 2015. *Justice* recognised that for any proposed reform to be credible there had to be a strategy for making better use of public money. Their recommendations did not simply call for more resources and better use of technology, but crucially changes in the legal system itself.

The funding crisis had been a long time in the making. In the 50s criminal legal aid was the poor sister of the legal aid world.[10] From the start there was little sympathy with the 'criminal classes'[11]. Criminal legal aid was miserly. Civil legal aid was distributed generously by comparison. Criminal legal aid expanded when the standard fees paid under the Poor Prisoners Defence Act 1930 were replaced by hourly rates in the 1960s, and again when there was public remuneration for advice in police stations. Concerned treasury officials noted the legal aid bill becoming the fastest expanding area of government expenditure. But capping criminal legal aid became problematic – particularly when the European Convention on Human Rights was integrated into national law. If a defendant's freedom was at stake it seemed only right – in an adversarial system – that poor defendants should have publicly funded advocates. Priority had to be given to criminal cases. Eventually the total legal aid spend was capped and any extra money required for criminal cases was taken from civil legal aid.

A re-evaluation of policy instigated by Lord Bach produced the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). That sought to make greater use of non-custodial sentences to facilitate cut backs in criminal legal aid and allow freed up resources to be redirected to civil cases – but, as it turned out there was no attempt was made to redirect the savings. On the contrary, swathes of civil cases were excluded from legal aid altogether. And the plan to reduce prisoner numbers was knocked off course. Ken Clarke had held financial

[8] Rushcliffe para 190

[9] *Law Society Gazette.* 8th October 2009.

[10] Criminal cases were not brought into the Legal Aid Act provisions until 1963.

[11] In the early 20th century the Law Society Gazette described a proposal to establish a right to publicly financed defence lawyers as a 'luxury'. The notion that representation was a prerequisite of justice was entirely alien.

portfolios so he knew the cost of Howard's 'Prison Works' policy. When he became Lord Chancellor, he revealed suspiciously liberal sentencing instincts. He was reshuffled.

In the mean-time Labour had lost the 2010 election so Lord Bach was able to distance himself from the attack on legal aid that he'd initiated. Clarke had taken his job by the time Magee's proposals had been fashioned into a bill. Bach spoke against the proposal to take employment cases outside legal aid when the bill was debated in the Lords. But earlier in March 2010 he had welcomed Magee's report. He said:

> "We think it is important to act before the election … to improve legal aid by strengthening governance and establishing a more rigorous approach."

The problem for government was that the Legal Services Commission could not be guaranteed to do the government's bidding. One of the purposes of LASPO was to abolish it, the excuse being that it had not succeeded in controlling expenditure as closely as government wanted.

Unlike the *Bach Report* and the *Manifesto,* the *Justice Report* recognised that if government was going to be persuaded to maintain legal services, it had to be directed toward finding a new way of delivering justice whilst controlling costs. In the forward to the *Report* Helena Kennedy QC wrote:

> "While *Justice* has been at the forefront in fighting savage cuts in legal aid, we also recognise that the system itself is in need of radical reform."

The reform that *Justice* proposed was to establish a new model of resolution in the civil courts. There would be a dispute resolution officer; trained to specialise in particular disputes who would take an investigative pro-active approach in all contested cases. The court officer would only revert to a traditional judge where resolution was impossible. The *Report* cited the Rechtwijzer system operating in the Netherlands where computer technology had been harnessed to this inquisitorial approach.[12]

This money saving 'investigative pro-active approach' that *Justice* describes represents a radical break with adversarial tradition which most commentators accept to be complex and expensive. Writing for the *Bach Commission* Sir Henry Brooke recognised the links between adversariality, and excessive cost:

> "It is not possible to understand the growth of expenditure on legal aid without appreciating that in England and Wales our form of adversarial system of justice is very much more complex (and much more expensive, as a direct consequence) than the systems of justice in other developed countries." [13]

Whilst the authors of the *Justice Report* are to be congratulated on being ready to shift towards an inquisitorial model, one has to ask why only apply that to registrars? If inquisitorial techniques save money why not apply them generally?

The problems confronting the criminal justice system were the subject of a lecture by Sir Brian Levenson President of the Queen's Bench Division in April 2018. Sir Brian's lecture[14] goes to the foundations of the notion of justice in an attempt to find new ways of dealing with contemporary problems. Sir Brian starts with the proposition taken from John Rawls' *Theory of Justice* that criminal justice is necessarily imperfect and that as much as anyone can do is to

[12] Justice Report p35

[13] Bach Commission on Access to Justice, Appendix 6: History of Legal Aid 1945-2010 by Sir Henry Brooke

[14] *The Pursuit of Criminal Justice,* Criminal Cases Review Commission Annual Lecture at UCL 25th April 2018

strive to minimise error. He develops his argument explaining the development of our system of criminal justice relying on John Langbein's seminal work *The Origin of Adversary Criminal Trial*[15]

Sir Brian complains that the explosion of criminal justice legislation has overwhelmed us. He recognises that cyber-crime is a challenge which has only just been identified. He gently laments the lack of adequate resources to ensure that the CPS does its job properly. More significantly he suggests we might learn from continental approaches to ensure that disclosure is dealt with properly. He says we may need to consider our adversarial pre-trial culture and that processes should be brought up to date and. Radical though this may appear to be, and way beyond those commentators who wish to retain our culture and simply demand more resources, it is disappointing that Sir Brian does not take us through to the culmination of Langbein's thesis. Langbein's criticism of our adversarial culture is uncompromising:

> 'our central blunder was to fail to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.'

We might note in passing the uneven route taken as the law on disclosure evolved. Our common law when still recognised its inquisitorial roots was opposed to pretrial disclosure. As investigation and trial procedure became more adversarial and judges less interventionist, so it became necessary to adopt systems for disclosure intended to even things up. [16]

Comparisons

There are several respects in which numerical comparisons may be made between national justice systems

- The resources available or the amount of money spent on prosecution, defence, judiciary, police, civil legal aid
- Number of prisoners
- Time
- Systems may also be compared by procedural techniques: adversarial or inquisitorial

Figures for the year 2014 from the European Commission for the Efficiency of Justice[17] show:

Expenditure in Euros per inhabitant

	Judicial System	Court	Pros Service	Legal Aid
England + Wales	91.58	40.36	11.59	39.64
European Median	46.4	31.37	9.21	2.49

Resources per 100,000 inhabitants

	England + Wales	European Median
Professional Judges	3.3	18.06
Prosecutors	3.9	10.27
Lawyers	314.7	110.17
Non-judge staff	31.1	54.02
Non -prosecution staff	6.5	14.13

[15] *The Origins of Adversary Criminal Trial* John H Langbein OUP 2003

[16] See Appendix on Disclosure.

[17] https://public.tableau.com/shared/364DJG7ZT?:display_count=yes&:showVizHome=no accessed on 17.2.18

The figures suggest that whereas in England and Wales the judiciary is comparatively expensive, (nearly twice the European median), legal aid is massively more expensive (about 15 times the European median). The European median for defence is about 25% of the cost of prosecution, whilst in England in Wales it is nearly 400% more.

Furthermore whereas the European median for number of judges and prosecutors is much higher than for England and Wales, for lawyers (ie defence lawyers) it is the other way round.

A Dutch academic paper[18] makes the same point.

> "The best way to compare ... is relating (expenditures) to GDP… England & Wales and Scotland are the highest spenders across all categories. Both spend roughly five times as much as Germany, Belgium and France."

The discrepancy is more marked for criminal defence;

> "On legal aid for suspects who have been charged, England & Wales and Scotland spend about 10 times as much per capita as France and Belgium…. For minor crimes the average cost was Euro 453. For representation in the Crown Court and above the average cost was Euro 2481. In France and Belgium the average … is around Euro 300."

So far as comparing police numbers is concerned figures for 2016[19] (before severe cuts to police budgets in UK) showed that the number of police officers in England and Wales was significantly lower than the European median.

England and Wales	212
EU median	318
Germany	299
France	376

On any account legal aid expenditure in the UK is massively over the European median and massively skewed towards defence. We spend significantly less on police, prosecutors, and on professional judges. Evidence gatherers, case presenters, and assessors of evidence in comparative terms are all are starved of resources.

If one looks to the number of prisoners a similar picture emerges. If we compare with our European neighbours we immediately notice that they imprison fewer offenders.

France	103
Germany	78
Italy	89
Netherlands	69
Finland	55
England and Wales	146

Prisoners per 100000. http://www.prisonstudies.org/ *28.2.18*

What might explain why England and Wales is so very different? Why is the legal aid bill per capita 10 times that of France and Belgium? One explanation[20] offered is that the system in England and Wales is adversarial.

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[18] *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice.* Maurits Barendrecht and others 2014

[19] https://ec.europa.eu/eurostat/statistics-explained accessed 9.4.19

[20] *A Secret Barrister – Stories of the Law and How It's Broken* Macmillan 2018. Page 204

Curiously comparing adversarial systems with inquisitorial systems[21] we note that generally speaking common law adversarial systems tend to have higher prisoner populations:

USA	666
New Zealand	217
Singapore	213
Australia	167
Jamaica	138
Scotland	135
England and Wales	146

Whilst inquisitorial systems all tend to have lower numbers:

France	103
Germany	78
Italy	89
Netherlands	69
Finland	55

Furthermore, we can see that inquisitorial trials are capable of working much faster, giving rise to higher conviction rates[22], higher public confidence and less probability of being distracted by irrelevant considerations. Francis Pakes points out that:

> 'Trials in England tend to take days or even weeks. In contrast trials in the Netherlands tend to take only minutes or hours. Straightforward trials of burglary, drunken driving or common assault take no more than half an hour from start to finish. More complicated cases may take several hours to one day, and only the most dramatic cases take more than a day in court to be completed. So called mega-cases are cases that take more than two days in court. In 1997 there were 70 of them.' [23]

Pakes accepts this must sound almost farcical to anyone familiar with English procedure but dismisses any suggestion that justice was compromised. He points out that the presiding judge would have read the dossier before the trial. This is the advantage of having a professional magistrate committed to the case before him and having controlling influence over procedure.

> 'After the defendant has been identified, the prosecutor reads the indictment and the judge proceeds to ask him questions. The prosecutor and the defence lawyer may also ask questions. Defence always has the last word. Witnesses are sometimes called but that is unusual.'

Definition of the common ground and issues to be contested commences long before the trial is opened, and the judge has a continuing obligation to the case starting long before the investigative stage is concluded. Inquisitorial procedure can speed up trial process identifying the essential issues without compromising on the standard of justice and without loss of public confidence in the trial process. David Rose[24] who as a journalist had seen too many miscarriages of justice wrote with approval that:

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[21] *Prisoners per 100000.* http://www.prisonstudies.org/ *28.2.18*

[22] It would be an error to imagine that continental courts are all biased. Their systems commence fewer weak cases and allocate the necessary resources to those that they prosecute.

[23] *Comparative Criminal Justice.* Francis Pakes Willan Publishing 2004

[24] *In the Name of the Law – the collapse of criminal justice.* David Rose Jonathan Cape 1996

> 'In 1991 Kenneth Baker established a Royal Commission[25] which conducted research into two jurisdictions following broadly inquisitorial principles: France and Germany and reported in neither country was it likely that miscarriages of justice such as the Guildford or Birmingham cases would occur[26]. Secondly in contrast to the stratified and often vexed relationship between the different actors in … England, on the continent this relationship was marked by a 'high degree of confidence and of co-operation and mutual trust. Finally, public confidence in both systems remained high in their respective countries and in the German case the conviction rate was as high as 90 per cent.' [27]

By contrast the hazards inherent in adversary trial procedure – where it is relatively easy to allow the important issues to be clouded out by peripheral matters – have long been recognised. In 1956 an American academic put it this way:

> 'In the practical operation of our adversary system where so much does in fact depend upon the financial resources of the respective parties and the comparative diligence skill and other qualities of contending counsel, it is especially important that a party be prevented from perverting the true function of the court by presenting a moot issue or securing a wrong result by disputing what is demonstrably indisputable amongst reasonable persons'. [28]

The Truth Deficit and the Marginal Deterrence Rate

Langbein's book has already been referred to[29]. His case, in essence, is that adversary trial came about as a reaction to over-bearing unfair prosecutions and flawed investigations. It would have been better, he suggests, to neutralize trial procedure rather than polarize it.

The lower probability of the truth being discovered – inherent in the adversary model – means both that there are greater prospects of the innocent being wrongly convicted, and the guilty being wrongly acquitted.

This tendency which Langbein describes as the truth deficit, coupled with inadequacy of resources to investigators and prosecutors, reduces the probability of arrest and conviction. It follows that the punishment has to be additionally severe in order to maintain the principle of deterrence. Offending is discouraged more by the threat of punishment than by imprisonment itself. It's not the severity of punishment that matters, but the certainty of conviction. This is one of the oldest recognised principles in penal theory.[30] And one of the most enduring. It is now known as Marginal Deterrence Theory. As Gary Becker has said – putting Beccaria's maxim in modern terminology 'it is the hallmark

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[25] R*oyal Commission on Criminal Justice Report* HMSO 1993

[26] A view supported by Paddy Hill.
http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/life_of_crime/miscarriages.stm [27/4/18]

[27] *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany*. Leonard Leigh and Lucia Zedner HMSO 1992

[28] *Some Problems of Proof Under the Anglo-American System of Litigation* E M Morgan New York Columbia University Press 1956. (See also Jenny McEwan *Evidence and the Adversarial Process* Blackwell 1998. She points out that key evidence may be omitted if neither side presents it.)

[29] Footnote 14 supra

[30] *On Crimes and Punishments* Cesare Beccaria 1764.

of an inefficient criminal justice system that it has to punish excessively to compensate for the lack of convictions'[31].

This explains why adversarial criminal justice systems tend to have higher prisoner populations. Policies to reduce the prison population by changes to the sentencing tariff might command more support if they were accompanied by collateral changes to enhance the probability of conviction thereby maintaining the marginal deterrence rate.

Miscarriages of Justice

There are some who suggest that forsaking the adversarial model will lead to more miscarriages of justice. They abhor the notion of a state functionary trespassing into areas now dominated by the independent bar. Prominent amongst them is the author of *The Secret Barrister* who, remembering notorious injustice cases – the Guildford Four, the Birmingham Six, and the Maguire Seven – suggests state impartiality is a myth and that the police and the Crown Prosecution Service cannot be trusted to disclose unused exculpatory material. State functionaries will be he or she suggests inevitably susceptible to political influence. The remedy the author urges upon us is to make larger legal aid payments to the legal profession.

The book's anonymous author should have noticed that in inquisitorial Italy state prosecutors have demonstrated their non-susceptibility to political influence by trying their damnedest to secure convictions against Berlusconi, frequently successfully despite enormous political pressure against them. And it is wrong to imply that the victims of injustice would all support his/her argument. They have set up pressure groups to advance quite a different approach. Paddy Hill, one of the Birmingham Six has founded a pressure group Miscarriages of Justice Organisation. Hill thinks the adversarial system should be replaced with a continental-style inquisitorial system and that the driving force behind any police investigation should be a search for the truth. He also wants juries to be required to give their verdicts in writing, to amplify their reasons and guard against the danger of perverse verdicts. Hill said he doubted that the requirement in the Criminal Procedure and Investigations Act to disclose unused material would suffice to prevent future injustices... He called for a radical overhaul to make the system more 'open and accountable'.

Kevin Christian, whose brother is serving a life sentence for a murder he denies committing, and who is a member of the pressure group, Innocent. Christian described adversarialism in trenchant terms:

> 'The adversarial system means that the criminal justice system can easily turn into an upmarket local dramatic society with the two main protagonists being counsel… with the difference being that the defence counsel may not have had time to learn his lines before the curtain goes up'. [32]

Christian favours the French system of investigating magistrates or the Staatsanwalte in Germany in which the prosecuting lawyers are involved from the outset.

Robert Brown spent 25 years in jail for a crime he did not commit. He is thought to be the longest serving victims of a miscarriage of justice in the United Kingdom. He too supports a shift to inquisitorial procedures. Defendants who have been wrongly convicted do not think the adversarial

[31] *Crime and Punishment: An Economic Approach* Gary S. Becker University of Chicago 1968 www.nber.org/chapters/c3625.pdf

[32] http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/life_of_crime/miscarriages.stm accessed 22.5.19

system is the best in the world. They want to change it. They'd prefer that we discovered the truth. They know the truth is an occasional by-product of our system[33].

It is worth noting that inquisitorial truth-seeking systems of justice have fewer miscarriages of justice and being more discerning when and how to prosecute, have higher conviction rates too. David Rose[34] who as a journalist had seen too many miscarriages of justice wrote with approval that:

> 'In 1991 Kenneth Baker established a Royal Commission[35] which conducted research into two jurisdictions following broadly inquisitorial principles: France and Germany and reported in neither country was it likely that miscarriages of justice such as the Guildford or Birmingham cases would occur. Secondly in contrast to the stratified and often vexed relationship between the different actors in … England, on the continent this relationship was marked by a 'high degree of confidence and of co-operation and mutual trust. Finally, public confidence in both systems remained high in their respective countries and in the German case the conviction rate was as high as 90 per cent.' [36]

Is cross-examination an essential component of a fair trial?

In 2018 Jasvinder Sanghera, a campaigner against forced marriages complained that following an encounter with Lord Lester he had some 12 or so years beforehand offered her corrupt inducements to become his mistress and sexually assaulted her.

The complaint was considered by Lucy Scott-Montcrieff the House of Lords Commissioner on Standards and upheld. He was ordered to be expelled from the House. He appealed to the select committee which again upheld the complaint but reduced the penalty to exclusion for four years.

He then further appealed to the House itself. The debate on 15th November which concerned the select committee's second report, is relevant as the principle ground of appeal was that the proceedings had not been fairly conducted. Lord Lester complained that he had had no opportunity to cross-examine the complainant. The rules governing the complaints procedure specified that procedure should be inquisitorial, not adversarial. Senior members of the judiciary including two former Lord Chancellors contributed to the debate. The House concluded that proceedings had not been fair and the Commissioner's decision was set aside. Notably the two former Lord Chancellors had both voted against him, Lord Mackay of Clashfern saying,

> 'As far as I can see, there is nothing unfair about the rules, so long as both sides get the full account of what the other side has said. In my opinion, that is natural justice: that you have the full account before you.'

On the 10th December the Committee for Privileges and Conduct (whose membership included Lord Mackay of Clashfern and Lord Irvine of Lairg) issued a third report[37]. Its reasoning punctures the

[33] 'The advocate in the trial … is not engaged much more than half the time – and then only incidentally – in the search for truth.' *The search for truth: an umpireal view.* Frankel (1975) 123 U Penn LR 1031 1035

[34] *In the Name of the Law – the collapse of criminal justice.* David Rose Jonathan Cape 1996

[35] R*oyal Commission on Criminal Justice Report* HMSO 1993

[36] *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany*. Leonard Leigh and Lucia Zedner HMSO 1992

[37] House of Lords Committee for Privileges and Conduct 3rd Report of Session 2017-2019 HL Paper 252

suggestion that cross-examination is an essential feature of a fair trial. The following extracts are some of the highlights of its argument:

> 'Cross-examination in court cases is a long-standing feature of Anglo-American law and of the law of other countries based on the English common law. But it is not the only way of running a fair and robust process that conforms with natural justice.'
>
> 'It would be wrong to characterise these other systems of law, or the internal disciplinary processes of many other legislatures and organisations, as lacking in fairness because they do not accord the same significance to the oral tradition of advocacy and to cross-examination as does English common law.'
>
> 'In inquisitorial proceedings, the judge plays a more active role in the proceedings than in an adversarial system, examining the witnesses, and scrutinising and testing the evidence. Oral cross-examination of the parties and of their witnesses by lawyers for the other side is not a feature of this type of proceeding. Of course, the evidence must be tested by the judge.'
>
> 'We accept that a proper testing of the evidence by an impartial adjudicator who listens to all sides is essential to natural justice and fairness. But we simply disagree that cross-examination is inherent in the very notion of fairness. Cross-examination is a particular technique, honed by generations of lawyers versed in the common law tradition, but by no means a fundamental feature of all systems of law, and indeed cross-examination may be inappropriate for dealing with complaints of sexual harassment.'
>
> 'We further note that cross-examination is particularly problematic in a complaint involving an allegation of sexual harassment, whether or not the behaviour under investigation amounts to conduct that could be deemed criminal. The adversarial model featuring cross-examination is widely held by experts to be disadvantageous for people reporting incidents of a sexual nature. In particular it would widely be seen as wrong if the person complained against was "allowed to confront the complainant" which is what one member stated was necessary in the debate on 15 November.'
>
> 'Finally, we note that one of the purposes of cross-examination is to test the credibility of competing claims. No cross-examiner can do this without being provided with material which would form a proper basis for challenging each account. However, in this case Lord Lester never advanced an alternative account beyond the assertion that what the complainant was saying was a "pack of lies".'

Before proceedings could recommence Lord Lester announced that he was unable on health grounds to endure any further hearings, and that he would voluntarily withdraw from taking part in business in the House.

Recent Developments

As Langbein's book makes abundantly clear the legal system is in a state of flux. There was not a date on which the inquisitorial system that Judge Jefferies presided over suddenly became adversarial. Changes came piecemeal, sometimes hastened by changes in the political culture, sometimes by the need to come to terms with the demands and opportunities created by advancing technology. Different eras have differing notions of certainty.

Take for example Dr Bodkin Adams. In 1957 160 of his patients died in suspicious circumstances. He stood trial for killing one of them. He was acquitted. The other cases did not proceed. He was however convicted of a minor matter concerning failure to keep a proper record of poisons and was struck off, but four years later he was able to practice again. In 1961 he reapplied successfully to be put back on the medical register. Dr Harold Shipman on the other hand - 200 of whose patients died in suspicious circumstances was convicted of murdering 15 of them in 2000.

In the years in between courts had learned to form adverse inferences from silence and to apply similar fact evidence. There have of course been other changes, but all of them have gone to undermine the notion of adversarial trial. Defence statements, case management hearings, abolition of hearsay rules, admissibility of bad character and pre-recorded video evidence are all part of that story.

What is required now is to consolidate on these advances. Judges should retain an ongoing interest in the cases before them and be able to impose sanctions when their orders are not complied with. Witnesses and victims should have rights as they do in inquisitorial jurisdictions.[38]

<u>Conclusions</u>

Other changes are needed too.

Perhaps the most obvious problem is the excessive use of imprisonment. This is now recognised by government which welcomed the House of Commons Justice Committee Report – 'Prison Population 2022: planning for the future'[39]. Whilst some traditional opponents of a more liberal sentencing regime have taken a more progressive stance[40], those actually responsible for the imprisoning have not been so easily persuaded.[41] Rory Stewart – the former prisons minister – suggested prison sentences of less than six months should be abolished[42] virtually terminating the power of magistrates to imprison.

This policy proposal must find legislative form. It may assist overcome opposition if it should be understood that some of the massive savings to be made could be transferred to law enforcement, taking spending on prisons down and spending on police and prosecution up to European averages. That would increase the probability of arrest and conviction. It would be Marginal Deterrence Theory put into practice.

But if the courts are to become inquisitorial in nature then a question arises as to what place there should be for amateur magistrates sitting on average only 35 days a year. What levels of experience

[38] Germany Austria Norway and Sweden – The Secret Barrister (at p 243) notes that witnesses – if they are required to testify at all – are be protected from hostile cross examination; that they can assist the prosecutor and have a meaningful role in their own right.
[39] HC 483 Published 3rd April 2019
[40] https://www.dailymail.co.uk/wires/pa/article-6876645/UK-highest-prison-population-western-Europe.html 'The UK has had the highest prison population in the EU every year since 2008 at least, according to the Council of Europe's annual penal statistics'
[41] https://www.magistrates-association.org.uk/news/ma-response-justice-select-committee-report-use-prison 'There is much to welcome in today's … report from the Justice Committee … We remain unconvinced, however, that the introduction of a 'presumption against' short prison sentences is the best way to reduce their use..'
[42] https://www.independent.co.uk/news/uk/home-news/prison-jail-sentences-less-six-months-minister-a8724311.html

or expertise can they bring to bear? How can they remain committed to their cases, as inquisitorial magistrates are, and return to them after adjournment for inquiries to be completed? One solution might be for lay magistrates, if they are to be retained at all, to deal only with the simplest non-imprisonable matters and for run-of-the-mill imprisonable offences to be hived off to a new intermediate tier, staffed by professional judges – such as was proposed in 2001.[43]

Such a solution would facilitate judicial oversight of investigation and trial. Currently there is no effective sanction for slip-shod investigation, failures to gather evidence or to disclose it. Inquisitorial procedure would identify the contentious issues to be resolved at trial much more readily than adversarial, and in those cases where there was reason to believe the police were in possession of exculpatory material the judge should be impowered to recommend or impose sanction (loss of pay or rank) when the material was not produced. The same might apply when evidence had not been secured.[44]

Perhaps police would be a little more motivated to take statements from witnesses if courts were readier to receive them as evidence. The propriety of a judge making a determination of the contentious issues simply by examining the statements has already been considered.[45] Prosecution can already apply to have a statement read instead of having to call the witness to give live evidence. But there is a case to be made for widening this provision to allow a presumption in favour of a statement's admissibility where it has been taken by a trained investigator, it is devoid of internal contradiction, consistent with all facts of which judicial notice may be taken and such other facts discovered in the process of investigation, and where the nature of the defence is such as not to require the arbiter of fact to require oral evidence to make a determination. This would in effect create a new right for witnesses.[46] A witness who provided a statement could be told 'There will be no need to attend at court unless the judge requires you to.' Too often they now fear that making a statement makes it very likely they will have to attend court simply because the defendant wants them to.

A revised legal system would not just create a new right for witnesses – it would create a new right for essential legal services. Inquisitorial procedure is cheaper. It requires less to be spent on legal aid. It maintains the deterrent principle without high prisoner numbers. Our current system skews expenditure towards criminal cases and leaves advice deserts around the country so that many citizens with legal problems are left without access to justice. How much better to have a National Legal Service, staffed by salaried lawyers and following the model of the National Health Service. It would consist of a national network of law centres dealing with civil cases and public defender offices[47] dealing with criminal cases. That would be closer to the model Rushcliffe set out at

[43] A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld

[44] *The Secret Barrister* p117 cites a grievous bodily harm case in which no statement was taken from the victim. The case was adjourned multiple times for the police to take a statement from her but none was although it was clear she was able to do so and would have attended at court. Ultimately the case was dismissed.

[45] Lord Lester's case supra.

[46] In the Lester case the victim gave a detailed account supported by witnesses. The defence was 'It's all lies.'

[47] The idea of Public Defenders is regularly criticised – particularly by those who feel economically threatened by it. But impartial observers have found they can work just as well as lawyers in private practice. *Evaluation of the Public Defender Service in England and Wales* – Lee Bridges, Ed Cape and others. 2007 (Institute of Advanced Legal Studies): 'The overwhelming view of the criminal justice professionals we surveyed was that there was little perceptible difference between the quality of service provided by PDOs and private practitioners in their areas.'

paragraph 176 of his report – a nation-wide scheme for giving advice. Rushcliffe, writing in 1945, anticipated that his scheme would need 250 law centres. Currently we have 43.[48]

Those who have observed the performance of the private sector when it comes to providing publicly funded services in the justice arena whether it is prisons or probation, will understand how relying on the private enterprise can operate to the disadvantage of the public and – when governments squeeze the margins on contracts – to the disadvantage of shareholders too.[49]

A new approach to justice would protect the public better, create effective incentives toward law-abiding conduct, incarcerate fewer prisoners and cost less. Witnesses and victims would secure new rights, and citizens who cannot now secure basic legal services would find it easier to do so. The principal difficulty is overcoming vested interests who imagine their prestige and financial well-being are at risk.

APPENDIX ON DISCLOSURE

It is frequently asserted that pretrial disclosure of evidence (whether used or unused) is a traditional feature of procedure in England and Wales.

> "One crucial feature of the criminal trial in England and Wales has always been the duty of the prosecution to disclose the evidence which is at its disposal to the defence." [50]

This is not true. In the eighteenth century the inquisitorial basis of criminal trial procedure deliberately excluded the possibility of the defendant having any notion of the evidence in the possession of the Crown. (To provide a defendant with the opportunity of rehearsing his reaction to the allegation against him would be to deny the court valuable assistance in discovering the truth.) In 1792 a defendant sought advance disclosure and was sharply rebuked:

> "There never yet was an instance of such an application as the present, to give the defendant an opportunity of inspecting the evidence intended to be used against him upon a public prosecution".
>
> "There is no principle to warrant it .... and if we were to grant it, it would subvert the whole system of criminal law".
>
> *King v Holland,* 1792 KB 4 T.R. 691, 100.

Holland's definitive status was recognised in early nineteenth century cases, and as recently as 1958 in the Supreme Court of Pennsylvania.[51] *Holland* is also recognised by Australian legal academics –

[48] https://www.lawcentres.org.uk [11.4.19]

[49] In the case of Carillion which held £200million in prison contracts, directors' remuneration packages were not so adversely affected.

[50] "Emmins on Criminal Procedure" John Sprack 1997. 7th Edition p 122.

[51] *Re Di Joseph's Petition*, 394 Pa 19, 145 A.2d 187 (1958)

Hunter and Cronin quote Kenyon's pungent definition of the law. They disagree with Emmins' assertion that there has always been a duty to disclose the material in the hands of the Crown. They suggest the Attorney General's 1982 guidelines represented something of a concession.

> "In England new rights to obtain disclosure of the prosecution case have evolved in the 1980s and 1990s in line with the Attorney General's guidelines on prosecution disclosure." [52]

Whatever the explanation may be *Holland* was forgotten by English lawyers. It is simply not mentioned in *R v Ward (1993) 96 Cr App R*, frequently regarded as the seminal case determining the shape of our present disclosure processes. No doubt *Ward* was uppermost in mind of those who drafted the Criminal Procedure and Investigation Act 1996. It might be reasonably asserted that the statutory arrangements for disclosure have been constructed on a complete misunderstanding of the common law.

The case of *Ward* is illustrative of the inherent difficulties created by excessive adversarialism. There are dangers where advocates become committed to establishing their case, rather than discovering what had happened. Prosecuting counsel – there were three of them – knew of the existence of potentially exculpatory material and rather than disclose it to the court or defence counsel, instead instructed a junior civil servant to write to her solicitors in dissembling terms, hoping that it would remain concealed. The ruse worked and she was convicted. When eventually the injustice was discovered the lesson learned was that new procedures were required to ensure exculpatory material should be disclosed. The more important lesson – that commitment to winning a case distorts the capacity to form an objective view of the evidence was overlooked. The importance of winning a case can too easily take priority over discovering the truth. In an inquisitorial system the investigator is accountable to the judge and presents evidence to him. In our adversarial system responsibility is more diffuse and there are too many opportunities for concealment.

As we contemplate a justice system breaking down, we should remember that there is a different way to do justice. We can, as Langbein encourages us, go back and correct the 'central blunder of the inherited system'. It is not too late to 'develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.'

In the course of doing so we might reduce the prison population, protect witnesses and victims and make savings to help pay for a new National Legal Service, enabling access to justice for everyone.

[52] "Evidence Advocacy and Ethical Practice" Hunter and Cronin. Butterworths 1995 p191.