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A RADICAL CURE

The essay by Ludovic Kennedy "This Crazy Charade Must End" (published in Police Life, Vol 18, No 11, July 1986, 8) makes a number of telling assertions about our criminal justice system:

* We complacently accept our legal system as "the best" there is, whilst knowing precious little about others which may be better.
* Our criminal trial system is a very peculiar one. The adversary trial creates a dramatic atmosphere. It encourages a search for the winner, sometimes at the expense of a search for the truth.
* There have been a number of notorious cases of injustice, despite the much vaunted claims of our criminal justice system. These cases haunt our community conscience. They exist in Australia as well as in Britain. The cases which come to light raise the question: how many such cases have not been uncovered?
* Some of the miscarriages of justice occur because of questionable police practices.

* Although various reforms have been suggested to tackle those practices and to remove them, the most radical reform could be the removal of the basic causes that are said to lead to such practices. These are the frustration which is felt with the present criminal trial system and the belief that it is too heavily weighted in favour of the acquittal of guilty criminals.

These, then, are Kennedy's theses. His solution is a radical - even astonishing - one. It is to abolish the adversarial system, abandon the accusatorial trial, remove the right to silence and replace the investigating police, in part at least, by an investigating magistrate. In a stroke, this would enhance the search for truth, place it in the hands of a neutral, experienced judicial officer, remove the possibility of misbehaviour during the critical phases of the investigation, and diminish the risks of a miscarriage of justice. By a combination of all of these virtues it would secure the conviction of more guilty people, reduce the risk of punishment of innocent people and so promote social order and well being.

It is a dazzling dream. How far can we support the diagnosis offered by Kennedy? How far should we embrace the cure which he suggests? Have we really reached the point that our inherited British system of police investigation and criminal trial - once described as the great centrepiece of our liberties - must be pronounced as a "crazy charade" and replaced by something borrowed from the inquisitorial system of the continent of Europe?

THE EXAMINING MAGISTRATE

It should not be thought that this proposal of Kennedy's is either novel, recent or without distinguished supporters. During British rule of India, it was soon discovered that great difficulties arose in seeking to administer criminal justice in that teeming Subcontinent in the same way as it was conducted at home. Apart from anything else, witnesses could be bought cheaply; alibis could quite readily be manufactured; tribal, linguistic and cultural emnities made neutral investigation and resolution of issues in conflict difficult or impossible. It was for these reasons that the British administration introduced procedures for receiving the alleged confessions of criminal suspects before magistrates. Such procedures are still followed in India to this day. They provide a neutral forum for recording confessions and an assurance of the integrity of the admissions made.

But confessional evidence is not the only defect which is said to give rise to the need for the reforms proposed by Kennedy. The problems he lists are many:

* Securing false confessions ("verbals").
* The planting of false evidence ("giving presents").
* Supression of evidence favourable to the accused.
* Persuading Crown witnesses to change their mind.
* Securing the admission of police evidence in circumstances where theaccused is at a great disadvantage in attacking and testing the police evidence, lest he be subjected to cross examination on the basis of past convictions.

* Manipulating identification evidence, which is notoriously susceptible to mistake, whether conducted by line up, photographs or identikits.
* Using unfair advantage in the presentation of expert and forensic evidence, where the expertise is substantially confined to the police force.

These are acknowledged problems for the administration of criminal justice. They exist in Australia as well as in England.

A decade as Chairman of the Australian Law Reform Commission taught me that we are prone to make assumptions about the merits of our system. We are conversely too resistant to notions that we can discover wisdom in the legal systems of non English speaking countries. This is not only in the sphere of criminal justice. For example, in the field of defamation law reform, the Australian Law Reform Commission suggested that the "pot of gold" system of money damages should be replaced by the European procedures involving rights of correction and rights of reply. These remedies are much more apt to the complaint and harm of defamation. But the idea, though a common place in countries of the civil law tradition, proved too radical for the Australian legal system to digest. It has come to nothing.

THE DANGERS OF INQUISITION

Although there are many defects, as Kennedy says, in our system of criminal justice, we should resist excessive pessimism. And we should reject revolutionary solutions which could not easily be grafted onto our laws and culture. Above all, we should be wary of "cures" which would fundamentally alter the relationship between authority and the individual.

Undue pessimism may derive from unreasonable expectations of a human justice system. It would be wrong to derive a "starry eyed" conception of the French investigating magistrate. They too can make mistakes. One of the chief problems of the juge d'instruction is that so much depends upon the personality, inclinations and devotion of the juge. Whilst it is true that under our system judges and magistrates also have varying talents and attitudes, the procedure which leaves it to the parties and their representatives to "put their best foot forward", tends to ensure that all significant evidence and important arguments which can be put for a party are advanced. The danger of the juge is that, if he or she approaches the investigation with preconceptions, those preconceptions can mould the course which the investigation takes. It is a well known phenomenon, demonstrated by many modern psychological studies, that the mind often searches out for what it expects to find. Our perceptions are shaped by our expectations. Accordingly, the inquisitorial system depends, perhaps too much, upon the juge. Our system, by sharing the responsibilities between the presiding judicial officer and the representatives of the parties presents a system which has an inbuilt control factor. It tends to provide protections against prejudice, laziness and bias.

Nor ought we to be excessively pessimistic about the celebrated cases of injustice which Kennedy catalogues. Of course we should be concerned. Any person wrongly convicted and punished is a stain on our conscience. But the best we can hope for, in any human institution, is that it will dispense human justice. By definition this will be imperfect as, since the Fall, man has

been unperfect and flawed. We can only try to build into our legal procedures protective rules and facilities for appellate review which reduce the risks of injustice to below an inescapable, and therefore tolerable, level.

I have said that the importation of the inquisitorial system is out of tune with out laws and culture. The very word "inquisitorial" is a perjorative word in the English language. It conjuries up images of the religious oppression of Spain. Our people, having been raised in a system which contemplates adversary trial do not find congenial the notion of a judge interfering too much. This point was made by Lord Denning MR in Jones v National Coal Board [1957] 2 QB 55. Whilst emphasising that a judge is not a mere umpire, Lord Denning cautioned against excessive intervention. Do this, he declared, and the judge "drops the mantle of a judge and assumes the role of an advocate; and the change does not beome him well". An earlier Master of the Rolls, Lord Greene, cautioned against the judge descending "into the arena" where he is "liable to have his vision clouded by the dust of conflict". Yuill v Yuill [1945] P 15, 20.

In Australia, there are constitutional difficulties in the Federal sphere at least, in adapting our legal system to the examining magistrate system as practised in India or proposed by Kennedy. These difficulties convinced the Australian Law Reform Commission not to suggest such a reform when it produced its report on Criminal Investigation in 1975. For Federal offences, it would not be feasible to establish a new system of special examining magistrates operating throughout Australia. In practice, it would be necessary to use the State magistrates.

Yet, without agreement of the States and possibly change of State laws, the Federal Parliament must take the State judiciary (including the magistrates) as it finds it. It is highly doubtful that Federal Parliament could impose on State magistrates entirely novel and non judicial functions. In the State sphere, the introduction of such changes by State Parliaments would not be constitutionally difficult. But there would doubtless be resistance from those magistrates who see their function to be judicial and who look upon the functions of coronial inquest and committal investigation as exceptions, not to be extended into interrogation of persons accused of criminal offences for the purpose of recording their confessions.

THE ROLE OF AUTHORITY

This brings me to the fundamental objection to Ludovic Kennedy's cure for the suggested ills of our criminal justice system. That system, like the Federal system of government in Australia and many other features of our society - both in Britain and Australia - is undoubtedly inefficient. But it is not for that reason necessarily to be condemned and abandoned. Sometimes we aspire to objectives in society even more important than efficiency. Just as Federal Parliamentary Government, with its division of the great power of the modern State, tends to secure our liberties, so may the accusatorial trial. Although the reality is often different, the theory of the accusatorial trial is one defensive of freedom. This is the fundamental flaw in Kennedy's argument. His search is for the truth. But the search of the accusatorial trial is for something rather more refined. The question it poses is not whether the accused is guilty or innocent in fact. It is whether the State, with all of

its organised power (including the police force) can prove the accused guilty. And can do so beyond reasonable doubt by admissible evidence and generally without relying upon the slightest obligation of the accused to provide that evidence. This very peculiar system of justice maps out the respective positions of the modern State and the individual citizen. If we were merely engaged in the search for the truth, we would doubtless reduce some police frustrations and some of the risks of injustice occasioned thereby. We would certainly be a little more efficient. Our procedures would be less labour intensive and hence less costly. We might even convict marginally more guilty people accused of crime. But in the process we would fundamentally change the relationship between the individual and the State. We should not venture upon such a change without the most clear sighted appreciation of where it might take our society. We enjoy freedoms which are almost unparalleled in human existence. Before fundamental changes are made which affect those freedoms, we should be very sure that we are on the right track.

THE ROAD TO REFORM

That is why it seems more likely to me that reforms to tackle the problems listed by Kennedy will come not from the revolutionary suggestion he makes but from the interstitial processes of law reform which tend to be the way of English speaking people. In Australia, we have already embarked upon law reforming measures. To tackle false confessions, there are now proposals for sound and video recording of confessions to police. The Victoria Police has led the way in introducing these procedures. To tackle other false testimony, we have introduced new,

independent and resolute procedures for the handling of complaints against the police - many of them derived from the innovations of Sir Robert Mark of the Metropolitan Police in London. Reforms have been suggested to the whole process of criminal investigation. Many of these proposals are collected in the Australian Law Reform Commission's report on Criminal Investigation 1975. They have been reflected in succeeding versions of the Criminal Investigation Bill.

The courts too have introduced in Australia more sensitive rules for the exclusion of evidence unlawfully obtained. Improvements in the laws of evidence have led to the removal of some of the worst anachronisms. In many jurisdictions, the dock statement by the accused has been abolished. Majority verdicts may be taken in some States of Australia. Special enhancement of police powers has been allowed by legislation enacted in particular areas of community concern such as drug law enforcement. These procedures seem more likely to me to tackle effectively the problems which concern Ludovic Kennedy. Moreoever, they are solutions which are in tune with our traditions. They are more congenial to our people. And they are more compatible with the high value which we attach to civil liberty, precisely because, until now that liberty has been guarded, when it matters most, by our very special system of criminal justice.

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