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When an outspoken proponent of the status quo, and a retired member of England's highest court, Lord Devlin, urges fundamental changes in our system of court trial, it is time to sit up and listen.

In a book titled "The Judge" published late 1979, Lord Devlin, with elegance and wit, advances many penetrating observations on the role of the judiciary in our system of government. Coming at the same time as the American analysis of the U.S. Supreme Court, "The Brethren", it is quite a contrast. Instead of relying on the gossip of law clerks and institutional confidences,it is a book of the ruminations of one of the century's most experienced and distinguished lawyers. Much of the system he stolidly defends against current trends and criticisms. But when it comes to a comparison of the English "adversary" method of trial with the Continental "inquisitorial" procedure, Devlin emerges as a telling critic of our trial system. In its place, he proposes important modifications to ensure that

courts more efficiently get at the truth and stop simply "umpiring" the opposing cases presented before them.

PATRICK DEVLIN, THE MAN

Devlin's career followed the copybook model for the English judge. Born in 1905 he was educated at Cambridge where he became President of the Cambridge Union. In 1929 he was called to the Bar at Gray's Inn. In 1945 he took silk. In 1947, at the comparatively early age of 42, he became a Justice of the High Court in the Queen's Bench Division. He held this post until 1960 when for a year he sat in the Court of Appeal. In recognition of his profound judicial talents he was elevated in 1961 to the House of Lords as a Lord of Appeal. After a comparatively short period in England's highest court, he retired in 1964. Since retirement he has chaired numerous committees of inquiry and taken part in the activities of his old university, the British Press Council and the Administrative Tribunal of the I.L.O. In 1963 he was made a Fellow of the British Academy.
During the 60s Devlin engaged in a debate with Professor H.L.A. Hart about the role of the law in the enforcement of morals. Devlin was invited to deliver a public lecture soon after the report of the Wolfenden Committee in England had recommended that homosexual practices in private between consenting adults should no longer be criminal. Devlin at first agreed with the recommendations of the committee but in the preparation of his lecture he changed his mind. He argued that society had a right to "protect its own existence". He also urged the right of the majority in society to follow its own moral convictions by resisting change that would undermine or prejudice the majority's "moral position".

The resulting debate was a scholar's feast. Although the controversy has changed its focus, it remains with us today in relation to the law's proper role in such matters as abortion, pornography, drugs, artificial insemination and so on.

Devlin displayed throughout the debate an abiding confidence in the consensus of the opinions of ordinary English men and women. It is generally assumed today that his critics had the better of the debate. At least today the consensus would appear to be that the law has a limited, and quite possibly declining, role in the enforcement of public morals.

DEVLIN THE ORTHODOX

In his new book, "The Judge", Devlin reflects in many pages his orthodox, almost "old-fashioned" view of the law, its procedures and its operators. A few samples :

* The reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it.
* Judges, like any other body of elderly men who have lived on the whole unadventurous lives, tend to be old-fashioned in their ideas. This is a fact of nature which reformers must accept.
* The ordinary Englishman is against reform. He accepts it only when he is confronted with a situation in which he can perceive unfairness in existing order, and he perceives that more easily when it affects himself than when it affects others.
* The English have a low opinion of lawyers until they become judges.
* The English judiciary is popularly treated as a national institution, like the Navy and tends to be admired to excess.
* A judge lives in a ivory tower, which critics always suppose to be his chosen habitation.
* All legal procedures attract barnacles that should be regularly scraped.

In much of his book, Devlin is at pains to defend the institutions of the English law. He does not do this blindly. He concedes, for example, that the judiciary is not without its failures. With typical bluntness, he describes a former Lord Chief Justice of England, Lord Hewart, as a "horror". Consistent with his obeisance to the good sense of ordinary men and women, he defends the jury system, whilst conceding that it is a strange institution of doubtful historical origins :

> "It is truly remarkable", he says, "that judges should demean their professional talents to the popular mediocrity of the jury". "What other sphere of business", he asks "is governed by the man in the street?"

He points out that the unanimous verdict of a jury was treated for the greater part of our legal history "almost as a sign from Heaven", a substitute, as it were, for the intervention of God in the trial by ordeal, out of which the Medieval jury developed.

Devlin criticises the erosion of jury trials in both the civil and criminal spheres. He laments the "sapping and undermining" of the jury's decision by statutes which have empowered Courts of Criminal Appeal to assess whether a jury would or would not have convicted, had certain further evidence or proper legal directions been given to them. In fact, he is not very kind to the Courts of Criminal Appeal He describes them as having "had the air of a place where regimental officers foregathered and staff wallahs were not highly thought of".

Put shortly, Devlin is an advocate of the "non-expert" in the courtroom. He sees justice as reflecting the good opinion of society. On this score, he resists justice "by the experts". His view leads him to oppose modern notions that judges should be trained in criminology and penology as a preparation for the conduct of criminal trials and the passing of consistent sentences on a prisoner. He is not

ıuch impressed by these new-fangled theories. Where, he asks, is the clear evidence of the advances of these sciences, to be stacked up against the progress that medical science can boast of? The administration of the criminal law is quite different for him to the determination of even a commercial case or a dispute about a patent or contract.

> "In such cases, background knowledge shared between the judge and counsel and parties makes for speed. Crime is quite different. It is of great importance that laymen should come to listen, as in fact they do, and that they should understand what is going on. It is even more important than the saving of time".

Devlin criticises proposals put forward that judges should have to undergo compulsory training before permitted to pass sentence. He admits that many judges, like himself when first appointed, had not had anything to do with criminal law for very many years, if at all. But he doubts that a "cramming course" is the way to prepare them. He considers a compulsory training late in life a"serious imposition" and "the unacceptable face of Socialism". But more important, he resists the idea in principle :

> "The judge should share the popular rather than the official outlook and should judge as the ordinary man judges. Accordingly, I am against any attempt to make him an expert in anything or to qualify or half qualify him in any particular science".

Devlin fears that with expertise comes doctrine and doctrine might reduce independence.

IMPROVING THE CIVIL TRIAL

Against this background, the radical proposals for reform put forward by this singular English law Lord startled some, not least because of his scathing criticisms of the present access to justice. Devlin compares the adversary system of determining disputes with the inquisitorial and finds, on many criteria, that the latter is to be preferred.

The adversary trial is the centrepiece of the English common law way of doing justice. It is the procedure followed in England, the United States, Australia and almost everywhere the British flag was planted. Under it, the judge or jury simply adjudicate on the competing evidence presented by each side. It is a "trial of strength" in the battlefield of the courtroom. The inquisitorial system, on the other hand, is an inquiry. Its centrepiece is the dossier or file and much less business is done in the courtroom. Its purpose is an inquiry to ascertain the truth of the matter. Under its procedures, the judge is not a mere umpire. He is in charge and has a positive duty to search out the truth.

Devlin weighs these two systems of doing justice. He concedes that in the end, in most cases, they probably reach similar conclusions. But he tests each of them against certain relevant criteria and tries to evaluate their respective strengths and weaknesses.

The adversary system of "verbal pugilism" has a number of advantages :

* Its emphasis on the trial, encourages openness in the doing of justice. There is a public tableau leading to a reasoned decision that can be judged on the evidence called.
* It tends to give satisfaction to the parties to have their dispute openly ventilated.
* With two equal combatants doing their best to "win the prize" for their side there is every incentive to present the case in the most favourable way.

As against these arguments, Devlin lists :

* The waste of time involved in waiting for judges to be available
* The inconvenience of busy witnesses who must often wait for days to be called for ten minutes of evidence.

* The indignities to which witnesses are often put by the procedures of cross-examination.
* The artificial rules of evidence, often designed as a counterpoise to the "ignorant" jury.
* The misplaced confidence in the ability to evaluate the truth of witnesses by their appearance in court.

Devlin points out that where there is no legal representative, the adversary system breaks down. But some cases just do not warrant using numbers of expensive lawyers. It is here that the costliness of the adversary trial effectively prevents citizens having their disputes resolved.

> "One of the most elementary duties of a civilised State", declares Devlin, "is to provide for its citizens a system of settling disputes. This obligation would be meaningless if the price to the citizen was out of proportion to the value in dispute".

Devlin criticises the tactical manoeuvering of the adversary trial, which can result in neither party daring to call a vital witness and the judge constrained by tradition from doing so. On his own calculations, Devlin estimates that the Continental dossier system should prove "a lot cheaper".

> "Law suits between ordinary citizens of limits means are uncommon ... because the cost would be prohibitive. Yet the obligation of a State to provide justice is not discharged by devising a single and inflexible mode of trial whose cost is beyond the reach of the ordinary citizen. Everyone knows, every lawyer particularly knows, that for the ordinary citizen a law suit is financially quite out of the question. The citizen who is up against an insurance company or a trade union, or any other powerful litigant, must take what is offered and be glad that he has got something".

The bundling out, overnight, of the adversary system, is unthinkable. There are too many investments, professional and otherwise, in its ancient procedures. But Devlin urges that a compromise should be struck by importing into the rules of the courts an alternative inquiry procedure... Under this, a great deal could be done on the initiative of the judge, in a more informal setting than in the courtroom, rather like the determination of matters "on the file" as in Europe. Devlin looks on this as an alternative mode of trial, in which the judge would take a much more active part. He is critical of the failure of the English judiciary to be more innovative in the very area of lawmaking which is their responsibility, namely the rules of procedure and the laws of evidence. For those to whom cost is no object, let them keep the adversary trial with its exquisite public use of expensive manpower. But a new and more informal alternative should be available which, once chosen, would put obligations on the judge not just to umpire the contestants before him but to search out and himself discover the truth of the matter.

REFORMING THE CRIMINAL TRIAL

Devlin is less inclined to change the settled balances of the criminal trial. He points out that even here there is room for improvement. Procedures which we take for granted today are of only quite recent origin. It is less than 150 years since the defendant was first given the right to be defended by counsel. It is only eighty years since he was given the right to call evidence. The right to appeal arose this century. The right to legal aid is more recent and is still not universal.

Devlin describes the increasing role of the police in the prosecution process and what he sees as a "slide" into an inquisitorial system, without the in-built safeguards that have been devised on the Continent. He says that once the police have made an arrest what follows, in their eyes, is simply a "solemnisation" required by society.

> "The process may be likened to the progress from the betrothal to the altar; occasionally something goes wrong in between, but this should be abnormal".

Instancing a number of cases where "blazing" miscarriages of justice occurred, Devlin urges that we should adopt a "judicial intermediary" to whom police could present their evidence and who would decide whether or not more evidence was needed or a charge should be brought. Such a person would have some of the functions of the French "examining magistrate" to weed out doubtful cases and to protect the system of criminal justice from the present tendency of police to reject any hypothesis consistent with innocence, once they have "got their man".

Why is this needed? Devlin cites several cases :

* Timothy Evans in 1950 "confessed" to the murder of his wife. Police took statements from two witnesses which made Evans' account extremely unlikely. Being satisfied with the confession, the police simply assumed that the witnesses were mistaken. Their statements were not made available to the defence. Evans was hanged. Only later did it emerge that the murder was actually one of those committed by the mass murderer Christie.
* In 1969 Virag was identified by six witness as a person who fired a shot at a policeman. Fingerprint evidence casting real doubt on Virag's guilt was not produced at the trial, because the police were convinced that six witnesses could not be wrong. Only later was the real culprit found. Virag had been wrongly convicted.

These and other cases evidence the dangers of the adversary trial, especially in criminal matters, where liberty is at stake. Devlin's answer is to graft on to our system one or two features of the Continental procedure, with less emphasis on "winning the case" and a greater stress on finding the truth of the matter.

If anyone of lesser reputation for judicial brilliance and orthodoxy presented such a critical review of our legal procedures, it would doubtless be dismissed as the folly of someone who did not really know what a marvellous system of law we have. No-one can accuse Lord Devlin of being ignorant or out of sympathy with our institutions. This makes his criticism all the more telling. Written meticulously by an ex judge of the greatest distinction, with an elegant command of the English tongue, here is a thought-provoking appeal not for the abandonment of well settled ways of doing things, but for grafting on to those ways new and alternative procedures. As we scrutinise the cost effectiveness of our way of resolving disputes and doing justice, there seems little doubt that we must search out and find new means. Almost certainly, these will lack the drama and glamour of the adversary"trial of strength." But if ordinary people cannot afford a Ritz system of justice, Lord Devlin was surely right to point us to some workable alternatives which might bring a more "low-key" justice within the reach of the ordinary citizen.

Devlin concludes his book with the comment that "the judiciary is often, and I think justifiably, criticised for its lack of eagerness to explore new domains". No-one could say that of Devlin. He has always been the conservative's radical.

PATRICK DEVLIN, THE JUDGE, Oxford University Press, Oxford, 1979
(£7.50 nett in U.K.)