

within the aims of the theory, but requiring no choice between conflicting moral demands. One could, of course, point out that this does not overcome the philosophical problem of grounding a set of prescriptions, since the injunction to maximise overall preference-attainment is simply another prescription on a par with those being treated by the theory as mere preferences. Nevertheless, the economic approach appears on the face of things to embody a powerful conception of legitimacy, whereby outcomes will be shaped by the distribution of preferences across the population.

Similarly, the economic approach attaches no importance to the conventional causal judgments studied by Hart and Honoré, treating only 'but for' causation as raising a genuine causal issue. This 'causal minimalism', as Hart and Honoré style it, flows from the aggregative approach of the economist, wherein every legal dispute involves a conflict about the allocation of resources, rather than a dispute about responsibility. Hence the economic approach seeks to avoid the seeming arbitrariness of the need to identify taken-for-granted baselines as a foundation for judgments of causal responsibility.

The most striking feature of law-and-economics to the outside observer, however, is its radical departure from the ordinary language and conceptual structures of private law. Traditional legal concepts such as those of fault, responsibility, and causation have focused upon the rights and wrongs of past transactions between the plaintiff and

defendant. All such backward-looking conceptions are abandoned by the economic approach, or are treated as entirely secondary to forward-looking aggregative questions of economic efficiency. This abandonment of traditional legal ideas has been the principal feature of economic analysis provoking (by negative reaction) the emergence of rival, non-economic, theories of private law.

CORRECTIVE JUSTICE


Economic theories of law attach little importance to the distinction between private and public law: the forms of private law are regarded as specific instrumentalities, differing from those of public law, but to be justified ultimately by reference to their consequences. By contrast, some of the currently influential non-economic theories attach great importance to the distinction: indeed, they take the demarcation of a distinct realm of private law as central to their whole enterprise. Private law is conceived of as a body of principles regulating justice between individual citizens and embodying a conception of corrective justice; while public law is regarded as an implementation of the state's distributive and aggregative projects. Consequently, it is suggested, political and moral disagreements find expression in public law, while private law is the manifestation of an apolitical and relatively uncontested conception of human agency and responsibility. In this way the theories seek to overcome the problem of moral pluralism.

The problem of causal indeterminacy

has been less explicitly addressed by non-economic theorists, and this omission poses some serious problems. For example, many such theorists analyse private law in terms of a model of corrective justice drawn from Aristotle. Their general concern is to present corrective justice as more than the simple restoration of a distributively just situation upset by a wrong of some sort: corrective justice, it is suggested, has a status that is autonomous and independent of distributive justice. Corrective justice expresses certain conceptions of agency and responsibility that are neutral between distributive schemes. Such theorists might reasonably point out that the common sense judgments of causal responsibility analysed by Hart and Honoré are, as the

DEMARCATON OF PRIVATE LAW

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authors themselves explain, fundamental to our whole notion of human identity and agency. Specific problems arising from our awareness of the plasticity of human arrangements should not, therefore, be too lightly confused with a fundamental erosion of notions of causal responsibility. 

Dr N E Simmonds

Reader in Jurisprudence
Fellow of Corpus Christi College,
University of Cambridge

Criminal Law

Criminal Procedure & Investigations Bill – for better or for worse?

by Sheilagh Davies

The *Criminal Justice Act 1987* (CJA 1987) hailed a new era. Obligations were imposed on prosecution and defence to collaborate at an early stage to identify issues, serve documents, prepare schedules and deal with points of law. The preparatory hearing was introduced. The intention was better case management, to smooth the path towards the presentation of trial and make the system generally more efficient.

INCREASE IN APPEALS

As an idea, this was a good one but its operation was at variance with what Parliament intended. The Act made provision that the party who lost on a particular point at a preparatory hearing could take that point on appeal. This caused a rush of applications to the Court of Appeal with counsel doubtless feeling that they had to take the point so as not to be disadvantaged later. In a number of

decisions the court ruled that the legal arguments did not form part of the preparatory hearing. Arguably, the Court of Appeal was looking for clarification, but the reality is that there have been a number of inconsistent decisions that have defeated Parliament's intention for smoother case management. If the Court of Appeal was looking for an administrative way of lowering the number of appeals they had to force the ball back into the court of the Executive.

Let us examine whether the Criminal Procedure and Investigations Bill has assisted the position or not.

The main provisions of the bill relate to prosecution and defence disclosure and the responsibilities of the police with regard to material for the purposes of prosecution disclosure. The proposed clauses were significantly amended by Standing Committee B and I deal with them in that amended form. Those provisions of the bill which affect serious fraud trials are contained within Sch. 2. This proposes to amend the CJA 1987 and deals primarily with preparatory hearings.

DISCLOSURE

Disclosure remains a thorny subject giving rise to disparate views. It is addressed in the bill in a way that is giving defence lawyers cause for concern. Whilst there remains an obligation on the prosecution to disclose 'material of all kinds' which specifically includes both information and objects of all descriptions, the obligation only relates to that material which, in the opinion of the prosecutor, might undermine the case for the prosecution against the accused. It is argued that this is a retrograde step, representing a distinct shift away from the disclosure guidelines achieved after a number of miscarriages of justice. It is a subjective test that demands not only an objectivity of the highest degree but an insight the prosecutor, through no fault of his own, may not have. How can he necessarily know what material will assist the defence in their task to undermine the prosecution case?

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Once there has been primary disclosure under cl. 3, cl. 5 goes on to provide that where the section applies the defence must give a defence statement to the prosecutor and, if appropriate, to the court setting out in general terms the nature of the defence, the matters upon which he takes issue with the prosecution and, in relation to each such matter, the reasons therefor.

Clause 7 deals with secondary disclosure, the requirement to disclose

any material not previously disclosed to the accused which might reasonably be expected to assist the defence as disclosed by the defence statement. The prosecutor is required to keep under review, during the course of the trial, whether any additional material needs to be disclosed because it falls under either head.

Critics of the bill claim that cl. 5 places an unfair burden on the defence, requiring far greater disclosure of them than that required by the prosecution. I am not sure this is right. Any party may depart from the case he disclosed – albeit the judge or (with his leave) any other party to the proceedings may comment adversely upon it. The judge has a wide discretion in deciding whether or not to give leave and in what circumstances.

PREPARATORY HEARINGS

Section 7 of the CJA 1987 deals with preparatory hearings in the case of serious or complex fraud. It is proposed to amend s. 7 by the removal of subs. (3), (4) and (5) i.e., those concerning the powers of the judge in relation to the orders he can make at a preparatory hearing. Essentially of course he can still make any order he thinks appropriate, but separate and specific provision is no longer made for him to order the prosecution or defence to prepare and serve any documents that appear relevant. As for the extent to which a judge may be reluctant to make orders – or can be persuaded not to – only time will tell. One can imagine judges taking different views but at this stage the impact of this amendment can only be speculative.

The new s. 9A deals with orders before the preparatory hearing and the amended s. 9(10) provides that an order made under this section shall have effect during the trial unless it appears to the judge, on application made to him during the trial, that the interests of justice require him to vary or discharge it. Effectively this means that while an order made is mandatory the position remains wide open. I wonder how many instances there will be of judges being asked to reverse their earlier orders. At least it might relieve some pressure from the Court of Appeal! Departing from a disclosed case is now arguably easier with the amended s. 10.

The bill proposes that judges are given a discretion to order a preparatory

RECOURSE TO TRIAL JUDGE

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hearing in any case which is potentially complex or lengthy. The powers the judge may exercise and the criteria for exercising them are similar to those in existence for serious fraud trials, as amended by the bill. The underlying reasoning is to crystallize the issues and there are proposals which would give the right to comment in the event of departure from a disclosed case. The judge may vary any order or ruling on application made to him on the grounds that the interests of justice require him to vary or discharge it but there is no right of interlocutory appeal. The question is surely: what do these proposals really add to the existing pleas and directions hearings (PDHs), now universally in operation? They add little but the PDH is at risk of becoming as unwieldy as some preparatory hearings in serious fraud trials but without the advantage of interlocutory appeals.

WHAT'S NEW?

The question is surely: what do these proposals really add to the existing pleas and directions hearings (PDHs), now universally in operation?

REPORTING CONDITIONS

One area where there is felt to be improvement in the bill itself is in relation to reporting conditions. The basic tenor is for there to be no reporting during the trial except where the judge permits it. These restrictions will not apply to the reporting of information such as the nature of the charges and details of witnesses but otherwise place much tighter restrictions on reporting.

An overall verdict: another statute to add to the wealth of legislation in the last few years. Some good proposals, some not. The same old story! 🙄