PRIME MINISTER 2 April 1985

PROSECUTION OF OFFENCES BILL: MEETING WITH THE LORD CHANCELLOR AND THE HOME SECRETARY, 3 APRIL 1985

1. Section 22

The argument in favour of the Lord Chancellor and the Home Secretary's proposal is that Section 22 of the above Bill will tackle lenient sentencing. The Lord Chancellor's speech elaborates this point (page 400 of Hansard attached). In fact, Section 22 will not empower the Court of Appeal to impose a more severe sentence in a particular case and it will only allow it to lay down sentencing guidelines. Lord Elwyn-Jones best summarises the contrary argument (page 386-7 attached), namely, that the section is unnecessary and wrong in principle.

2. The Old Law

The old law is attached. The Home Secretary will probably say that this could go in the next Criminal Justice Bill in the 1986-7 Session.

3. 'Sentencing Declaration'

The Home Secretary will say that this option needs investigation, but might run in the Criminal Justice Bill in 1986-7 Session (Leon Brittan's minute attached).

This Week

There has been press comment from Peter Utley that the Government should stand its ground.

Conclusion

This battle in Parliament might win the power to obtain sentencing guidelines or might be lost. It would be better to achieve the same by a safer route. We recommend re-enacting the Criminal Appeal Act, 1968, Section 11(3) and considering powers for a sentencing declaration in the Criminal Justice Bill.

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CRIMINAL APPEAL ACT, 1907

Section 5(i):

If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefore as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

Repealed Criminal Appeal Act, 1968, Section 11(3)

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2 April 1985

D Hartley,

PROSECUTION APPEALS

Thank you for your minute of 21 March. I am most grateful for the thought you have given to possible alternatives to what was clause 22 of the Prosecution of Offences Bill, and I agree that the options you have put forward deserve consideration.

Your suggestion of "Sentencing Declarations" is an interesting one. If we proposed that it should be open to the Attorney General to seek such a declaration in an individual case, this might well, as you recognise, encounter the same sort of Parliamentary resistance as clause 22 did: it could be said that a power to seek a declaration differed from power to refer a case for the opinion of the Court of Appeal only in wording. (Clause 22 did not in fact use the word "appeal".) It might also be said that the concept of a declaration was not entirely appropriate for our purpose, since in civil proceedings a declaration establishes the rights of the parties, whereas we envisage an opinion delivered by the Court of Appeal which would not alter the original sentence; moreover, an applicant for a declaration in civil proceedings is required not merely to raise an issue but to specify the terms of the declaration sought - which it would be inappropriate for the Attorney General to do in relation to sentencing.

Your other option of a power to seek a declaration in regard to a category of offence would have the advantage of making the formulation of general sentencing principles less dependent on the Court of Appeal's own initiative (or lack of it) and on the ability of the Criminal Appeal Office to find a relevant case which happens to be the subject of an appeal. What the Parliamentary reaction to this proposal might be would, I think, depend to a large extent on how it was received by the Lord Chief Justice and his senior colleagues in the Court of Appeal. Without support from that quarter, I can see the proposal being criticised as giving the Attorney General - and thereby, it would be mistakenly alleged, the

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Government - a statutory role in the formulation of sentencing policy which should be a matter for the courts alone. Concern might be expressed over the exercise of the power in relation to offences arising from political or industrial conflict where the level of sentences imposed might be in danger of becoming a political issue. The proposal might also be attacked as contrary to the traditional principle that a court should not be called upon to adjudicate on issues put in an abstract and hypothetical form.

How the proposal would be received by the judges is hard to predict. When Andrew Ashworth put forward in 1982 the idea of a sentencing council charged with drawing up general sentencing guidelines to be promulgated by the Lord Chief Justice (who would be Chairman of the Council) in the form of practice directions, no judicial enthusiasm for this idea was shown; but his proposed council would have been a mixed body of judges and others. I believe that, if we were to bring this proposal forward as an immediate alternative to clause 22, it would be likely to be received with suspicion and criticism which we could not expect to allay in the time available for getting the Prosecution Bill through the House of Commons. What I would like to do instead is to sound judicial opinion more slowly, so that the proposal can be considered as one which might be embodied in the Criminal Justice Bill that I am planning for the 1986-87 session if it is favourably received. I shall need also to consult the Lord Chancellor and the Attorney General.

You also raise the question of returning to the old system of criminal appeals. This is a matter which Lord Justice Watkins, on behalf of the Court of Appeal, has already broached with my officials, and again it is a subject that might appropriately be dealt with in the next Criminal Justice Bill, although the discussions have not yet reached a point at which specific proposals have been put to me. I doubt, however, whether we could present any changes of this sort as a substitute for clause 22, since an offender on whom a manifestly over-lenient sentence has been passed is unlikely himself to submit his case to the judgment of the Court of Appeal.

I hope you may agree that this is the best way in which to pursue your interesting and constructive proposals.

Peter Utley The Daily Telegraph 1.4.5.

LORD HAILSHAM is quite right to complain (as he did on Friday) of inadequate and misleading reports of judicial proceedings which often lead the public to suppose that judges have treated criminals too leniently. But what good will complaining do? I suspect that most of these errors are not deliberate or malicious, but arise simply from the complexity of judicial proceedings and the speed with which often inexperienced reporters have to recount them.

The surest remedy would be to give to the Attorney General the power to apply to the Court of Appeal for a comment on any sentence the justice and reasonableness of which was seriously in dispute. The sentence would remain unchanged, but the reasons for and against it would be publicly ventilated and pronounced on.

This was precisely the proposal, contained in the Prosecution of Offenders Bill, which scandalised the judiciary and was rejected by the Lords last January. If sentences are thought to be too lenient, the public will make its feelings about them known (not least through the Press), and the causes both of the criminal and the community would surely be best served in many cases by having the matter publicly and judicially threshed out.

I have an almost invincible prejudice in favour of lawyers and their quaint traditions; but, on this issue, I think the Government should stand its ground and reintroduce the discarded clause.