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John Jackson, Sean Doran. *Judge Without Jury: Diplock Trials in the Adversary System.* Oxford: Clarendon Press, 1995. xxii + 322 pp. $69.00 (cloth), ISBN 978-0-19-825889-6.

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I'll Be Judge, I'll Be Jury

Perhaps Lewis Carroll anticipated the creation of the Diplock Courts in the North of Ireland when he wrote his "Mouse's Tale": Fury said to a mouse, That he met in the house, "Let us both go to law: I will prosecute YOU. – Come, I'll take no denial; We must have a trial: For really this morning I've nothing to do." Said the mouse to the cur, "Such a trial, dear Sir, With no jury or judge, would be wasting our breath." "I'll be judge, I'll be jury," Said cunning old Fury: "I'll try the whole cause, and condemn you to death."[1]

Cunning old Fury himself might have designed the Diplock Courts, in which to sit as prosecutor, judge, and jury. Certainly Carroll's satirical doggerel starkly foreshadowed the lack of procedural safeguards available to a defendant accused of a serious crime in the courts of Ulster, the subject of Sean Doran and John Jackson's *Judge Without Jury.*

The juryless "emergency" Diplock courts of Northern Ireland have received scant scholarly attention, and for that reason, Professors Jackson and Doran's *Judge Without Jury* is a useful addition to the literature. This look at the effect of abolishing the right to jury trial in serious criminal cases is valuable as far as it goes, and it is one of the first to attempt an empirical analysis of this peculiar system. Unfortunately, the authors' handling of the material often disappoints.

The Diplock courts, created in 1973 to try serious criminal cases alleged to be connected with the Irish Troubles, operate with a single judge and no jury. Since the Diplock Courts were created nearly a quarter-century ago, approximately one in three serious criminal cases in Ulster has been tried without benefit of jury, with a conviction rate greatly exceeding that of "ordinary" (non-Diplock) criminal courts in the same province. The vast majority of Diplock court convictions result from confessions (the right to remain silent has also been abolished) and from extensive use of uncorroborated testimony by government informants, or "supergrasses."

Professors Jackson and Doran, both of Queens University, Belfast, Northern Ireland, carried out their study by observing twenty-six Diplock and seventeen jury trials of serious criminal cases in the Belfast Crown Court during one twelve-month period. Critics had feared that Diplock judges would become "case hardened," or biased against the accused. To determine whether that was occurring, the authors chose to count and classify instances of "judicial intervention," i. e., instances in which judges interrupted the proceedings to question witnesses and defendants. Jackson and Doran chose to study this aspect of the Diplock system because they deemed it to be the best indicator of whether Diplock courts had in fact shifted from an adversarial approach to a more inquest-oriented approach. As they note elsewhere:

We therefore monitored the number of witnesses questioned in the trials in our sample, as well as the number of questions judges asked as a proportion of the time the witness was in the witness box. We also studied the variations in questioning of the various kinds of witness, prosecution and defense (accused, victims, experts, and others). A further issue was whether questioning occurred during the examination-in-chief or cross-examination or whether it occurred after counsel had finished examining the witness.[2]

Judge Without Jury is largely a compilation of the results of this statistical study, and the presentation, at times, becomes a recitation of numbers with scant discussion of the implications of the statistical findings.

Like the Diplock Courts themselves, *Judge Without Jury* cannot be understood apart from the history of Ireland's "Troubles." On March 24, 1972, Great Britain dissolved the Ulster government, established direct rule over the North, and appointed a series of "blue ribbon" commissions to propose changes in the Northern Irish justice system. Lord Diplock's commission expressed concerns about possible juror bias and witness intimidation in the climate of terrorism, and proposed radical "tempo-

rary" changes in criminal procedure, including juryless trials, later enacted in the Northern Ireland [Emergency Provisions Act 1973, ch. 53 (England)]. In addition to abolishing the right to jury trial in many serious criminal cases, the Act authorized "preventive" incarceration without probable cause, abolished the right to silence, relaxed standards for admission of coerced confessions, and permitted reliance on the uncorroborated testimony of so-called "supergrasses" (snitches), and anonymous witnesses who were allowed to testify from behind screens and whose identities were unknown.

The Act also abolished the right to trial by jury for what are known as "scheduled" offenses, listed in Schedule One of the Act. These include such crimes as bombing which are normally considered terroristic in nature, along with many serious criminal offenses (such as murder) that do not necessarily relate to terrorism. The attorney general has the authority to allow a jury trial if he believes there is no terrorist involvement, but a defendant accused of a scheduled offense has no right to insist on a jury trial.

As one might expect, Professors Jackson and Doran found that "inquisitorial" questioning (in the form of cross-examination by the judge) occurred almost exclusively in Diplock trials and not in the "ordinary" criminal trials. They also found that Diplock judges were far more likely to question defendants, defense witnesses, and defense experts than were judges in jury trials. Unfortunately, the authors do not consider in any real depth the potential implications of this apparent shift in emphasis. Also unanswered is the question of fairness.

One could argue, of course, that having two parallel systems for defendants charged with essentially similar crimes, based on suspected political affiliation, is not necessarily unfair so long as the requirements of Article 6 of the European Convention are honored. The United Kingdom, after all, does not operate under the Fourteenth Amendment's equal protection clause. While the right to jury trial is considered an important safeguard in the common law, dating back at least to 1215 and the Magna Carta, it is not an international human right. This issue deserves a thorough analysis. As the European Court has recognized, the mere fact that a procedure appears to comply with the specific minimum standards enshrined in Article 6 does not necessarily mean that the procedure satisfies the standards of a fair trial. Unfortunately, *Judge Without Jury* bypasses this issue with scarcely a mention. Likewise, the authors largely bypass consideration of the implications of certain other aspects of Diplock trials, including coerced confessions, "supergrass" testimony, and anonymous witnesses. The authors' fence-straddling approach to the suitability of the single-judge format to the adversarial process makes *Judge Without Jury* less valuable than it might otherwise have been.

Judge Without Jury would also have benefitted from a more searching look at the history of the Crown's failed use of police-state "emergency" tactics in other contexts such as the 1952 Kenya emergency following the Mau Mau independence uprising and the 1945 emergency powers invoked by the British High Commissioner in Palestine. A comparison of the situations that led to these suspensions of civil rights with the situation in Ulster and an analysis of the long term effects would also have improved the analysis.

Professors Doran and Jackson, along with Professor Michael L. Seigel, have published many of these observations and conclusions in their article "Rethinking Adversariness in Nonjury Criminal Trials," 23 *Am. J. Crim. L.* 1 (1995) and in John D. Jackson & Sean Doran "Conventional Trials In Unconventional Times: The Diplock Court Experience," 4 *Crim. L. F.* 503 (1995), John D. Jackson & Sean Doran, "Diplock and the Presumption against Jury Trial," 1992 *Crim. L. Rev.* 755, and John D. Jackson, "Curtailing the Right of Silence: Lessons from Northern Ireland," 1991 *Crim. L. Rev.* 404. They have also presented a talk on these issues at the Society for the Reform of Criminal Law Conference on "Reform of Evidence Law" in Vancouver, British Columbia, Canada, on August 3-7, 1992. *Judge Without Jury* goes over much the same ground, and while it goes into greater detail, it does not go into much greater depth nor does it give more than passing consideration to the implications of the broader picture.

Jackson and Doran conclude that the Diplock courts are a realistic solution given Northern Ireland's longstanding and intractable Troubles, arguing that despite the absence of a jury, the Diplock system attempts to provide defendants with a fair and impartial forum by providing additional procedural safeguards, such as the requirement for written opinions, and the provision of appeals as of right, to compensate for the absence of the jury. At the same time, they point out that at least on the basis of judicial questioning, judges are more inclined to be interventionist in Diplock trials. This of course raises the question whether this trend is a matter for concern, but *Judge Without Jury* largely leaves such questions unanswered.

Other authors have tackled these subjects with greater forthrightness. For example, Kevin Boyle noted in 1982 that:

[T]he elimination of the jury ... led to ... an increase in the extent to which the judges themselves sought to take a direct role in the elucidation of the truth by questioning witnesses and counsel. The overall effect was ... to emphasize the extent to which the trial process had become a "closed-shop" in the hands of a small group of professional lawyers.[3]

Judge Without Jury tends to validate Boyle's view, without adding a great deal to Boyle's observations.

Judge Without Jury is crammed with statistics concerning the frequency, timing, and other features of judicial intervention, but gives short shrift to the implications raised by the presence of an inquisitorial judge in an otherwise adversarial system. For example, the authors noted that defendants and defense witnesses, especially experts, were the most likely to be questioned in Diplock trials. (The judges questioned only fifty-six percent of all prosecution witnesses, compared with 84 percent of defense witnesses.) In jury trials, by contrast, judges were most likely to question victim-witnesses. Perhaps it is unfair to criticize *Judge Without Jury* for failing to meet goals that the authors did not seek to achieve. Jackson and Doran made it clear that they wanted to study the incidence and substance of judicial questioning. However, with the fundamental fairness of the traditional adversary system at stake, *Judge Without Jury* would have been a great deal more valuable had the implications of judicial questioning been given as much attention as their frequency.

It is, of course, important to study the mechanics of the decision-making process, but it is not clear that this kind of mechanical counting of occurrences does much to generate a useful look at a troubling and controversial system. The authors present their research with some degree of objectivity, and their study is perhaps the most thorough overview of this peculiar jurisprudential artifact to date. In this sense, *Judge Without Jury* is a useful addition to the literature, but it falls short of full value as the statistics at times overwhelm any attempt at analysis. The major flaws in this work are its tendency to repetition and the authors' seeming inability to take a position on this highly controversial matter. A table of cases would have been helpful; the skimpy two-page index makes it unnecessarily difficult to refer to particular issues or to find references to particular cases.

Even more troubling is the omission of some of the cases which most demonstrate the problematic nature of Lord Diplock's solution to the "Irish question." Instead of historical and legal analysis, Doran and Jackson offer dry statistics and equivocal observations. One searches the index in vain for mention of the trials of Bobby Sands, the Birmingham Six, Martin Meehan, and other important cases whose omission renders the presentation somewhat bloodless and abstract. Indeed, the notorious "Supergrass" trial in which some two hundred persons were accused and convicted in a mass trial largely on the unsupported word of government "supergrass" (snitch) Christopher Black is only briefly mentioned as part of the Diplock court's "blackest phase," but is not subjected to significant analysis. Presiding over the Diplock Court that tried the "Black Supergrass" case was Basil Kelly, a former Unionist Protestant member of Parliament and former attorney general for the British administration of Northern Ireland, yet the implications of denial of jury trial in such a court are largely unexplored.

In a September 13, 1995, article on page twelve of *The Independent*'s Finance and Law section, headlined "Diplock courts: a model for British justice? Northern Ireland's system of trial by judge is widely hated," Professors Doran and Jackson pose the question:

In the changing political climate, modifications to the legal process which were effected in response to the Troubles are being stripped of their original justification. As political violence loses its grip, much rethinking needs to be done on the entire legal strategy which was developed to counter its threat. If features of the legal process are in line for dismantling in the event of lasting peace, then surely the system of non-jury trial in the form of the Diplock courts must be at the front of the queue?

In *Judge Without Jury*, as in their other writings on this subject, Doran and Jackson equivocate. One can glean from *Judge Without Jury* that there is a serious danger that the Diplock system of criminal justice is weighted against the accused, but this larger issue is lost in the minutiae of counting instances of judicial questioning. The authors have taken an important, though tentative, beginning step which illustrates the need for further systematic study of justice in the Diplock courts, but *Judge Without Jury* ultimately does not fulfill that need.

Notes:

[1]. Lewis Carroll, *Alice in Wonderland*, ch. 3.

[2]. John D. Jackson & Sean Doran "Conventional Trials In Unconventional Times: The Diplock Court Experience," 4 *Crim. L. F.* (1995), p. 514.

[3]. Kevin Boyle, "Human Rights and the Northern Ireland Emergency", in John A. Andrews, editor, *Human Rights in Criminal Procedure*, Norwell, MA: Kluwer Academic Publishers, 1982, pp. 144, 160.

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