FRANCO-BRITISH LAWYERS SOCIETY

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Notes for a brief presentation by Professor J.R. Spencer, QC, on Criminal Procedure.

The following three topics will be addressed from the English law perspective:
(i) delays, and accelerated procedures;
(ii) the position of the victim;
(iii) evidence (in particular the right of silence, evidence of bad character and orality).

(i) *delays, and accelerated procedures*

The problem (or perceived problem) of criminal procedure being unduly slow has been a constant matter of concern in England for at least the last 30 years. What measures have been introduced with a view to solving the difficulty?

1. Where the traditional "heavy" form of criminal procedure (trial on indictment) is used, reducing or removing altogether the traditional pre-trial phase of *committal for trial*; however, gains by doing this have been more than offset by the extra time that is now required by providing better guarantees for defendants (e.g. disclosure of "unused material").

2. Replacing trial on indictment by (i) summary trial in the magistrates courts and (ii) extensive use of guilty pleas (which obviate the need for a trial, leaving only a brief hearing to determine sentence).

3. Replacing court proceedings (even of the attenuated sort described above) by out-of-court proceedings: (i) cautioning, (ii) in certain types of case – notably revenue cases – compounding, (iii) fixed penalty procedures.

4. Introducing official time-limits. English law, surprisingly perhaps, has little in the way of formal prescription periods limiting the delay that is allowed to elapse between the commission of an offence and the institution of criminal proceedings. To some extent, this gap is filled by the doctrine of "abuse of process". As regards the time that may elapse between the institution of proceedings and the eventual disposition of the case, Parliament has intervened in a limited way by giving the Home Secretary power to make "custody time-limits", which set a maximum to the length of time a defendant may be held in custody pending trial. These, however, only limit the period of pre-trial detention: if the defendant is not in custody, there is no binding time-limit within which the proceedings must be completed.

(i) *the position of the victim*

1. In England the victim (like any other citizen) has the right to start a prosecution; but unlike in France, gets no official help to do this.

2. In English law, the victim has (unlike his counterpart in France) no right to make him/herself an official party to a prosecution brought by the official agencies; nor has s/he the right to be heard if the public prosecutor does not wish to call him/her as a witness. Some limited attempts are currently being made to see that the court is aware of the victim's point of view by using what are usually called "victim impact statements."

3. The court, when sentencing, is legally obliged to consider making a compensation order against the defendant in favour of anyone who has suffered loss or damage as a result of the offence. However, the victim has no right to ask the court for this power to be exercised. On the positive side, however, where a compensation order is made, this is enforced against the defendant automatically by the State: the victim, unlike in France, does not have to take proceedings to enforce the judgment. The victim of a crime of violence is also entitled to compensation from the State via the Criminal Injuries Compensation Board; but unlike in France, there is no official compensation for victims of non-violent offences.

(ii) *evidence*

1. The right of silence. This concept covers two distinct things: (a) the right of the defendant to refuse to answer questions, and (b) refusal of the legal system to accept the exercise of this right in suspicious circumstances as amounting to a piece of circumstantial evidence against him. English law, generally speaking, respects the right in sense (a): to the extent of providing the defendant, before official questioning, with official reminders that he is not obliged to answer ("cautions"). At one time, it broadly speaking accepted the right to silence in sense (b) as well – but major inroads were made in this by the Criminal Justice and Public Order Act 1994.

2. Evidence of bad character. In general, the prosecution may not use previous convictions, or the fact that the defendant has a bad character, as evidence to help show him guilty of the offence charged. However (a) such evidence may sometimes be used to establish guilt, where it points to guilt in by some more direct line of reasoning than "he's the sort of person who would do this sort of thing"; and (b) evidence of bad character is (of course) taken into account when it comes to deciding the sentence. The Criminal Justice Bill currently before Parliament aims to make evidence of bad character more readily admissible as evidence to establish guilt.

3. Orality. In principle, "hearsay evidence" is inadmissible: and the concept of "hearsay" is extremely wide, covering virtually evidence that a witness saw or heard or experienced something, when this takes any form other than that of the witness's oral evidence on oath, delivered directy to the court. Thus what the French call *procès-verbaux* amount in English law to hearsay, and would normally be inadmissible in evidence. However: (a) the hearsay rule only applies to contested trials; it does not apply to pre-trial proceedings, or to hearings to determine sentence; (b) even in contested trials, important exceptions now exist to render admissible the evidence of witnesses who are unavoidably absent (in particular under the Criminal Justice Act 1988). As with evidence of bad character, there are proposals to make hearsay evidence more readily admissible in the current Criminal Justice Bill.