Juries reborn

By Mark Findlay

In most states and territories in Australia the impact of the jury on criminal justice is being systematically and radically eroded by the expansion of summary jurisdiction.[1]

Juries are persistently attacked for not understanding complex cases, not returning the appropriate verdicts, wasting resources through hung trials, and expressing the prejudices of a narrow franchise.[2] Why, then, is it that in civil law jurisdictions the role of the jury, particularly in the appeal process, is being expanded,[3] and in Japan much judicial and policy energy is being invested in the introduction of jury trial?

The answer to this question lies in many of the features of the jury that historically have endeared it to common law communities and have—even today—made it the last remaining feature of the criminal justice process in which the public at large has confidence.[4] Unlike police, lawyers, judges and corrective services personnel, jurors retain community respect and regard even in the face of significant political and media criticism. It is as if, despite suggestions that jurors don't comprehend the complexities of the trial and sometimes get it wrong, we would rather have the determination of guilt or innocence in the hands of our 'peers' than the legal professionals. The distrust of judicial discretion in particular—unfair and unfounded as it so often is—has even led to calls by senior judges such as the Chief Justice of NSW, to consider involving juries in the sentencing process.[5]

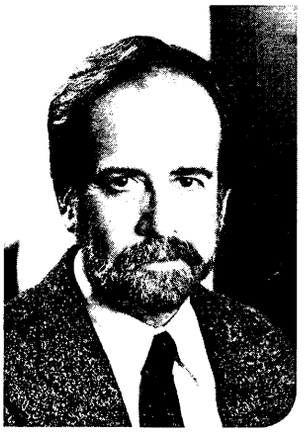
In other legal cultures the jury is either being re-introduced or experiments with jury trial for the first time are well underway. The justification for this trend confirms some of the fundamental reasons why the jury has resisted centuries of prolonged attack, to remain a fundamental indicator of fair trial practice.[6]

Justice legitimacy

Prior to its return to China, Hong Kong was gripped by a debate regarding the nature of its prevailing legal culture. Interestingly when surveyed just prior to 1997, Cantonese speaking citizens in Hong Kong confessed ignorance of what the jury did and had little personal knowledge of jury practice, but overwhelmingly supported its continued operation as a crucial feature of the common law, which they felt ensured good governance.[7]

Following the collapse of the Soviet Union, the Supreme Court of the Russian Federation was anxious to experiment with jury trial, in spite of the significant economic cost and the uncertainty about how members of the Russian public would respond to their responsibilities as jurors. Strong reasons for this were to identify a reformed approach to criminal justice, and to some extent link it back to the pre-soviet traditions, where a version of the jury had limited influence. More than this was the intention to stamp a participatory dimension on Russian criminal trials, which was viewed as profoundly distinct from the justice system that had been overthrown.[8]

More recently in Japan, the criminal courts have come under sustained criticism for their detachment from community values, and their apparent inability in some high profile cases to appear independent from political considerations. In response to this the government has encouraged the courts to support the qualified introduction of jury trial



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in a model that is unfamiliar in the civil law traditions of post-war Japanese justice.

An essential consideration regarding the link between juries and justice legitimacy is community participation. The view prevails that no matter how juries are constructed, and the limited responsibility and influence they have over trial determinations, it is better for democratic governance that jurors sit in the courtroom, rather than it remain the exclusive domain of legal professionals.

Common sense above legalism

Historically, juries have been prized as a mechanism for tempering the hard and inflexible application of the law, and introducing popular wisdom into the assessment of liability, and consequent punishment. In England, during the period where capital punishment was the common outcome of a criminal conviction, juries regularly mitigated the savagery of this sentencing regime either by requesting mercy for the accused, or refusing to convict for more serious offences with which the accused might have been charged.

Today, it is common for judges to instruct juries where appropriate to bring common sense and their life experiences to bear when determining the nature of the facts and their consequences. Juries sometimes take this to the limit by modifying their view of the law as it relates to the facts in order to produce an outcome, which while not strictly 'legal' might accord with contemporary community concerns for justice.

In preparing the legislation to govern the re-introduction of jury trial into Russia, the drafters and their political masters were anxious to specifically provide the opportunity for juries to return verdicts that accorded with their notions of justice rather than legal compliance. The legislators took the view that jurors should be specifically empowered to return verdicts on justice as they saw it, without penalty or prohibition.

Professional accountability

A motivation for the Japanese reform has been to introduce members of the public into the trial process so that they can keep an eye on what the professionals get up to. At the very least it is hoped that by needing to explain what it is that they require of jurors and how the law should be applied to the facts, judges would no longer be removed from the public gaze.

In the Russian experiment (and as is the case with the expansion of the role of lay judges under the new Italian criminal procedure code) jurors were given a limited power to individually ask questions as the trial progressed and to intervene during the examination of witnesses.

For the Russians, the interest in accountability cuts both ways. Prior to delivering the verdict, jurors may be asked a series of questions by the judge which are intended to explain to some extent the process of their reasoning, and their appreciation of the law. Jurors are also specifically questioned on whether there is anything in the interpretation of the case as they see it that would justify mercy in the delivery of sentence.

Ensuring the presumption of innocence

A criticism of civil law criminal justice traditions is that they conventionally have relied at trial more on documentary evidence, and have diminished the significance of oral evidence, which can be challenged by the accused. The *International Covenant on Civil and Political Rights* requires that accused persons be given the opportunity to address their accusers. This has been interpreted as meaning that criminal charges should be tested in open court rather than merely being determined in pre-trial investigations, or through giving the accused the chance to present his or her version of the facts at the trial.

In China, its new criminal procedure law has prescribed specific rights and responsibilities for the legal representative of the accused, in order to test the state's case through challenging witnesses' oral testimony. These provisions have been criticised as failing to significantly influence the practice in Chinese trials. A reason for this has been suggested as the power of the police, the prosecutors and the judge to sideline the defence lawyer and even to persecute those who aggressively attempt to advance their client's interests. If there was some public scrutiny of the court process in a formal sense it is felt by critics that the alienation of the defence would be less easy to achieve and maintain.

The recently revised Italian criminal procedure code has also heightened the potential for

defence lawyers to participate in the trial process. Different from China, however, have been the additional provisions in the Italian reforms to enliven the evaluative role of the lay adjudicators. Added to this, victims in the Italian trial can be legally represented and can ask questions on their own initiative as the examination of witnesses progresses.

Dealing with experts

In several Australian criminal jurisdictions it has been accepted that jurors are unduly confused by expert evidence, and as such may not carry out their fact-finding functions as accurately as they should. Add this to what has become commonly known as the 'CSI factor', where jurors expect to consider forensic evidence in a successful prosecution case, and the prevalence (if not relevance)[9] of expert evidence before juries will become a more significant feature of criminal trial practice in the future. And as a consequence, juries will be more recognised as the appropriate mechanism for evaluating expert evidence.

It is interesting that a recent criticism of juries is their suspected inability to understand complicated expert evidence. However, surveys do not support this and popular culture constantly portrays juries as the decision-making forum for DNA evidence in particular. The challenge, therefore, is for judges and advocates to introduce, question and direct expert evidence so that any committed and concentrating juror can appreciate its meaning and probative value.

In states such as Victoria there has been recent legislation covering complex trials and the manner in which evidence is presented in these circumstances. Pre-trial interrogation of experts—in order to maximise the possibility of agreed facts and to limit the issues in contest that experts present to juries—has been designed to assist juror comprehension in these specialist circumstances.

Conclusion

The jury is a dynamic institution. Its common law manifestations have changed radically from when as 'compurgation' the jury was a group of neighbours who could attest to the character of the accused. Juries have consistently provided the opportunity for community representation within the justice process and that may provide the key to their prevailing popularity.

For justice systems in transition, the jury and the representation they promise are the demonstration of democracy in some form at work. Despite the contraction of the jury as an active influence over courtroom deliberations in Australia, this does not reflect the global trend to rediscover jury decision-making and community involvement in criminal trials.

Endnotes

1. This is where local or magistrates courts, which operate without juries, are being given responsibility to hear more serious offences, at the election of the prosecution or the defence.
2. For a critical evaluation of how this critique is all too often based on popular wisdom rather than empirical understandings see M Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41(1) *British Journal of Criminology 5*.
3. The nature and impact of this development is discussed in B McKillop, 'Review of Convictions after Jury Trials: the New French Jury Court of Appeal' (2006) 28 (2) *Sydney Law Review* 343.
4. Empirical justifications for this are provided in M Findlay, *Jury Management in NSW* (1994).
5. This issue is presently receiving the detailed consideration of the NSW Law Reform Commission.
6. Having said this, it is only at the federal level that limited access to jury trial is a constitutional right in Australia.
7. This survey is examined in detail in P Duff (et al), *Juries: A Hong Kong Perspective* (1992).
8. The nature and extent of this experiment is discussed in M Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41(1) *British Journal of Criminology 5*.
9. The disproportionate influence of forensic evidence on jury deliberations is surveyed in M Findlay, *Juror Comprehension and the Hard Case—Making Forensic Evidence Simpler* (2006) Sydney Law School Research Paper 06/59 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928788> at 2 May 2007.