



***The Jury on Trial – Some Perspectives***  
**2017 Clayton Utz Alexander Christy Freeleagus Oration**  
**1 September 2017**

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**The Hon Justice A Philippides**  
**Court of Appeal**

Justice Keane, your Honours, distinguished guests, ladies and gentlemen.

The Alex Freeleagus Oration has attracted extraordinary interest since it was instituted three years ago and we have been fortunate to have had outstanding speakers, and so it is this evening. The enormous respect, one might say reverence, accorded to anything that should fall from tonight's speaker is reflected in the over-capacity audience present in the Banco Court. The topic that Justice Keane has chosen, "The Jury on Trial: from Socrates to Modern Times", would have had Alex Freeleagus' wholehearted endorsement. It considers the unique contribution of Ancient Greece in the conception of democracy, as encompassing a direct and active role by citizens, not only in office-holding, but in the passing of legal judgment ("krisis").

Aeschylus' trilogy the *Oresteia*, to which Justice Keane has referred, examines three types of rule: rule by monarchy; by tyranny; and lastly, in the *Eumenides*, rule in the Athenian democracy, where neither King nor tyrant ruled, but the citizens. The *Eumenides* portrays the Areopagus as a court where disputes are resolved peacefully by reasoned argument. And it is significant that it is presented as the inaugural jury court. Some few years earlier, it had been the subject of important democratic reforms which advocated and advanced by Ephialtes (who was assisted by the up and coming Pericles). As the renowned classicist, Paul Cartledge, explains in his book "Democracy, A Life", the reforms transferred a great deal of its legal powers to Solon's Heliaea, that became known as the *Dikasteria* or People's Court, so that these jury courts became both courts of first instance and of appeal.<sup>1</sup>

It is in this context that it is important to appreciate, as Paul Cartledge emphasises, the uniqueness of the "demokratia" of ancient Greece, as one where the "demos" (people)



exercised “kratos” (power) that was, most importantly, “political power.” That is, power over matters of the “polis”, being the citizen-state of face to face societies such as found in ancient Athens. It was the rule of the many over the few, but more pertinently, of ordinary, poor citizens over the rich, leisured, aristocratic class through the exercise of equal power in both the Assembly and in the courts.<sup>2</sup> The demos “ruled and were ruled in turn” as Aristotle described it, observing that the citizen of a polis had a share in judgment (‘krisis’) as well as in rule or office.<sup>3</sup>

At the time of the trial of Socrates in 399 BC, Athens had suffered at the hands of the outrightly anti-democratic Spartan-backed Thirty Tyrants, who rose to power after its disastrous war with Sparta. The jury courts, suspended during the war, were replaced with the Council of the 500, before whom the regime’s opponents were tried. There was no respect for the use of secret ballot.<sup>4</sup> One contemporary account estimated the number killed in less than a year exceeded the number killed in the 10 years of the Peloponnesian War.<sup>5</sup> More violence followed until democracy was restored after an amnesty.

It is against this tumultuous background, as Justice Keane has explained, that Socrates’ trial for impiety is to be considered. Was the jury’s verdict one impeachable as unreasonable? Plato and many others, including Stuart Mill, would emphatically say yes, moreover, that it was an example of mob rule. Others, notably Paul Cartledge, while acknowledging Socrates’ undoubted courage, have made an opposing case.<sup>6</sup> As Justice Keane had explained, in the “demokratia” of Socrates’ time, there was no appetite for the questioning of its gods, on whose protection and goodwill the *polis* depended, nor, in the dreadful times that had been endured, was there any patience for atheism.<sup>7</sup> The undermining of the religious cohesion of the *polis* was considered a serious matter that went to the core of the political wellbeing of the city state.<sup>8</sup>

The trial of Socrates raises the issue of freedom of speech, but, as Justice Keane has observed, there was no concept of a *right* to freedom of speech in Ancient Greece. The Athenians, as Paul Cartledge puts it, “placed no absolute value on freedom of



speech as a democratic value”<sup>9</sup> and, indeed, “would not feel comfortable at all with any notion of universal human rights”.<sup>10</sup>

It was direct, active engagement by citizens for the betterment of the *polis* that was expected and valued and the norm of Athenian democracy. Pericles was reported to have said of Athenian democracy, “We alone judge the person who has no share in ‘*ta politika*’ (an active life of the polis) to be not (merely) a quietist but useless”.<sup>11</sup>

Although our jury system does not descend from the ancient Greeks, it remains the case that it is only in the third arm of government, in our judicial system, and only in the form of the jury, where direct decisional participation by citizens may be found. The importance of the jury system in our criminal justice system cannot be overstated and the legitimacy that it brings is well understood.<sup>12</sup>

Indeed, the scope for employment of a type of citizen jury on occasion beyond the judicial system – in the legislative arm of government has been the subject of much discourse. The concept involves the input of lay decision-makers selected by the ancient Greek practice of sortition (random selection of the public by poll) who are equipped with appropriate information and provide their recommendations for consideration by parliamentarians. The use of such citizens’ juries has been the subject of much commentary<sup>13</sup> and has occurred in Ireland and Finland and in South Australia.<sup>14</sup> Recently, the Australian Capital Territory has announced that a review into that Territory’s compulsory third party insurance scheme will be conducted by a citizens’ jury of 50, which will provide recommendations for legislative reform to be considered.<sup>15</sup>

Whether the notion of a “citizen jury” may provide a further means for direct engagement by citizens of our democracies in the governmental process remains to be seen. Justice Keane has demonstrated, however, with the scholarship, intellectual rigour and eloquence for which he is known, the unparalleled importance, in our criminal justice system, and for our society as a whole, of the role played by the jury. We are greatly indebted to him.



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## END NOTES

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- 1 Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 85-86.
  - 2 Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 17, 102, 117.
  - 3 Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 169. An annual panel of 6,000 citizens selected by lot formed the jury and laws were passed by a sub-group of the 6,000 jurors, known as law-givers, while decrees were passed by a majority of the Assembly: Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 21.
  - 4 Adriaan Lanni, *Law and Order in Ancient Athens* (Cambridge University Press, 2016) at 174.
  - 5 Adriaan Lanni, *Law and Order in Ancient Athens* (Cambridge University Press, 2016) at 173.
  - 6 Paul Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge University Press, 2009) at 76-90.
  - 7 Socrates was not alone in that regard. See Tim Whitmarsh, *Battling the Gods: Atheism in the Ancient World* (Knopf, 2015).
  - 8 Sophocles expresses the ruination that flowed from the gods' displeasure in *Antigone* thus: "Blessed are those whose life has not tasted evils. For when a house is shaken by the gods, there is no element of *ate* that does not advance towards the family's members, in all their numbers": Douglas Cairns, *Sophocles: Antigone* (Bloomsbury, 2016) at 86.
  - 9 Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 129.
  - 10 Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) at 311.
  - 11 Paul Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge University Press, 2009) at 62. The notion that abstention from public affairs rendered a citizen "useless" attributed to Pericles find a milder resonance in De Torqueville's sentiments about the importance of the jury to society in that it "rubs off that private selfishness which is the rust of society". See also Miller, *Examined Lives: From Socrates to Nietzsche* (Picador, 2012) at 23 as to Socrates' ceasing to engage with public affairs to any extent. See also the excellent discussion about Socrates' civil participation and notion of civic duties in Josiah Ober, *Socrates and democratic Athens: The story of the trial in its historical and legal contexts* (Princeton University, 2006).
  - 12 Although the jury's role in civil trials is increasingly restricted, it retains a key role in defamation trials and the importance of their constitutional role in that area as representatives of the community is frequently emphasised: see *Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227 at [135].
  - 13 See, for example, David Van ReyBrouck, *Against Elections: The Case for Democracy* (Random House, 2016).
  - 14 See, for example, The Citizens' Assembly, Republic of Ireland, *About the Citizens' Assembly* (2016) <<https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/>>; yourSay, Government of South Australia, *What is a Citizens' Jury all about?* <<https://yoursay.sa.gov.au/initiatives/citizens-jury>>; Celeste Young, 'City calls on jury of its citizens to deliberate on Melbourne's future', *The Conversation* (online), 19 July 2016 <<http://theconversation.com/city-calls-on-jury-of-its-citizens-to-deliberate-on-melbournes-future-59620>>.
  - 15 Louise Maher, 'What is a citizens' jury and why is Canberra having one?' *ABC News* (online), 28 August 2017 <<http://www.abc.net.au/news/2017-08-28/canberras-first-citizens-jury-to-tackle-ctp-insurance/8843130>>.