



## Rules, rights and justice: an introduction to law

### *Trial by jury*

#### **MISHAL HUSAIN:**

Britain was the first country in the world to adopt the system of trial by jury. Juries have been around here for eight hundred years and the system's been emulated all over the world. It's been praised as a bastion of civil liberties and a model of citizenship. But in the twenty first century the old system's meeting new challenges. Fraud cases and those where there's a high level of scientific or technical content are particularly prone to reveal cracks in the system. So, are we beginning to witness the limitations of trial by jury? Well with me in the studio are three experts whose work has given them a special insight. Professor Roger Matthews is based at London's Southbank University. His past research includes unique face to face interviews with jurors. Burkhard Schafer is a senior lecturer in law at the University of Edinburgh. He specialises in evidence and criminal procedures in other European countries, particularly Germany, France, the Netherlands and Italy. And Professor Gary Slapper is director for the Centre for Law at the Open University and one of the authors on this W100 course. Welcome to you all. Let's start our health check on the British jury system by taking a look for a moment at the bigger picture. Gary Slapper, how well do you think the system of trial by jury is adapting to the challenges of the twenty first century?

#### **PROFESSOR GARY SLAPPER:**

I think it's adapting very well. I think part of the reason for that is it has a long and carefully evolving history and it's successfully adapted itself to other social systems and other social developments, and this is particularly so when you remember that the jury evolved from a mechanism that used people who knew the defendant or an event and who swore, adjured, to events precisely because they knew the person or what was going on. It's evolved from that to the exact opposite over eight hundred years, where people are selected because they know nothing of the person or the event and ...

#### **MISHAL HUSAIN:**

So you think some of the criticism of the jury system these days is a little misplaced?

#### **PROFESSOR GARY SLAPPER:**

I think much of the criticism is greatly misplaced because sometimes small weaknesses or difficulties with a jury system are seen as being exaggeratedly bad. When you look at the broader picture about how successful a mechanism this has been over many centuries.

#### **MISHAL HUSAIN:**

Let's bring out some differences now between the system here and the system elsewhere. Burkhard Schafer, you're an expert on continental jurisdictions. What are the main differences that strike you at the first instance?

#### **BURKHARD SCHAFFER:**

Well at first it is rather difficult to speak of the continental system even though continental jurisdictions are all inquisitorial, the way they incorporate lay participation differs wildly, and the differences between France and Germany are considerably greater than those between England and Scotland for instance. What can in general be said is firstly that the iconic character of the jury its role as democratic participant, is much less pronounced. The continental jury system historically evolved very much as a response to the experience in France under the revolution. The idea of people's tribunals, were very democratically but also in a very unjust and very cruel way enforcing the will of the government, rather than justice. And because of that there is a certain suspicion and a certain disinclination to state the role of the juries in democratic terms. This is the one common denominator which resulted in the

Netherlands in a total abolition of the jury, and in a very restrained, controlled way of using lay participants in other countries.

**MISHAL HUSAIN:**

Well we're going to definitely bring out more of those differences and lessons possibly to learn later on in the discussion. But Roger Matthews, let's turn to the actual perspective of the jury themselves. We don't get to hear from them very often, but your research was unique in that you put questions to jurors themselves. How did they see the system?

**PROFESSOR ROGER MATTHEWS:**

Well I mean most of the jurors that we spoke to were very committed to the whole jury system. They found it a very fulfilling experience. They were very conscientious about the whole process and wanted to see fair play, they wanted to see a professional system operating that respected people's rights. And most of the jurors were very happy to do jury service again.

**MISHAL HUSAIN:**

And had their perception of being on a jury changed through the experience itself.

**PROFESSOR ROGER MATTHEWS:**

Well the research that we did was looking at the confidence of jurors and how being involved in the jury system increased or decreased that confidence. And overall for the people who participated there was a quite clearly not only an increase in their level of confidence that they had in the court system, in the jury system but also notions of citizenship for example were enhanced by the process of actually being involved in the jury itself.

**MISHAL HUSAIN:**

Gary, how do you see that research? Does it fit into how you see the jury system?

**PROFESSOR GARY SLAPPER:**

Yes I think it underlines the importance of the fact that the jury is a very significant part of the general social apparatus. In the phrase of one nineteenth century commentator, it's a good teacher of citizenship. This is one of the key concrete examples of where society does something together, that where people forfeit other things that they would be doing in their life to serve socially on behalf of the community. And very importantly to implement the standards and the will of the community, I think.

**MISHAL HUSAIN:**

Burkhard, would the perspective from say France or Germany be in line with that?

**BURKHARD SCHAFFER:**

I would question one aspect of this argument as it applies to the jury in continental systems. If there is indeed an important political role for lay participation, why should it focus on that aspect of the trial which is least open to democratic decision making. The truth of the question of fact. Would it not be much more rational to focus on punishment, the sentencing aspect? Or possibly even on the legal aspect. And that is indeed what happened in continental jurisdictions where the jurors do not only decide about questions of fact but also about the sentencing and indeed of questions of law.

**MISHAL HUSAIN:**

Roger do you think that jurors would hear, would welcome that idea? Being involved in those different stages of the process?

**PROFESSOR ROGER MATTHEWS:**

Well I think that's a very interesting point actually because one of the things that we were looking at when we were doing the research was about whether jurors thought that judges were giving out too light or too severe sentences. Were they being too lenient? Were they being too harsh? And what we actually discovered was, and this is one of the important things about this whole process is to make a distinction between the process of the trial and the outcome of the trial. Most of the jurors that we spoke to were not actually that interested in the

outcome. What they were interested in was the process. They wanted to see the process working properly and they wanted to see it being fair and just. And when you finish jury service they give you a telephone number that you can ring up to find out what the verdict was and what the sentence was. Only one in three of the people that we interviewed ever bothered to ring that number. And when we said to people, did you think the sentence was fair, they reality was that most people aren't really too concerned whether the person say if they're convicted gets say two years or four years. What they want to know was, were they properly represented? Was the process fair?

**MISHAL HUSAIN:**

Let's continue and talk about one concern that's often raised, which is exactly this, how decisions are made, the Contempt of Court Act forbids discussion of what happens in the jury room. But there is anecdotal evidence of jurors wanting to use unusual sources of reference Ouija boards and star charts for instance to aid their decisions. Gary let me come to you first. Do you have concerns about how juries reach their decisions?

**PROFESSOR GARY SLAPPER:**

Certainly when these stories crop up they are outlandish and some of them are quite funny because juries have consulted Ouija boards or asked silly questions of the judge from time to time demonstrating that they don't appear to have a good idea about how they should be making the decision. But strange as those cases are, broadly the evidence indicates that juries have a very careful deliberative process in the way that they reason through.

**MISHAL HUSAIN:**

Burkhard, how would juries in continental jurisdictions approach this?

**BURKHARD SCHAFFER:**

I would have some concerns about the accuracy of fact finding, of lay people, but I would have exactly the same concern on accuracy of fact finding by trained lawyers. We do not teach lawyers how to interpret facts. And that is consistent in continental jurisdictions as it is in common law jurisdictions. We don't teach about DNA, we don't teach about statistics, so I can't see why lay people should in themselves be less well placed to judge questions of fact. The one important distinction I would make is however whether or not the jury should report its reasons in some written form as a requirement of justice. If I am punished I want to know why. I want to know why the other side was convinced. And the continental system while it does not enquire from the individual juror to give reasons, the court at least will supply in its written judgment also an evaluation of the evidence which I think is a helpful mechanism also to have possibilities of appeal if for instance decisions were based on blatantly racist or rather outlandish methods of fact finding.

**MISHAL HUSAIN:**

Gary?

**PROFESSOR GARY SLAPPER:**

Occasionally there deliberations because they are small sections of society, suffer from the type of thing that you'd see more broadly. So it's clear that from time to time juries appear to introduce sexist or racist or all sorts of other prejudiced ideas. Those are then dealt with within the jury setting in the way that they would be in society at large.

**MISHAL HUSAIN:**

Roger what did your research reveal about this process of decision-making? What did the jurors tell you about how they came to decide one way or the other?

**PROFESSOR ROGER MATTHEWS:**

Well we weren't allowed to talk about decision-making because this is the Contempt of Court Act and it's very tricky ground to do any research on at the moment. But what was very clear was that the vast majority of jurors both took it very, very seriously. Spent a lot of time and thought about it. And whether their decisions were right or wrong and there was no doubt that they were very serious about the whole process. And certainly people who came to very quick decisions or people who were seen not to take it seriously were actually internally sanctioned

by the jury themselves and were treated with a certain degree of reprehension. So basically there was a lot of pressure to go through the arguments carefully and to come to a thoughtful decision.

**MISHAL HUSAIN:**

Well although there is still huge respect for the jury system, it's unlikely to be the most time efficient system that could possibly be devised. Even in the smoothest running trial time has got to be devoted to explanations and there's scope for further delays due to failures of communication, accidents and illness. Let's explore now any concerns about the jury system wasting court time and the tax payers' money. Roger let me put this to you first. That this is often the criticism that we hear about juries. How do you think jurors feel about it?

**PROFESSOR ROGER MATTHEWS:**

I think jurors have in the past been very upset where cases have been stopped or if people have not turned up and particularly defence or prosecution lawyers have not turned up. My impression was actually travelling around different courts is that this whole process has actually been tightened up quite considerably now. And certainly in the old days, I mean for example jurors would sit around courts for days and days waiting for trials to restart or for people to turn up. The whole thing has actually now become much more efficient and there's a lot of pressure on people to turn up on the day because it's more expensive you know if one or two people don't turn up.

**MISHAL HUSAIN:**

Burkhard, of course the system's very different in so many European countries where people are often nominated aren't they? Rather than chosen at random. I wonder whether that meets some of these kinds of concerns that you hear expressed.

**BURKHARD SCHAFFER:**

They are nominated in Germany but they are looking closer to a mixture of the British judge and a justice of the peace. They are chosen at random in France or Italy. I am not convinced that is the jury that delays trials. I totally agree it typically is a question of efficient calling of witnesses, efficient calling of experts. I would probably have the opposite concern that the jury trial at present is maybe too quick and too efficient and that relates back to a point Gary made about the democratic and parliamentary function of the jury system. One of the important functions of a parliament is to ask questions. To be actively involved, to stand up and be counted. That obviously delays the process but can have huge benefits. And the continental juror typically would have the same rights as the judge to ask questions of the witness. It is slower, it takes longer, but I think in terms of accuracy that has certain benefits.

**MISHAL HUSAIN:**

Gary, that would be something of a revolution here, that kind of system.

**PROFESSOR GARY SLAPPER:**

It would, although really it's not the system which needs changing but the way that people within the system work it. And I mean that jurors are currently entitled to ask any questions of the court and the judge. It might be through the way that history has developed and the way that juries along with other lay members of the court have found it easy to be cowed and intimidated by the authority of the bench and the bewigged judge from on high. In fact they were then and are now entitled to ask questions of the court and you would hope that with growing notions of citizenship this will occur more often than it does already.

**MISHAL HUSAIN:**

Let's talk about a particular kind of challenge, fraud cases for instance and cases involving complex scientific or technical information are this. One notorious Old Bailey trial for fraud for instance on the Jubilee Line extension lasted nearly two years and cost the tax payer sixty million pounds. Roger, this is exactly the kind of case that one sometimes hears the criticism that juries shouldn't be involved in this kind of case.

**PROFESSOR ROGER MATTHEWS:**

I think that the main problem with this particular Jubilee Line case and similar cases is they were argued in terms of the complexity of the evidence and that's why they were inappropriate for jurors. The reality was, it was the length of the case that was the problem. And any case that lasts for two years is obviously going to be very difficult to sustain twelve people, not going to work, etc.

**MISHAL HUSAIN:**

On this point about the specialist aspect though of the actual content Burkhard Schaeffer I know that in many parts of the continent you have specialist jurors don't you, to meet these kinds of demands?

**BURKHARD SCHAFFER:**

We would not use them in criminal litigation but in civil cases where there is lots of lay participation, we do indeed quite often choose lay participants because of their expert knowledge. In commercial litigation which is very similar to complex fraud cases we do have as lay participants people with a background in business for instance. The United States is experimenting with specialist jurors even in criminal proceedings. In the continent we use it in civil litigation. I have doubts about its applicability in a criminal context. Fraud cases can be complex but they can also be very, very simple. You don't know in advance the time issue mentioned by Roger I think is crucial and there are ways of helping the juror cope with that. Questions of note-taking, possibly allowing them to discuss amongst them before the trial is over. Again something that would happen on the continent might be better solutions.

**MISHAL HUSAIN:**

Gary what do you think of the solutions in these complex technical cases?

**PROFESSOR GARY SLAPPER:**

I think there has not been yet sufficient attention paid to the idea of simplifying the fraud cases in the way that they're presented. Einstein once said that however complicated ideas are, they should always be reducible to, at a minimum of one page of A4, double-spaced. You should always be able to compress complicated stories into simpler versions. And one has to wonder how, just how - complicated something could be. If really the answer to the question is guilty or not guilty, if it takes close to two years of being in court for most of those days in order for the story to be told.

**MISHAL HUSAIN:**

And of course Roger, I mean very few people want to give up that, their time to that extent and how do jurors feel faced with what could potentially be a really long running case.

**PROFESSOR ROGER MATTHEWS:**

One of the things that is quite clearly the case is that - see you've got a number of conflicting pressures. On one level jurors, people in general find it much harder to give up two three four, weeks of their lives. I mean they're very busy people, they've got all the pressures of modern life. It's actually very difficult to make that commitment. On the other side of it you've also got a government and politicians who actually want to expedite cases. So they want the whole process to be smoother and quicker and faster and more efficient. But at the same time what they also want which you also get from jury system, is they want that level of public involvement and elements of citizenship. So in fact I mean you have those kind of three pressures, pulling in different directions simultaneously and that really is at the heart of this whole sort of process, so its in-between those pressures that the debate's being played out.

**MISHAL HUSAIN:**

But the most important principle at stake is that justice must be done so it's important to look at the quality of the final decisions. Let's do that now. Do jurors make fairer decisions than professional judges? In recent years the acquittal rate in trial by jury has been higher than in trial by judges. So should we be concerned about the quality of juries' decisions. Burkhard, your view.

**BURKHARD SCHAFFER:**

I think there's a definite role to be played for lay participants in the criminal trial system. I think by and large they increase the quality because they allow prejudices and preconceptions to be challenged through dialogue. And a single judge who has preconceptions is biased, is as dangerous as a juror who is biased. So it is important to allow that kind of diversity to come into the system. How you do it in precise procedural terms might be open for debate. In the continental system the judge will discuss together with the jury his assumptions are as challenged as theirs. That might have certain advantages. The other advantage that I see is that it allows the court to give reasons for the decisions and from a point of fairness if I were the accused, I would like to know why I was convicted not just on the legal why, but also why for instance my statement wasn't believed and that of my accuser was. That is what the inquisitorial, joint deliberation of judge and jury can provide.

**MISHAL HUSAIN:**

Gary what do you think of that idea? About giving reasons for juries' decisions?

**PROFESSOR GARY SLAPPER:**

Yes, there is an argument that according to the philosophy which is behind the Human Rights Act that it is important for this to happen so that justice can be more open and less opaque. Whether or not it's done in cases of acquittal as well as conviction would be one question to resolve. And how precisely the reasons have to be given is another question. But it's certainly carries clear merit as a suggestion and would be one of a number of ways in which the jury could evolve into the future.

**MISHAL HUSAIN:**

Roger what do you think of that idea?

**PROFESSOR ROGER MATTHEWS:**

Well it was one of the recommendations actually in the research that we did, that jurors should be given more opportunity to actually ask questions, to consult and to get advice and become more involved in the trial. And I think that there's quite clearly been a case historically where the relationship between the jurors and the judge has become a distant relationship. And certainly in terms of maybe improving the quality of decision-making, you know, some greater combination would be better.

**MISHAL HUSAIN:**

And do you think there are questions and valid concerns about the quality of decision making from a jury?

**PROFESSOR ROGER MATTHEWS:**

I think the quality of the decision making in terms of guilt and innocence is taken very serious by jurors and therefore I don't think there's any great problem that these things are taken lightly. And I think that one can have some reassurance from the fact that a great deal of thought and time and effort goes into making what are seen to be the right decisions.

MISHAL HUSAIN: Burkhard you of course have the luxury in a sense of the outsider's perception. Can I ask you finally just for your thoughts on how this system of trial by jury in Britain looks from the outsider's side?

**BURKHARD SCHAFFER:**

I think that the closer one looks at the system, the more the similarities become apparent. The main difference seems indeed to be whether or not an inquisitorial system which puts the juror in charge has advantages over one where he remains largely passive. Think of a student being taught in seminars or in lectures. Decide for yourself which mode of education you prefer and you will know which type of jury member you want to be.

**MISHAL HUSAIN:**

Okay, well at this point we're going to have to stop our own deliberations because we're running out of time. I'd like to thank our panel of experts, Gary Slapper, Roger Matthews and Burkhard Schaffer and we leave it to you to deliver the verdict.