**Jury Trial Reform: Verdicts, Reasons and the Rule of Law**

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**27 October 2018**

Dear Editor,

In the days following the verdict of the much-publicised Jackson/Olding rape trial, it was revealed that a juror had made comments online explaining the jury's decision.[1] Though the comments were swiftly removed, they threw a spotlight on something closely guarded and sacrosanct in the criminal justice system - the reasons for a verdict. The extensive media reporting of the trial has brought unprecedented scrutiny to the intricacies and anachronisms of jury trials on the island of Ireland. It has also raised legitimate questions about the functioning of both rape trials and juries generally, many of which have been discussed in considerable detail elsewhere.[2] This letter, however, will seek to argue that due to their failure to give reasons for their decisions, juries are fundamentally contrary to the rule of law.

The modern criminal jury, that 12 ordinary citizens convene to render an impartial finding of fact, has its origins in ancient England, stretching back hundreds of years.[3] In Ireland, the role of the jury is constitutionally enshrined under Article 38.5, which provides that no person shall be tried on any criminal charge without a jury, save for summary and special charges. The role of the jury is also regulated by the Juries Act 1976 and the common law.[4] At the conclusion of the judge's charge, the jury will retire to consider the evidence, deliberate in secret and render a verdict.[5] A jury cannot be questioned subsequently or reveal how they reached this verdict.[6] The primary motivation for this is that it would end the finality of a jury verdict undermining the legal certainty of the decision and so as to preserve public confidence.[7] The necessity to protect the independence of the jury and the need to reduce the possibility of appeals have both further been cited as motivation for maintaining the secrecy around the deliberative process.[8]

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[1] Conor Gallagher and Amanda Ferguson, 'Belfast Rape Trial Juror's Online Comments Referred to AG' *The Irish Times* (Dublin, 30 March 2018).
[2] See Jack Farrell, 'Vixens, Sirens and Whore: The Persistence of Stereotypes in Sexual Offence Law' (2017) 20(1) TCLR 30; Bryan O'Sullivan, 'Protection against Cross-Examination by the Accused in Sexual Offence Trials' (2015) 25(3) ICLJ 54; Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998).
[3] Robert Van Moschzisker, 'The Historic Origin of Trial by Jury' (1921) 70(1) Uni Penn LR 1.
[4] See *Murphy v Ireland & ors* [2014] 1 ILRM 457 [15].
[5] Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall 2016) [22-01].
[6] Law Reform Commission, Consultation Paper on Contempt of Court (LRC, Dublin 1991) 363.
[7] ibid 363-367.
[8] *Bushel's Case* (1670) 124 ER 1006; *R v O'Connor; R v Mirza* [2004] UKHL 2.

In contrast, central to the concept of procedural fairness and the administration of justice is the well-accepted principle that decision-makers, both judicial and administrative, are required to give reasons for their decision.[9] Per Shapiro, the requirement that they do so serves a vital function in constraining the judiciary's and the executive's exercise of power, particularly in cases where the grounds of decision can be debated, attacked, and defended.[10] This fulfils a normative function, that decision-makers act fairly, rationally and for proper purposes, and that their decisions are defeasible. The requirement to give reasons has been described, both philosophically and practically, as essential to the operation of the law and more fundamentally, the rule of law.[11] Raz has argued if the law is to be obeyed, then it must be capable of guiding the behaviour of its subjects; it must be such that they can find out what it is and act on it. 'This is the basic intuition from which the doctrine of the rule of law derives'.[12] As Bingham LJ put it, it was the requirement to give reasons that made courts accessible to 'all persons and authorities within the state'.[13] This approach is logically consistent; the necessity to articulate reasons leads to more rational and carefully considered decision-making and it is almost axiomatic that a reasoned argument should require a reasoned response.[14] As argued by Fuller, when decisions are compelled to be explained and justified, the effect will generally be to pull those decisions towards goodness, by whatever standards of ultimate goodness there are.[15] Generally, the necessity to give reasons for decisions is accepted as a fundamental aspect of the rule of law itself.

Given that giving reasons are a necessary part of the rule of law, why then do we tolerate juries? Arguably this is primarily due to their entrenched institutionalism; they fulfil a longstanding and necessary function and are simply culturally accepted. But there are alternatives to the current regime. First, criminal trials could simply go the way of civil trials whereby judges are both the legal and factual arbiters since the abolition of juries in most cases, which would require constitutional change. In the alternative, juries could be required to give reasons for their decisions. There is a long line of Irish constitutional and international jurisprudence on the duty to give reasons for administrative and judicial decisions,[16] and there has been a

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[9] See *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.
[10] David Shapiro, 'In Defence of Judicial Candor' (1987) 100 Harv LR 731, 737.
[11] See Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 22; Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 210.
[12] Raz ibid 214.
[13] Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37.
[14] Charles P Curtis, 'The Trial Judge and the Jury' (1951) 5 Vanderbilt LR 150, 163; Frederick Schauer, 'Giving Reasons' (1994) 47 Stan LR 633; Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353.
[15] Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) Harv LR 630, 636.
[16] See Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (Round Hall 2010) [14-108].

tentative movement toward the same for jury trials. In 2009, in *Taxquet v Belgium*,[17] the European Court of Human Rights held that the conviction of a man for murder was a breach of Article 6, the right to a fair trial, of the Convention on the basis that the verdict given was not understandable to the Applicant.

> [F]or the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness....[T]he rule of law and the avoidance of arbitrary power are principles underlying the Convention.[18]

Admittedly, whilst the Court did not go as far as to say that Article 6 imperilled all jury trials, it held where it was not possible for the applicant to ascertain which evidence and factual circumstance had caused the jury to find him guilty, Article 6 was violated.[19] Whilst it is extremely unlikely the Court would require juries to give reasons any time soon, the judgment goes some way to demonstrate indirectly the logical inconsistency of not giving them, when compared to the same requirements of administrative and judicial decision-makers.

Requiring juries to give reasons is by no means a step into the dark; certain jurisdictions such as Spain and previously Switzerland require they do so.[20] Introducing such a requirement in Ireland would certainly necessitate some change, perhaps more cultural than anything else. However, it would inject some much needed clarity into an inaccessible and, to many, obscure facet of criminal justice, as well as reinvigorating the application of the rule of law. Since the Jackson/Olding trial and ensuing protests throughout Ireland, the Minister for Justice Charlie Flanagan announced he would review the legal protections for complainants in sexual assault trials,[21] perhaps too it is time to review one of the oldest and most opaque aspects of the justice system.

Is mise le meas,
Cillian Bracken

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[17] App No 926/05 (ECtHR, 13 January 2009).
[18] ibid [90].
[19] ibid [97].
[20] Stephen Thaman, 'Should Criminal Juries Give Reasons for Their Verdicts: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v Belgium*' (2011) 86(2) CKLR 613.
[21] Sarah Bardon, 'Flanagan to Review All Aspects of Sexual Assault Trials' *The Irish Times* (Dublin, 2 April 2018).