

**'THE LAMP THAT SHOWS THAT FREEDOM LIVES'  
-AN INTRODUCTION TO THE JURY SYSTEM**



Chan Wei June  
Graduated with an LLB  
Second Class Honours  
from the University of  
Liverpool; former  
student of HELP  
University College

The original concept of the jury was precisely the opposite of what it later became. Initially, jurors were expected to know what had happened or, if not, they were supposed to find out before the trial. Medieval juries played a more active role as they spoke more than they listened.<sup>11</sup> In the 13th century it was 'the duty of the jurors... to make inquiries about the facts of which they will have to speak when they come before the court.'<sup>12</sup> But by the 16th century, it had become expected that the jury would be ignorant of the facts of the case.

Now, the jury's duty is to weigh the evidence submitted and decide what the true facts of the case are. Then, the judge directs them as to the relevant point of law and the jury have to apply the law to the facts of the case and reach a verdict.<sup>13</sup> In a criminal case, the jury will give a verdict of guilty or not guilty and the judge will decide the sentence. For a civil case, the jury determines how much money should be awarded in damages.<sup>14</sup>

More importantly, it is the epitome of democracy - to be tried by one's peers and to promote public participation - thus strengthening the legitimacy of the

<sup>11</sup> Michael Zander, *Cases and Materials on the English Legal System* (7<sup>th</sup> edn LexisNexis, UK 1996) 361.

<sup>12</sup> F Pollock and FW Maitland, *The History of English Law* (2<sup>nd</sup> edn The Law Book Exchange Ltd, New Jersey 1996) 624 - 625.

<sup>13</sup> Catherine Elliot and Frances Quinn, *English Legal System* (6<sup>th</sup> edn Pearson Longman, London 2005) 178.

<sup>14</sup> *Ibid.*

legal system. It humanises the cold harsh aspect of the law by reducing the power of legal professionals whose opinions may not necessarily reflect the lay majority.<sup>15</sup>

**Mum's the Word: Jury Secrecy**

For 200 years, a rule in common law states that the deliberations of a jury must take place in secret and after the trial, they remain confidential. After the conviction of the defendant in a criminal trial or after the delivery of the verdict of a civil case, the court will not admit evidence or inquire into what happened in the jury room.<sup>16</sup>

Dating back to 1785, the common law prohibits the court from receiving evidence from a juror about anything said during the jury's deliberations and the rule comes to force from the moment the jury is empanelled. Nevertheless, the rule excludes evidence received from a third party and evidence of an irregular occurrence of an extraneous nature.

Until 1981, there was a lacuna in the law concerning jury secrecy involving the media, which became obvious in the case of *Attorney-General v New Statesman*.<sup>17</sup> This case led to contempt proceedings brought by the Attorney-General against the New Statesman.<sup>18</sup> On the facts, the New Statesman was held not to be in breach of the law. The Court held that a mere disclosure of the secrets of the jury room was not contempt in common law because it did not influence the finality of the jury verdicts or the attitude of future jurors towards their duties.<sup>19</sup> Hence, this brought about the introduction of the Contempt of Court Act 1981(hereinafter

<sup>15</sup> Gary Slapper and David Kelly, *The English Legal System*, (8<sup>th</sup> edn Routledge Cavendish, London 2006) 299.

<sup>16</sup> Terrence Ingman, *The English Legal Process*, (11<sup>th</sup> edn OUP, Oxford 2006) 269.

<sup>17</sup> [1980] 1 All ER 644.

The New Statesman had published an interview with one of the jurors, who remained anonymous. The juror claimed that on the first day of the trial, the members of the jury had already decided to deliver a not guilty verdict.

<sup>18</sup> Terrence Ingman, *The English Legal Process*, (11<sup>th</sup> edn OUP, Oxford 2006) 272.

<sup>19</sup> *Ibid.*

referred to as 'the said Act') to fill in the gaping hole in the common law. Section 8<sup>20</sup> specifically provides for the confidentiality of jury's deliberations.

#### When Silence is not Golden: Problems with Jury Secrecy

The secrecy of the jury chamber has long been criticised by academics, journalists and judges. This strong censure comes from the primary reason that it may cause a miscarriage of justice. This is because the Act impedes the court's ability to investigate accusations of jury bias<sup>21</sup> or reports on impropriety during deliberations<sup>22</sup>. Although juries decide only 1 per cent of criminal cases, this 1 per cent translates to 30,000 trials and these are usually the most serious ones.<sup>23</sup>

Defendants for criminal cases have more than just their reputation at stake – their liberty is on the line. Hence, when cases such as *R v Mirza* (2004),<sup>24</sup> *Attorney General v Scotcher*<sup>25</sup> and *R v Qureshi*<sup>26</sup> arise, a shadow of doubt is cast upon the validity of the long-standing principle of jury secrecy. In *Remli v France*<sup>27</sup> the accused was a French citizen of Algerian origin and he contended that one of the jurors had made a racist remark. The Strasbourg Court held that under *Article 6 of*

<sup>20</sup> It states that 'it is a contempt of court to obtain disclose or solicit any particulars of statement made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations in any legal proceedings.'

<sup>21</sup> *R v Mirza; R v Connor and Rollock* [2004] UKHL 2.

<sup>22</sup> *R v Young* (1995) QB 324.

<sup>23</sup> Catherine Elliot and Frances Quinn, *English Legal System* (6<sup>th</sup> edn Pearson Longman, London 2005) 178.

<sup>24</sup> [2004] UKHL 2.

After the trial of Mirza, a juror wrote to her barrister claiming other jurors were racially biased against Mr Mirza. She said when she objected she was "shouted down" by "bigots".

<sup>25</sup> [2005] UKHL 36.

In this case, the appellant was a juror of a case where two brothers were convicted by a majority verdict. He wrote anonymously to the defendant's mother stating that he voted for an acquittal and gave details on his view of the unsatisfactory nature of the jury's deliberations. The letter was referred to the police and when the appellant's identity was discovered the Attorney-General instituted legal proceedings against him for contempt of court.

<sup>26</sup> [2001] EWCA Crim 1807.

<sup>27</sup> [1996] 22 EHRR 253.

*the European Convention on Human Rights* – the right to a fair trial – national courts have 'an obligation' to ensure that there is an 'impartial tribunal' for the defendant. Hence, the failure of the French court to investigate the allegation was held to have violated that right. Despite this, an accused person who alleges that his or her jury behaved improperly faces an uphill struggle.<sup>28</sup> Even a juror who makes a similar contention could risk facing jail time if the complaint is not put forward through a proper channel.

Also, since the jury system is highly respected, the courts themselves have vigorously resisted any measure that in their view would tarnish the image of the innate fairness of the jury system. Judicial policy has long endorsed two presumptions; first, that juries decide cases only on the evidence; second, that any judicial direction to a jury to disregard any matter possibly giving rise to bias will be thoroughly adhered to by jurors.<sup>29</sup>

These two assumptions are not only unsubstantiated but also dangerous. The courts are taking a risky gamble by trusting the jury system with good faith that they will carry out their duties accordingly. Unfortunately, sometimes, jurors are anything but disciplined, fair and dedicated when carrying out their civic duty.

Occasional misconducts have happened; two jurors climbed through a window to smoke cigarettes on the ledge and refused to participate in deliberations. Another female juror had sent a bottle of champagne to a prosecutor with a note saying, "What does a lady need to do to attract your attention?"<sup>30</sup> This raises more than just eyebrows but also questions regarding the quality of the decision since the jury chamber is sealed.

<sup>28</sup> Pamela Ferguson, 'The Criminal Jury in England and Scotland: The Confidentiality Principle and The Investigation of Impropriety' (2006), *International Journal of Evidence and Proof* 8.

<sup>29</sup> David Corker and Neil Johnson, 'Jury Malpractice' (2005) NLJ 1.

<sup>30</sup> Chris Summers, 'Spotlight on Jury Room Pressures' *BBC News* (2007) <[http://news.bbc.co.uk/2/hi/uk\\_news/4745030.stm](http://news.bbc.co.uk/2/hi/uk_news/4745030.stm)> accessed 11 January 2008.

Next, in relation to the quality of verdicts handed by the jurors, one can reason that the principle of confidentiality does not promote accountability among the jurors. A judge delivers a judgment consisting of a detailed and explicit finding of fact.<sup>31</sup> On the other hand, the jury only returns an unexplained verdict. The former is easier to be reviewed in the appellate courts. Additionally, *Article 6 of the European Convention on Human Rights* requires the courts to give reason for their judgements. One can argue that the jury system evidently goes against this rudimentary principle.

Jury secrecy also infringes the juror's freedom of expression as stipulated in *Article 10 of European Convention of Human Rights*. Based on his personal experience, barrister Geoffrey Bindman narrates that at the end of the day, no actual harm was done when the jurors gave account of the debates in the jury room after the trial. Based on their discussion, he believes that they acted with 'impeccable thoroughness and objectivity'. By doing so, they had vindicated the jury system and he strongly believes that the public 'would be impressed' by their performance.<sup>32</sup>

Moreover, in criminal trials, the jurors are occasionally subjected to deeply distressing evidence or graphic photographs of injuries that can be horrific. Criticisms have been launched at the way the jury system forces people to observe pornography, of either violent or sexual kind without providing them proper counselling when their service ends.<sup>33</sup> This problem is aggravated by the fact that jurors are reminded not to discuss the case with anyone else because the evaluation of the evidence would form part of their deliberations.<sup>34</sup> Without a proper outlet to

<sup>31</sup> Catherine Elliot and Frances Quinn, *English Legal System* (6<sup>th</sup> edn Pearson Longman, London 2005) 197.

<sup>32</sup> Geoffrey Bindman, 'It's Good To Talk' (2006), NLJ 2.

<sup>33</sup> Gary Slapper and David Kelly, *The English Legal System*, (8<sup>th</sup> edn Routledge Cavendish, London 2006) 302.

<sup>34</sup> Catherine Elliot and Frances Quinn, *English Legal System* (6<sup>th</sup> edn Pearson Longman, London 2005) 198.

express their distress and traumatic experience, jurors may suffer from psychological problems.

### The 'Right' to Remain Silent: Why Jury Secrecy is Important

Firstly, jury confidentiality is fundamental because it promotes the freedom of discussion. Legal protection allows jurors to freely deliberate and to fully express their views without the fear of negative repercussions. This is important especially in trials involving terrorists where jurors may be reluctant to convict the defendant for fear of exposure to intimidation to acts of revenge from disgruntled parties. Also, this is significant to the 'acquittal of an unpopular accused or one charged of a particularly repulsive crime'.<sup>35</sup>

Take, for instance, the trial of the two Algerian illegal immigrants who were convicted under the Terrorism Act 2000 for raising funds for al-Qaeda. The trial had almost collapsed as 3 jurors were excused due to fear of safety.<sup>36</sup> Without the said Act, such trials would be impossible to carry out. The confidentiality rule gives the jurors a sense of security and protection. The result of this is that their verdict would not be tainted with the need to please either party or society.

Secondly, a juror who knows that anything spoken in the jury room has potential to become front-page headlines might well feel reluctant to speak frankly, or even to undertake jury duty at all.<sup>37</sup> The confidentiality principle not only safeguards the jurors during trial but also after the trial as it helps preserve the juror's anonymity and privacy. Hence, it guarantees that the future and image of the jurors are protected.

<sup>35</sup> Judgement of Arbour J in the case of *R v Pan* [2001] 2 SCR 344 373.

<sup>36</sup> Steve Bird, 'Jurors Too Scared To Take On Case' *Times Online* (2003) <<http://www.timesonline.co.uk/tol/news/uk/article1125943.ece>> accessed on 12 January 2008.

<sup>37</sup> Pamela Ferguson, 'The Criminal Jury in England and Scotland: The Confidentiality Principle and The Investigation of Impropriety' (2006), *International Journal of Evidence and Proof* 4.

Of late, the common law rule has been recognised and accepted by the European Court of Human Rights in the case of *Gregory v United Kingdom*<sup>38</sup> as being a 'crucial and legitimate feature of English trial law.' The trial judge had handled the allegation of a prejudicial juror accordingly.

Next, in keeping the jury's deliberations secret, it ensures the finality of the verdicts because the jury only needs to give a general verdict that cannot give rise to misinterpretation. Consequently, the decision is not open to dispute.<sup>39</sup> In addition, it is unrealistic to require that laymen write out their reasoning similar to a judgment of a well-trained and experienced judge. The public's confidence towards the jury system might waver if they knew how the jury actually came about their decision. Despite all its shortcomings, there still remains validations for the principle to stand.

#### Secret Service Abroad: A Comparative Study

Several thousand miles away, in New Zealand, the confidentiality rule is starting to loosen up. The mystery shrouding the secret room is dissipating because the New Zealand Law Commission - with the blessings of the government and the judiciary - undertook a research project on jury decision making that involves interviews with jurors in a sample of fifty trials.<sup>40</sup> Jurors were asked on a variety of issues such as their own personal understanding and approach towards a case as well as on collective jury deliberation. The main aim was to compile empirical data in order to study how to enhance the effectiveness and efficiency of jury decision making and to reduce or eliminate any prejudice from pre-trial or trial publicity.<sup>41</sup>

<sup>38</sup> [1998] 25 EHRR 577.

<sup>39</sup> Catherine Elliot and Frances Quinn, *English Legal System* (6<sup>th</sup> edn Pearson Longman, London 2005) 191.

<sup>40</sup> Cameron Neil and others, 'The New Zealand Jury' (1999) 62 *Law and Contemporary Problems* 103, 130.

<sup>41</sup> *Ibid.*

In Canada, *section 649 of the Criminal Code (Canada)* makes it an offence for a juror to disclose any information relating to the proceedings of jury decision making when it is absent from the courtroom. Unlike the stringent position in the UK, there are exceptions to it, which are for investigations into, or prosecution of, alleged offences by a juror.

No such research has been carried out in the UK and often; researches rely on the use of mock juries either present at the trial or in viewing re-enactments or video-films of the trial to conduct their investigations.<sup>42</sup> There are some weaknesses in using this approach because mock juries do not necessarily evoke the same atmosphere as an actual trial. Additionally, the participants may take it lightly since there are no legal repercussions if they do not perform with due diligence and care.

America's take on jury secrecy is quite distinct from the rest. It is accepted that 'a juror who discloses information about the in-camera proceedings of a jury is not in contempt of the court'.<sup>43</sup> Freedom of speech is enshrined in the First Amendment of the United States written constitution and news gathering is an essential part of it. Consequently, over the years, the media and jurors alike have misused this right. Recently, after the high profile case of Michael Jackson's child abuse trial, the jury opened up its verdict in post-trial news conferences and interviews. One juror went as far to say that despite acquitting the defendant - due to lack of evidence - he believed that 'Michael Jackson probably had molested the boys'.<sup>44</sup> This is solely an American phenomenon and jurors for illustrious cases can become public figures, snapped up for media interviews and book deals as soon as the verdict is recorded.<sup>45</sup>

<sup>42</sup> New Zealand Law Commission, 'Juries in Criminal Trials Part Two' (NZLC PP37).

<sup>43</sup> *Ibid.*

<sup>44</sup> 'Should Jurors Speak Out?' *BBC News* (2005) <[http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4094562.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4094562.stm)> accessed on 13 January 2008.

<sup>45</sup> *Ibid.*

A grave problem has emerged, that of individuals desiring to become jurors in high profile cases in order to sell the details of the trial, including the details of the jury's deliberation. This situation is a blatant disrespect and violation of the institution of the jury. Perhaps even more dangerous is the possibility for a juror to produce a verdict that would make a "good ending" to the story.<sup>46</sup> Some states such as New York and California have enacted laws to prohibit jurors from selling their stories during the course of the trial.<sup>47</sup> At least 26 federal districts have local regulations which authorize the court to supervise juror interviews by restricting the time and place of such interviews.<sup>48</sup> Even so, a judge has no power to forbid this which highlights their limited influence in upholding the secrecy rule.

This has led to criticisms and the loudest coming from the judiciary itself. In *United States v Antar*<sup>49</sup> district Judge Nicholas H. Politan commented that post-verdict interviews create a "collision within the whole jury system."<sup>50</sup> Conversely, some view this as a violation of the defendant's Sixth Amendment right to a fair trial. It is not in the domain of the media to second guess the jury's verdict and "subject [jurors] to easy and obvious criticism."<sup>51</sup> The public must accept the verdict except the trial judge who may have the power to set aside a verdict.<sup>52</sup> Such a trend is unheard of in the United Kingdom - if a juror or media outlet were doing the same, they would end up in the dock - because confidentiality is still a major cornerstone in English law and is guarded tenaciously.

<sup>46</sup> Copernicus Gaza, 'Getting Inside The Jury's Head: Media Access to Jurors After the Trial' (1995) NYL SCH J HUM RTS 311.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> 839 F. Supp. 293 (D.N.J. 1993).

<sup>50</sup> Copernicus Gaza, 'Getting Inside The Jury's Head: Media Access to Jurors After the Trial' (1995) NYL SCH J HUM RTS 311.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

### To Change or Not to Change, That Is The Question: Reforms for the Confidentiality Principle

Hence, based on the discussion above, a change is imperative since the confidentiality principle seems to be hampering the course of justice instead of aiding it. In *Attorney-General v Scotcher*<sup>53</sup> the defendant sought to use the fact that he had genuinely believed that there was a miscarriage of justice as a defence. However, the Divisional Court held that this belief could not be used as a defence.<sup>54</sup> This case exposed a major flaw in the law because the said Act did not provide for a situation where a juror revealed details of deliberations to highlight a potential miscarriage of justice, either before or after the defendant's conviction.<sup>55</sup> This situation results in a conflict between the interest of the defendant and the juror since the confidentiality principle impedes the proper investigation of such allegations.

One opines that the interest of the defendant should supersede the jurors. Parliament's principal intention in enacting the said Act was to prevent the media from harassing jurors to reveal their deliberations. The courts should not interpret it so widely to persecute jurors who honestly believe that there was a possibility of a miscarriage of justice.<sup>56</sup> It is understandable why a juror may choose to disclose the information after the trial. He could have been suppressed by peer pressure from the other jurors, or his lack of faith in the court to resolve the matter. Moreover, the issue of a miscarriage of justice occurring should never be taken lightly and must be looked into. Nevertheless, abolishing the age-old principle is not a feasible solution as seen in the case of the United States where jurors lack certain etiquette and decorum. New Zealand's approach though, is much more practicable.

<sup>53</sup> [2005] UKHL 36.

<sup>54</sup> Emily Finch, 'Juries: Secrecy of Deliberations' (2005) NLJ 1.

<sup>55</sup> *Ibid.*

<sup>56</sup> Pamela Ferguson, 'The Criminal Jury In England and Scotland: The Confidentiality Principle and The Investigation of Impropriety' (2006) International Journal of Evidence and Proof 3.

Consequently, modifications such as subjecting the deliberation process of the jury in the company of an assessor could be used. The assessor could function as a silent observer and would try to ensure that the jury's deliberations are focused on the consideration of the evidence without any elements of biasness.<sup>57</sup> Besides that, assessors need not be judges, but ought to be legally qualified. The assessor would not be permitted to vote on the verdict or to give an opinion on the evidence.<sup>58</sup> More importantly, the assessor should also be subjected under the same confidentiality principle in order to preserve the spirit of the jury system. Only when a juror raises a complaint can the assessor give details about the deliberations.

Alternatively, the said Act could be amended to allow, where appropriate, an enquiry by the trial judge and/or the Court of Appeal into alleged impropriety by a jury, whether in the course of its deliberations or otherwise. Lord Justice Auld proposed this suggestion in his review of the criminal courts. One proposes that such an exception should be governed under strict rules with the intention, that not all cases decided by the jury would be forced to undergo a rehearing. The courts must strike a balance between certainty in the law and fairness.

Another solution would be to record discussions in the jury room and have the tapes sealed and in the event any allegation of impropriety were to arise, in which case there would be proof of any alleged wrongdoing.<sup>59</sup> Professor Spencer, a jury expert, has recommended recording the discussions in the jury room. These tapes will be sealed and kept in case any allegations of impropriety were to arise, with the intention that there will be proof of any alleged wrongdoing.<sup>60</sup> Jurors will be more mindful of their behaviour and concentrate more on the case. Moreover, the

<sup>57</sup> Pamela Ferguson, 'The Criminal Jury In England and Scotland: The Confidentiality Principle and The Investigation of Impropriety' (2006) *International Journal of Evidence and Proof* 3.

<sup>58</sup> *Ibid.*

<sup>59</sup> Cameron Timmis, 'JURIES, Trial by error?' (2006) *Law Society Gazette* 3.

<sup>60</sup> *Ibid.*

evidence could vindicate the juror who lodges the complaint and no complaint will be made irrationally.

Lastly, let's consider the French method where a professional magistrate or judge sits with the jurors in the jury room.<sup>61</sup> The jury could perform better under the watchful eye of a judge and issues of impartiality and improper behaviour would not arise. Nevertheless, this is a slightly more radical approach and it eliminates the significant aspect of lay participation in the jury system. The judge could indirectly influence the jurors because the jurors may look to him for guidance since he has a greater understanding of the law.

#### Concluding Remarks

Lord Devlin eloquently once described the jury system as 'the lamp that shows that freedom lives.' However, over the years, the light of the lamp has only been burning feebly and casting a dark shadow over the justice system. In order to bring the jury system back to its former glory, one strongly proposes that the confidentiality principle be loosened as the principle should hold the system together; not strangle it.

<sup>61</sup> Cameron Timmis, 'JURIES, Trial by error?' (2006) *Law Society Gazette* 3.