



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GILBERT + TOBIN CENTRE
OF PUBLIC LAW

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Secretary of State for Northern Ireland, Theresa Villiers MP
Northern Ireland Office
11 Milbank
London SW1P 4PN
The UNITED KINGDOM

Dear Secretary of State Villiers,

Non-Jury Trial Arrangements for Northern Ireland

Thank you for this opportunity to make a submission to your review of the Justice and Security (Northern Ireland) Act 2007. We acknowledge that sections 1-8 of the Act (providing for the continuation of non-jury trial) will expire if not renewed by 31 July 2013 and we commend you on conducting a consultation in advance of making your recommendation to Parliament. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

I Context

The Justice and Security (Northern Ireland) Act 2007 enacted a range of measures providing for the administration of justice in Northern Ireland. In particular, it continued in force the provision for non-jury trials for scheduled offences found most recently in Part 7 of the Terrorism Act 2000 and previously in the Northern Ireland (Emergency Provisions) Acts. However, it made one key change to the law. Section 75(1) of the Terrorism Act 2000 provided that: "A trial on indictment of a scheduled offence shall be conducted by the court without a jury." Section 1(2) of the Justice and Security (Northern Ireland) Act 2007 introduced a presumption in favour of jury trial, unless the Director of Public Prosecutions for Northern Ireland issued a certificate to try the defendant in a court without a jury.

This presumption in favour of jury trial has been an important part of a broader programme of normalisation, established by the Belfast Agreement in 1998. Normalisation, as a concept, is typically regarded as having negative connotations. It is most often used to describe the malevolent creep of exceptional (often anti-terrorism) legislation into the ordinary criminal law. For example, it has been used to portray the creep of restrictions on the right to silence, which were initially employed in the context of Northern Irish terrorism and were later applied to serious fraud cases throughout the UK and then to all criminal cases in England and Wales.

SYDNEY 2052 AUSTRALIA

Telephone: +61 (2) 9385 9654

Facsimile: +61 (2) 9385 1175

www.gtcentre.unsw.edu.au

The Belfast Agreement, however, puts forward a positive interpretation of the concept, equating it to the development in Northern Ireland of a normal peaceful society. That normalisation required, amongst other things, the removal of emergency powers in Northern Ireland.

The abolition of non-jury trials would be consistent with the concept of normalisation as the process of removing “emergency powers”. The maintenance of a special non-jury trial procedure for terrorism-related offences is an ongoing impediment to the characterisation of the Northern Irish criminal justice system as “normal”. The repeal or suspension of ss. 1-8 of the Justice and Security (Northern Ireland) Act 2007 would achieve normalisation as characterised narrowly in the Belfast Agreement (the “removal of emergency powers”).

Although generally understood to mean “the removal of emergency powers”, it is possible – perhaps even logical – that through that process the Agreement intended that the outcome of normalising Northern Ireland would be to bring it in line with Great Britain and the Republic of Ireland. Abolishing non-jury trial would actually place Northern Ireland at odds with contemporary criminal justice procedures in the rest of the UK and in the Republic of Ireland. This would not, therefore, be normalisation.

Under Part 7 of the UK Criminal Justice Act 2003 it is possible to conduct certain serious criminal trials without a jury. Specifically, s. 44 of the Act allows for non-jury trial where there is “evidence of a real and present danger that jury tampering would take place”. At present the Criminal Justice Act 2003 “does not apply in relation to a trial to which section 5 of the Justice and Security (Northern Ireland) Act 2007 (trials on indictment without a jury) applies”: see, Criminal Justice Act 2003, s.50(2).

Arguably the situation in Northern Ireland could be normalised by repealing the relevant provisions of the Justice and Security (Northern Ireland) Act 2007 and simultaneously repealing s. 50(2) of the Criminal Justice Act 2003. The effect of such measures would be to bring Northern Irish law in line with the rest of the UK. This would also facilitate the continuation of non-jury trial in Northern Ireland.

Furthermore, such an approach would accord with experience in the Republic of Ireland. Under the Republic of Ireland’s Offences Against the State Act 1939, the ordinary courts can be certified as inadequate and a trial can proceed before the Special Criminal Court. It is established precedent that such cases do not need to be subversive in nature, despite the title of the Act. It has become routine to prosecute organised crime cases before that non-jury court.

If normal means to replicate what is done elsewhere in the UK and Ireland, then maintaining a form of non-jury trial in Northern Ireland through the amendment of the Criminal Justice Act 2003 would normalise Northern Ireland’s criminal justice system in a straightforward manner. However, there are other arguments for and against the retention of non-jury trial in Northern Ireland.

II Should Jury Trial be Restricted?

The vulnerability of juries to intimidation was acknowledged by Lord Diplock in his report of 1972. Unfortunately, the report produced little evidence, statistical or otherwise, in support of this finding. While the actual risk and extent of intimidation is difficult to quantify there are grounds for assuming that it is real. The Terrorism Act 2000 defines terrorism as “the use or threat [of violence] designed to ... intimidate the public or a section of the public”. Given that jurors are drawn from the public at large it is probable that jurors will feel intimidated by acts of terrorism or the ongoing threat of terrorism. As a result, it is logical to assume that organised terrorist groups – such as the operative paramilitary organisations in Northern Ireland – are capable of identifying and intimidating jurors. On that basis jurors may fear repercussions from the associates of the accused. As Lord Diplock acknowledged, it does not matter whether a juror’s fears are well founded: a “frightened juror is a bad

juror” (Cmnd. 5185, para. 36). The perception of risk may be sufficient to interfere with a juror’s ability to carry out their functions effectively.

A further argument in favour of restricting trial by jury in the terrorism context places an emphasis on the right of the accused to a fair trial. In *Sander v the United Kingdom* the European Court of the Human Rights stressed that “a tribunal, including a jury, must be impartial” (para. 22). Since terrorism targets violence at the civilian population, effective terrorism will invoke a popular reaction. Jurors who feel terrorised may be biased against those from the same ethnic or religious background as those they hold responsible for the acts of terrorism. This argument persuaded the Constitutional Court of the Russian Federation to suspend jury trial for all terrorism related offences. From a legal perspective the issue of jury bias is particularly important.

In the Northern Ireland of 1972 widespread sectarianism led Lord Diplock to conclude that juries were an impediment to a fair trial (paras. 35-41). While Northern Irish society has made significant advances since the Belfast Agreement the problem of sectarianism and the attendant risk of juror bias in terrorism cases is real. That potential for bias could be characterised as an impediment to a fair trial.

III Should Jury Trial be Restored?

Despite the arguments above, there are compelling reasons for restoring jury trials in Northern Ireland. These arguments rely on an appreciation of the complex functions served by the jury: a jury trial is about much more than the administration of justice. While trial by jury is often characterised as a legal right, the jury also serves important political and educative functions.

The US Federalist debates, the nineteenth century writings of Alexis de Tocqueville, and Lord Devlin’s image of the jury as a “little parliament”, have all highlighted the important role of the jury in involving the people in the process of governing. They all characterised the jury as an institution of democracy. To that end the US Supreme Court in *Powers v Ohio*, emphasised the right to serve on a jury rather than the right to trial by jury. This is a reversal of the established hierarchy: the jury is no longer solely about the rights of the accused, but rather it is seen as an “opportunity to ... induce political participation” (Gastil 2002, p. 586).

More recently, the role of the jury has been linked to citizen participation in civil society. This serves an important educative function:

Members of a democratic society need to connect not just with each other but also with the state in ways that are inspiring, empowering, educational, and habit forming ... This perspective provides a new appreciation of the unique position of the jury through which a state institution brings private citizens together to deliberate on a public problem (Gastil 2010, p. 9).

This is not merely theoretical; concrete examples demonstrate the important role that jury trial serves. Research repeatedly shows that jurors are positive about the institution and feel satisfied that they have done their civic duty. Furthermore, after serving on a jury individuals are more likely to vote than they were previously.

The value of the jury as a communal good becomes all the more important in the context of terrorism. The threat of terrorism weakens civil society. It can distort the political debate and impede parliamentary dissent. In such circumstances the role of the jury as a democratic institution is all the more important. It helps to maintain a connection between the citizen and the democratic structures of the state at a time when they are under stress. As a result, although the impetus to defend the right to a fair trial would lead us to abandon the jury for terrorism related offences it is important to be cognisant of the value of jury trial to democratic participation. This is particularly true in societies

such as Northern Ireland where the democratic society is already under pressure. Such an approach does not imply that the rights of the accused are unimportant. Rather it creates a presumption in favour of retaining the jury in the terrorism context – but a presumption, like all others, which could be displaced by compelling reasons.

Trial by jury also ensures that the trial process is both legitimate and transparent. Judge alone trials can achieve just results. However, the involvement of lay people serves two important functions: first, it forces legal professionals to present their arguments in a manner which can be understood by the non-expert. A verdict is more likely to be accepted by the general public if they can understand it. Second, a broadly representative jury in the criminal justice system ensures that verdicts become decisions of the community not just the “system”.

Public belief in the legitimacy of trial by jury goes to the heart of this issue. While it may be illogical, it is undeniable that the jury has secured an elevated place in the popular imagination. The symbol of the jury and the perception that it is central to a fair trial affords jury trial a perception of legitimacy in the eyes of the public. That perception of legitimacy makes verdicts in criminal trials acceptable to the public.

This is particularly important because counter-terrorism in general suffers from a perception of illegitimacy. There is no generally agreed meaning of “terrorism”. As a result, a verdict which declares something to have been an act of terrorism is likely to be contentious. The exceptional nature of counter-terrorism regimes and the political machinations surrounding them contribute to an atmosphere of perceived illegitimacy which has been exploited for propaganda purposes. Roach has argued that removing the jury in terrorism trials can be seen as a “symbolic rejection of criminal justice norms”. Ensuring terrorism cases are tried by a jury will help overcome this. They will legitimate verdicts which might otherwise have been seen as contentious.

IV The Jury as a Political Institution in Northern Ireland

In conclusion we would advise the Secretary of State to acknowledge the symbolic importance of “normalisation” within the meaning of the Belfast Agreement. In our view demonstrating that Northern Ireland is moving away from the exceptional powers which characterised the Troubles is a symbolically powerful. Moreover, the right to trial by jury has value in terms of strengthening the commitment to democratic institutions and the buttressing of civil society in Northern Ireland. However, it would be naïve to deny the ongoing paramilitary threat.

The legislative options available to the Secretary of State allow her to address a number of policy goals. The Criminal Justice Act removes trial by jury only where there is a risk of intimidation in the attendant case. Utilising this legislative regime would remove all reference to proscribed organisations from the decision to prosecute an individual before a non-jury court. In that respect it would support a policy of criminalisation of dissident republican and rogue loyalist paramilitary activity.

Repealing the relevant provisions of the Justice and Security Act while simultaneously extending the Criminal Justice Act 2003 to Northern Ireland would also align Northern Ireland with practice on non-jury trial in the rest of the UK and the Republic of Ireland. It would thereby achieve the goal of “normalisation”, but at the same time it would maintain a form of non-jury trial which could be utilised in cases of paramilitary and organised crime where a specific risk of intimidation exists.

We suggest that the jury as an institution has a political significance which extends beyond its legal function. The jury does more than determine guilt or innocence in a formal legal sense. As a result we believe that Northern Ireland would benefit from a statement of political intent in support of normalisation and this institution of deliberative democracy. Finally, we believe that a legislative path is available which would allow the Secretary of State to achieve that without weakening the security apparatus of Northern Ireland.

V Summary

- Normalisation is an important goal of the Belfast Agreement.
- Jury trial can help to strengthen civil society and confer legitimacy on the criminal justice system.
- The Secretary of State should repeal ss. 1-8 of the Justice and Security (Northern Ireland) Act 2007.
- Simultaneously, the Secretary of State should extend the jurisdiction of the Criminal Justice Act 2003 to Northern Ireland.
- Such an approach would normalise Northern Ireland both in terms of the Belfast Agreement and in terms of bringing Northern Ireland into line with the rest of the UK and the Republic of Ireland.

We thank you for your time.

Yours sincerely,

Dr Fergal Davis, *Senior Lecturer, Australian Research Council Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, G+T Centre of Public Law, UNSW*

Dr Jessie Blackburn, *Post-Doctoral Fellow, Australian Research Council Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, G+T Centre of Public Law, UNSW*

Ms Jennifer Goh, *Research Assistant, Australian Research Council Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, G+T Centre of Public Law, UNSW*

References

J. Blackburn, F.F. Davis and N.C. Taylor, "Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman" (2013) *Statute Law Review*, forthcoming.

F. Davis and S. Tyulkina, "Terrorism and Trial by Jury in Russia" Available at: <http://ssrn.com/abstract=2133235> or <http://dx.doi.org/10.2139/ssrn.2133235>

F. Davis, "The Jury as a Political Institution in an Age of Counter-Terrorism" (2013) *POLITICS* 33(1) 5.

K. Diplock, Lord, *Report of the Commission to Consider legal Procedures to Deal With Terrorist Activities in Northern Ireland* Cmnd. 5185 (1972) para. 36.

J. Gastil, E.P. Deess and P.J. Weiser, "Civic Awakenings in the Jury Room: a Test of the Connection Between Jury Deliberation and Political Participation" (2002) 64(2) *The Journal of Politics* 585.

J. Gastil, E.P. Deess, P.J. Weiser and C. Simmons, *The Jury and Democracy: how jury deliberation promotes civic engagement and political participation* (Oxford: Oxford University Press, 2010).

Sander v. the United Kingdom (2001) *European Human Rights Reporter* 44.