

## TRUTH AND LIES IN INQUISITIONS AND THE ADVERSARY SYSTEM

The near presence, relatively speaking, of Mars, being proof amongst other things of the fact we are in orbit around the sun, might cause us to remember the trial of Galileo for heresy 370 years ago before an inquisition in the form of the holy office constituted by ten cardinals. His offence was the publication of his dialogue on the physics of tides, which was a defence of Copernican astronomical theory, or the earth's identity in relation to other nearby celestial objects.

Despite the fact that Galileo had no means for presenting an adequate contrary case - he had no copy of the charge or of the evidence and no counsel to be heard in his defence, the trial was impeccably good mannered and Galileo recanted even before he was shown the instruments of torture which the good cardinals had in the back room, just in case he decided to stick to his guns. Nevertheless he was sentenced to life imprisonment, although the sentence was soon commuted to what we might now call home detention.

Galileo's sentence makes Pauline Hanson's term look pretty light by comparison. Some people think that Ms Hanson was also punished for daring to speak the truth about our national identity, but in fact it was for two offences against s 408C(1)(f) of the *Criminal Code* of Queensland - dishonestly inducing a person to do an act which the person is lawfully entitled to abstain from doing. As well she was convicted of two counts (against s 408C(1)(b)) - dishonestly obtaining two cheques. The amount involved was just under \$500,000. The fraud so alleged involved another kind of identity fraud - the running together of two organisations or the confusion of one with the other, the Pauline Hanson Support Movement Inc, which had thousands of members and more than 500 in Queensland and Pauline Hanson's One Nation, the political party which had three members, of whom only Ms Hanson lived in Queensland. The Crown case was that when the application for electoral funding was made in Queensland by the political party, both Ms Hanson and Mr Ettridge knew that the party only had three members, and that it needed to have 500 in order to legally get public funding. I will come back to mention some events in that trial.

The process of that trial and sentence identifies some elements of distinction between how criminal matters are prosecuted in our country and in others. Sometimes these distinctions are capable of being crammed into one pigeonhole or another. Two of these are the categories of adversary and inquisitorial systems. Our system of civil and criminal justice tends to be described as one in which the adversary system operates. I will mention some features of both systems in a moment, particularly as they relate to court proceedings. There are other areas, or jurisdictions, which operate in NSW where the proceedings appear to have the markings of an inquisition, and you have heard, or will hear today from people who work for those organisations have inquisitorial powers - you can identify them because periodically someone who has appeared before them has a story written about them which likens them to the Star Chamber or Galileo's cardinals. The instruments of torture and trial by ordeal have been replaced in the case of these organisations their critics complain, by trial by media or by the unjustified use of Draconian powers. Torture is a good way of getting someone to confess to something, anything in order to get it to stop, but it is to the best way to get to the truth. Draco himself was a 7<sup>th</sup> century B.C. Athenian lawyer whose harsh legal code punished both trivial and serious crimes with death. It was said that his code was written in blood, not ink. He made today's law and order debate look like one for pussycats.

Critics of today's commissions usually omit to mention the rights which are legislated for in such instances - such as the right of legal representation, and the right to be protected against the invasion of certain civil liberties which we somewhat rashly in these post September 11 times take for granted - for example, the right not to incriminate yourself out of your own mouth, the right of natural justice - that is, not to have serious findings made against you without being given an opportunity to be heard. This is not to say that the power of such entities to make an impact on people's lives should not be used carefully. After all, power corrupts but absolute power is absolutely delightful.

From time to time there are calls to consider change to what is called the adversarial character of the system.

Such calls assume that the problems associated with say, the costs, delay or unfairness in the system, are attributable its adversarial character and that these problems can be 'cured' by transplanting or borrowing from the civil code systems. Traditionally, that of France is examined in this respect. English examinations of this issue (eg Lord Woolf's) have diagnosed that litigation problems in England and Wales derive to a large extent from what is called the unrestrained adversarial culture of the legal system. One solution, is to put judges in charge 'to run the show'. There have been movements towards this here for some years, in the form of case management. It has been more successful in some areas than others.

The debate on changing adversarial culture can be clouded as protagonists debate core values and practices in prototype legal models, sometimes comparing the perceived shortcomings of one system with an idealised version of the other. The term 'adversarial' connotes a competitive battle between foes or contestants and is popularly associated with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to our legal system. These different meanings associated with an adversarial system have confused the debate concerning legal system reform.

The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning and to a significant extent reflect particular historical developments rather than the practices of modern legal systems. No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany have modified their own, and exported different versions of their respective systems.

In broad terms, an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute. The term 'inquisitorial' refers to civil code systems in which the judge has such primary responsibility. 'Inquisitorial' also connotes an inquiry where the decision maker investigates a matter. Civil code proceedings represent, in procedural theory, 'judicial prosecution' of the parties' dispute, as opposed to 'party prosecution' of the dispute under the common law system.

Notwithstanding variation between these models, in civil matters at least, there is a significant degree of convergence of the practices in common law and civil code countries. German civil procedure, in particular, has many of the characteristics of civil process in adversarial systems, and is generally described as an adversarial or party system. Parties present the facts to the court and their lawyers have comparable roles to those in common law countries. The court may only consider those facts brought before it; it may not investigate on its own.

In private civil disputes in both legal models, the involvement of the parties in the presentation of the case extends to: initiating proceedings, determining the issues to be decided, investigating the case facts, selecting and presenting witnesses and other evidence. In common law systems, involvement of the parties also covers selecting and presenting experts (in civil code systems experts are appointed by the court), and presentation of oral evidence, argument and submissions by counsel at the hearing.

In the Australian litigation and review system, processes such as case management, court or tribunal connected ADR processes and discretionary rules of evidence and procedure have modified adversarial features of the system.

A conference held to examine comparative legal systems, co-sponsored by the ALR Commission, described the high costs and delays likewise afflicting the French and German systems (the systems discussed at the conference). One commentator (eg Lowenfeld, reviewing common law and civil code systems in the 1997 *American Journal of Comparative Law* symposium on civil procedure) commented that

one result of listening to and reading about each other's problem was the realization that none of the observers and commentators was satisfied with the system he or she knew best.

The relative merits and demerits of adversarial systems have been extensively debated. On the one hand there are perceived benefits, such as judicial impartiality, independence, consistency, flexibility and the democratic character of adversarial processes. On the other, there are the disadvantages of the tactical manoeuvring, partisanship and unreliability of witnesses, the obscured focus of many adversarial hearings, and the unfairness that can result in such hearings when parties are unrepresented or there is inequality of legal representation.

The argument in favour of retention of our existing system goes like this: (Luban)

[F]irst the adversary system, despite its imperfections, irrationalities, loopholes and perversities, seems to do as good a job as any at finding truth and protecting legal rights . . . Second, some adjudicatory system is necessary. Third, it's the way we have always done things. These things constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.

Sir Anthony Mason (a former HC CJ) commented that a wholesale change by Australia to an inquisitorial system of civil justice would be

an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.

There are legal, practical, cultural and costs constraints limiting reform of our legal system, some of them constitutional.

While 'due process', 'natural justice', and the judicial process are not inherently adversarial concepts, they are characteristics of an adversarial system. The adoption of some inquisitorial features into the Australian legal system may interfere with accepted notions of natural justice. This of course a parochial observation, like arguing the merits of *League v AFL*. No doubt the Europeans or the Indonesians don't see their justice as being inferior to ours.

A duty to act fairly is also part of non adversarial procedures. A judge who conducts the investigation, who assists the parties to clarify the issues and pleadings and who calls or questions witnesses is not acting unfairly. However, in an adversarial system, for proceedings to be fair, a judge must be independent of the state and seen to be impartial. Procedural fairness is also preserved through party control of investigation and proceedings. There are clear limitations to a judge's participation, investigation and management of a matter.

In civil law countries the responsibilities of the judge to discover the truth go beyond the determination of the dispute between the parties (: J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 208), whereas: 'Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties' (A Mason 'The future of adversarial justice' *Paper* 17th

Annual AIJA Conference Adelaide 7 August 1999, 13 -- draft.) However, others believe that 'truth is best discovered by powerful statements on both sides of the question' ( Lord Eldon LC quoted with favour by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63), or that '[s]uccessful cross examination is the most effective means of discovering the truth' ( G Downes 'Changing roles and skills for advocates' *Paper Beyond the adversarial system* Conference Brisbane 10-11 July 1997)

It remains a moot point which system offers the best method for ascertaining the truth. Critics familiar with both systems do not agree.

The adversarial system has proceeded on the assumption that the fairest and most effective method of determining the truth of a matter is to allow the parties to put their respective cases in their own way. This assumption depends upon the parties being able to identify their own interests and fight their own battles. The extent to which a party can do that will depend upon their own qualities and resources and those of their legal representatives and experts: *Dietrich v R* (1992) 177 CLR 292, 335 (Deane J); *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

The origins of the civil or inquisitorial system lies in Roman Law and the *code civil* of nineteenth century France, while the common law derives from medieval English civil society. The transplantation of both systems throughout the western world and beyond was assured by spread of the French and British empires.

In the legal systems of today there is no pure example of either the civil law or common law system. All relevant legal systems in the western world are to greater or lesser degrees hybrids of these two models or of other legal families. But to be able accurately to characterise the legal system that presently operates in Australia it is useful to outline some of the features that distinguish the common law and civil law families.

The essential features of the common law family include

- In the litigation system the trial is the distinct and separate climax to the litigation process. Oral evidence is usually a significant component of this.
- Court-room practice may be subject to rigid and technical rules.
- Proceedings are essentially controlled by the parties to the dispute and there is an emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive.
- The judiciary possesses an inherent and separate power to adjudicate.

The essential features of the civil law family include

- In litigation no rigid separation exists between the stages of the trial and pre-trial in court cases. Legal proceedings are viewed as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made. Much of the material on which the court relies is in a written form added to the court file, or dossier, as the proceedings roll on.
- Rules relating to court-room practice are intended to be minimal and uncomplicated.
- The role played by lawyers is less conspicuous with an emphasis on written submissions rather than oral argument. The role of the judiciary is both proactive and inquisitive. The greater directorial role of the judiciary allows less room for the parties to direct their own case. In this sense the system is more hierarchical than participatory.

It is the combination of these elements within each of the two families of common law and civil law and their respective court procedures and practices which permit the short-hand descriptors of 'adversarial' and 'inquisitorial' to be used. In the classical adversarial form of trial:

... the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... . So firmly is all this established in our law that the judge is not allowed in to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties.

As the trial is the climax to the litigation process, the 'shadow' of the trial affects the form and content of pre-trial proceedings. The defining characteristic of adjudication in common law systems is its adversarial nature, reflected in the practice and culture of litigation. This metaphor of a fight or a battle can of course, be counter productive to an agreed resolution of the matter.

The origins of the legal system in Australia lie in medieval English civil society. The basic elements of our legal system evolved during the reign of the Plantagenet Kings. There was no deliberate act of creation of the system nor any defined moment of its coming into being .It took its form from a coalition of established practices and procedures. The lawyers, judges and court officials who administered it were pragmatists.

Australia inherited the adversarial common law system of England in accordance with the laws of settlement at the time.

The English legal system provided a template for Australia but did not dictate the development of the local legal system. Federation under the Commonwealth Constitution in 1900 provided the most dramatic local adaptation of the basic English model. As a consequence of federation, colonial courts became State courts and the High Court was established at the federal level.

With the possible exception of the High Court, the various court processes of the States and Commonwealth can be loosely characterised as adversarial.

The practice and procedures of the Federal Court and State civil courts have been modified over recent years and now have various non-adversarial features. In civil law, these features include the development of managerial judging and case management and the greater use of ADR.

A significant range of matters is now covered by State and Federal Tribunals. Tribunals are intended to be non-adversarial and informal with tribunal members playing an active inquiring role in proceedings, although because decisions made by tribunals are generally subject to judicial review and the supervisory role of the Courts, the findings of tribunals can be debated in an adversarial way.

Statutes which are comprehensive and detailed in style and content now comprise the most significant source of our law. Case law is still an important source of law particularly in certain areas such as tort law but that is changing too with insurance crises.

Traditionally the common law judge had limited power over the direction or substance of the case and, in reaching a conclusion and writing a judgment, was limited by the facts presented and the arguments raised by the parties. In comparison, the judge in a conventional civil law inquisitorial model is expected to pursue actively whatever avenues will result in resolution of the disputes, in a continuous process of inquiry encompassing trial and pre-trial stages. Judges in Australian courts are becoming more active in defining the issues in dispute in civil law and moving cases forward to a hearing. The development of managerial judging and case management in Australian courts constitute reactions to the procedural excesses of adversarial litigation. But there is a limited use of such procedures in the criminal law. We are starting to see that with recent reforms to trial procedure which are intended to provide more disclosure, both by prosecution and defence in what are called complex criminal trials (length, nature of evidence, legal issues). In my experience

however, the nomination of trials as complex, thus triggering these mechanisms, is something that does not happen very often.

Within the broader community, knowledge about the legal and litigation system is limited. Public awareness about the legal system is shaped predominantly by media depictions of the law. Many of these accounts focus on court proceedings and emphasise the dramatic nature of courtroom interaction. This creates an expectation that litigation is the usual way in which the legal system resolves disputes. The dramatic content of television trials may underscore a litigant's need for and expectation of their 'day in court'. Popular culture has yet to fashion a popular interest in and knowledge of alternative dispute resolution. Somehow it doesn't seem as sexy, does it? Consensus is tougher to push than it was in Bob Hawke's day.

But the actual experience of people with litigation is different, of course, since television dramas rarely focus on what happens when people lose a case. Erin Brockovich wasn't famous for taking on a huge corporation and losing all her client's houses. Lots of marble foyers up the hill have been laid on the accumulation of billable hours in the discovery processes in commercial litigation or class actions. Now lawyers are obliged, in civil cases, to tell their clients of the alternatives to litigation. But it is amazing how many people still want to put their financial future in the hands of someone else to decide. The same applies to a much lesser extent in criminal cases, when someone's future is to be determined. On the other hand it is amazing that so many people who pass through the criminal justice system plead guilty and take their punishment without a struggle. Our whole system operates on that basis and could not operate without it. In many overseas systems based on forms of civil law, there is no provision for a guilty plea. even if the accused admits the crime, the court still has to determine the issue.

I mentioned the Hanson/ Ettridge trial earlier not only because its topicality and because it the emotions which it unlocked were of a kind normally reserved for the unjustified sacking of an Australian cricket captain. They called into question the nature of how our trial system operates. How appealing was it to those who defend the system to point out that both the DPP and the trial judge, let alone the jury, were independent, at least legally so, from the State.

But there were two things I wanted to mention in relation to that trial, because the rights I have just mentioned were relevant. First, Ms Hanson was legally represented at her trial, but she chose not to give evidence in her evidence. She opted, you might think, not to take the risk of incriminating herself. That was her right, under our system which requires the prosecution to establish guilt. Because of that, the jury would not have been entitled to be told that they could conclude from her silence that she was guilty. Now Ms Hanson may well have been convicted in any event, but the tribunal of fact (the jury) was not given the opportunity of hearing what she had to say about the circumstances. Mr Ettridge was not legally represented. That is, he appeared for himself. When it came to sentencing, he failed to take advantage of the opportunity to say things about what a good fellow he was otherwise, and instead railed against the verdict. Now, in his appeal, he complains that the judge should have told him about what he should have done.

In these two snippets of proceedings that took five weeks, we see the hallmarks of the adversary system. Its primary feature is that the contestants to the contest define the extent of it. They introduce such evidence as they choose, or choose not to (e.g. Hanson not giving evidence), and advance such arguments as they see fit, or see fit not to (e.g. Ettridge not identifying his good character and noble public works, but complaining about the verdict). The judge is above the battle and can only shift the boundaries of the case to a limited extent. Of course one of the few joys of sitting on the bench is to have a view of the case of which the fools conducting it have not thought.

In a jury trial, where the members of the population decide the facts in the framework of the law prescribed by the judge, the realistic chance of seeking a different pathway than that chosen by the parties is extremely limited. Neither can a judge examine the witnesses in such a way as might suggest that he or she has joined in the contest, but only to clarify the evidence. The judge is not allowed to intervene to have the witnesses called in the order that he or she wants - if he does that or joins in the contest, that has led to a re-trial. On the other hand, a judge who loudly says "Oh God" and puts his head on his arm and made loud groaning noises at the tediousness of a defence lawyer's address to the jury, was held not to have derailed the trial process: *Hircock* 1970 1 QB 67. There was an infamous judge on the District Court of New South Wales, who, the transcript having recorded his summing-up to the jury as having been excessively critical of the accused's version of events, was reprimanded by the appeal court. He took to expressing his views in other ways: While saying this: members of the jury, if you think I am expressing a view of the accused's case, you are bound to disregard it unless it coincides with your own, he would do this.

For the sake of not dwelling on the detail, I have ignored a discussion of the duties of a judge to an unrepresented accused.

This lack of intervention is said to be in contrast to the position in European countries such as France. There the primary responsibility for asking questions of witnesses and of the accused falls on the presiding judge, not on the parties or their lawyers. The accused can refuse to answer, but if he does, the court can draw inferences from his silence. The judge or judges retire with the jury when they consider their verdict. Perhaps this is one reason why the conviction rate for serious crimes in France is something like 95 %. In Japan it is 99%. Perhaps these rates are also because there is much greater provision for detention by the authorities, rather than the strict limitations that are in place here for detention by police. Here the rate is much lower. For state charges in the District Court where most jury trials are conducted, the conviction rate in recent years when juries are involved has been under fifty per cent until last year. The French figure I have given you might be distorted by the absence of a separate figure for people who would have pleaded guilty if they could have.

Legally trained officials also play a much greater part in the investigation of crime in France from the time that the crime is detected, and arguably that plays a role in sorting out weak cases, but we can talk about that another day.

The view of the adversary system that the parties decide on the evidence that is to be presented, rather than judges, is based on the view that judges should remain above the battle. To describe it in these terms is to identify the best and worst parts of it simultaneously. It is best or worst depending on whether you are the victim or the accused and what the result is. The criminal trial has been characterised as a conflict and struggle for liberty from imprisonment. To put the adversary system another way, it might be said that truth is best discovered by powerful statements on both sides of the question. Whether these noble ideals bear any relationship with modern reality is open to doubt. The newspapers today are characterised by extreme views on both sides on many important issues, when most of us want more consideration of a sensible middle course.

The proliferation in the last fifteen years of permanent tribunals, presumably aimed at succeeding in their individual areas of investigation where traditional methods have failed, is a powerful indicator that government has identified that the success in investigation requires additional powers outside those in the court system or in ad hoc Royal Commissions. In some of the legislation which sets up those bodies, this is actually spelt out - for example, the PIC Act specifically says that the Commission is not bound by the rules of evidence and is required to exercise its functions with as little formality as possible (no wigs and Gowns) and the Commission is required to accept written submissions as far as possible and hearings are to be conducted with as little emphasis on an

adversarial approach as possible - s20, s17 ICAC Act, s13A NSWCC Act. While no one has much trouble with abandoning the rules of evidence, there is still generally, an adversarial approach adopted in the usual hearing before these bodies. Usually, but not always, the lawyers engaged by the Commission prepare the examination and, in effect, present it to the hearing. Even though the presiding Commissioner can and often does ask questions, these tend to be secondary to the main thrust of the evidence presented.

In addition, generally, the legislation establishing these bodies in NSW has done away with the right to silence, such as of which Ms Hanson availed herself. This means that factual findings can be based on what the person under investigation has been forced to say. The balancing protection is usually however, that that material is unable to be used in evidence against that person. So, if the only evidence of corruption is that which comes from the person under investigation in such a hearing, he or she cannot be prosecuted on the basis of that evidence. I was involved in one such case where the gate-keeper at St Peters tip had received over \$500,000 in cash from one company over three years for letting its trucks go over the weighbridge without charge. He admitted it before the Commission but because he had spent the money at the TAB and had nothing to show for it, there was precious little evidence to prosecute him. But it led to reforms in corruption prevention. Critics of these organisations complain of the lack of successful prosecutions which flow from such investigations of these bodies. It seems unlikely in the short to medium term that this will change. Terrorism is one thing which could change it, since people are more willing to give up their own civil liberties in tough times.

The big question is whether our systems encompass the best system for identifying the truth. The answer I will give is in one sense no answer at all. Truth, when it is sought to be ascertained years after the event, is a relative concept. It is relative to what persists in the memory of the witness. Witnesses can give evidence well, badly or somewhere in between. They can be confident, nervous or somewhere in between. They can appear to be telling the truth when they are not and they can appear to be lying when they are not. Worse, one person can appear to be a liar to one observer, but not to another. When it comes to the determination of guilt or innocence, it is bizarre, and not very scientific, that the determination of these things is left to people without any experience of the accused or the witnesses, who are exhorted to use their common sense in determining where truth lies. However, the alternatives are not attractive. At least with the jury there is hopefully, although less now than say thirty years ago, a cross-section of the community. The alternative is for a judge, or a combination of judge and citizens, to determine these matters. Really lawyers fancy themselves as being able to detect liars, but they are just as able to be fooled as anyone else. In the case of professional fraudsters of course, one is often dealing with the type of person for whom charm and criminality are interchangeable. Charming defendants, and good looking ones, are more likely to be acquitted.

One of the features of our adversary system in criminal law in this State is that, until recent times, guilt, if contested, fell to be determined by a jury of citizens, that is, by a group of persons unassociated with the government and the legal system. One of the features of inquisitorial systems such as that in France, is that even though there is a lay or civilian jury, the judge retires with them when the verdict is considered and assists them in their determination.

There is a whittling away in Australia of the use of the jury in criminal trials. It has been disappearing rapidly in civil trials. In NSW, in criminal matters, there can now be trials by judge alone. Normally this is a request made in cases where the accused's representatives fear that the jury might be prejudiced by the unpleasantness of the facts, whereas the lawyers somewhat pompously assume that judges will not be. In other spheres, like sex crimes in regional areas, defendants are much more likely to choose juries on the theory that there, but for the grace of God, go I. Or in the famous words of a country jury, we find the accused not guilty of stealing stock provided he returns the

cattle. In the Commonwealth sphere, a trial by jury on a criminal charge is enshrined in the Constitution and so that right can only be removed by referendum. You know how likely that is. This protection has been held to prohibit majority verdicts in a Commonwealth criminal trial, even where such verdicts are permitted by State law.

In State fraud trials, juries are the norm, the perception of defence lawyers (and I generalise here) being that juries do not usually perceive fraud as justifying a severe punishment and will be more likely to acquit, or alternatively, that the facts will be sufficiently confusing that the jury will not understand the case and will, as a result, acquit. Whether these anecdotal propositions hold force is anyone's guess, since there is a paucity of research on these issues. There are many exceptions to what I have just said, however.

For example, it might be that directors of some newsworthy failed public company who face fraud charges, depending on the strength of the evidence against them, would not seek to let a jury determine their fate, because they might fear that a jury would have a pre-conceived view of their guilt. If they have a defence which relies heavily on a technical legal point, then they might think that a judge would be a better tribunal.

There are values and protections in our jury system, generally in favour of the accused, but not always - principally that the arbiter of facts is wholly independent from the state which brings the charges, and is blessedly ignorant of the issues before hearing of them in the court room and they are not insiders who might have a greater knowledge about the case. Years ago, a particular group of couriers of drugs were all coached with the same story, by a group of lawyers, no less, to give if they were caught. The police and prosecution had heard it before. The jury would not have and depending on the credibility of the individual accused, might acquit. That separation of the function of judge of the law and of the facts, which means that the jury does not get to hear of evidence which has been excluded from them on legal grounds, means that they can approach the question of guilt with a purity which is deemed to exist in judges who hear trials without a jury but in practice, may cause prejudice in some and not in others.

Despite the shortcomings that it can be argued from a defendant's point of view that a trial by judge alone brings, as I have said, the right to trial by jury is being whittled away. In England, a review of the Criminal Courts (by Lord Justice Auld) recommended trial in long, complex fraud cases by a judge with a panel of experts, presumably on the basis that the involvement of persons with business or professional expertise relevant to such matters would lead to a fairer result, which may or may not be a euphemism for more convictions. It has also been recommended there that the judge can of his own motion decide that it is in the interests of justice that the normal jury be dispensed with. Because such innovations assume that the persons involved (judges and experts) are able to exclude prejudicial but inadmissible material which they might come to hear in the trial from their deliberations through "mental gymnastics" but it would be difficult to know if they actually have, one of the propositions to go with such reforms is to require of the court that it give reasoned judgment for its decision, rather than simply a verdict, so that an appeal court could examine the appropriateness of what was considered as the basis for the verdict.

Here in NSW, a trial judge who hears a criminal case without a jury must have the request of the accused and the consent of the prosecution before he can hear a case without a jury. He or she cannot decide that issue without such a request. At the conclusion of the trial a judgment must be given, including the relevant legal principles, as the verdict - s 133 Criminal Procedure Act 1986. Judges sometimes get the legal principles wrong and their verdicts can be overturned because of it.

Opponents of such systems suggest that these developments would almost certainly involve a greater involvement for the judge in a position of dominance in the court room which no jury with

its virtual observer-like status could adopt. Whether this is so is doubtful, though, since there is usually not a great involvement by judges in civil cases heard without juries. When they do become wrongly involved, they normally get rapped over the knuckles by appeal courts. This trend towards the diminishing use of juries is likely to continue, in the short term at least. It must greatly appeal to government, because the summoning, control and paying of juries, let alone the inconvenience caused to them, is significant.

However, while our laws permit the defendant to have a say in the tribunal that determines his fate, juries will not disappear completely.

These arguments about the competing benefits of different approaches to finding the truth will come and go, depending on which planet of public opinion pulls the strongest. A bit like Galileo's tides really.

DAVID STAEHLI

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Ph: 92324811

Note: This paper draws heavily on and quotes from discussion papers and articles, many of which are not attributed in the text. References to those materials are available on request from the author.