

Introduction

"Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.....So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads into the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

Sir William Blackstone, Commentaries

Despite the considerable growth in the use of administrative sanctions against commercial malpractice, the criminal trial remains the centrepiece of moral condemnation in our society. Lord Devlin (1956, 164) refers to trial by jury as. 'the lamp that shows that freedom lives". Certainly, as Blackstone's grandiose rhetoric indicates, the jury is the symbol of popular legitimization of the Due Process of Law, whereby the criminal justice system is a sort of obstacle course for prosecutors rather than a smooth machine for processing and repressing 'crime'.

Rhetoric, however, can be the enemy of reason. Judge Jerome Frank (1950, 108) observes that whenever he hears the jury praised as the Palladium of liberty, he recalls that palladium is also the name of a chemical element which, in the spongy state,

has the remarkable quality of absorbing up to 1,000 times its own volume in hydrogen gas. One of the aims of this report is to subject fraud trials to some critical analysis: if the consequence is to deflate some of the airy assertions that have been made about jury trial, then this may be no bad thing. However, I would stress that this report deals with the issue of how frauds are and could be tried. Many of the arguments, and much of the evidence, that are adduced here may have no relevance whatever for the trial of other types of crime. Moreover, although it is the author's hope that policy will be informed by the review which follows, this in no way pre-empts the adoption of moral or political views which place different priorities upon the factors to be discussed.

Wider issues of civil liberties will not be dealt with in detail here. Modern States may regard themselves as less prone to oppress their citizens than was the case during the great libertarian age of the English jury, from the seventeenth to the early nineteenth centuries, when increasingly radical (though middle-class) jurors frustrated the will of the Crown and the judiciary. It may be that the long-term legitimating function of the jury is more valuable than the short-term rewards from doing without it, but this is outside the scope of this report. To the extent that time and information availability permit, I will examine the problems in dealing with commercial fraud experienced by Commonwealth countries during and immediately prior to the trial stage.

To some of the smaller and less affluent Commonwealth nations, whose principal problems have been in detecting fraud and in building up cases for prosecution, this may not appear to be a pressing concern. Indeed, there may be a greater need to develop prosecutorial expertise than to improve the trial process, for what is not prosecuted cannot be tried. However, the

difficulties with fraud trials that have been experienced in England, Australia, and Canada provide a timely opportunity for advance planning elsewhere. For as we achieve improvements in legislation, and in policing and prosecutorial competence regarding fraud, the greater will be the strains that will occur at the trial stage. This report is premised upon the notion that criminal justice systems are interdependent mechanisms, in which tensions that appear at any one stage have implications for all the other stages.

In reviewing pre-trial procedures and the mode of trial, a good deal of the analysis will be based on English practices. However, I am well aware of the dangers of a parochial ethnocentrism, particularly when one examines institutions such as jury trial, which have never taken root particularly well in African or in Asian soil, whether because of ethnic conflicts or because of difficulties in securing jurors of the right calibre and motivation. Consequently, an effort will be made to bear these practical aspects in mind when making recommendations.