

The Place of the Explained Verdict in the English Criminal Justice System

Bethel G.A. Erastus-Obilo

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The Place of the Explained Verdict in the English Criminal Justice System

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Erastus-Obilo, Bethel G. A

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¹ Anthony Bradney is Professor of Law formerly of the University of Leicester.

² Professor Patricia Leighton is currently the Jean Monet Professor of Law at the University of Glamorgan and visiting professor at the College of Europe, Brugge.

In light of superior legal thinking on the issue, I approach the subject with some apprehension and an acute awareness of my own limitations. The task is as onerous as it is evolutionary and I have benefited immensely from my intellectual superiors in this pursuit. Yet, the rigours of the challenge demand juxtaposing arguments and robust analysis. I have attempted to present both here. The success of the attempt, however, is moot.

'It is the nature of man to rise to greatness where greatness is expected of him'.

Steinbeck, John, (1902-1968) American Author, Pulitzer and Nobel Prize Winner.

Abstract

Lay participation in the criminal justice process in the form of a jury is a celebrated phenomenon throughout the common law jurisdictions. While not claiming credit for its origin, England, as the latent cradle of the modern jury, disseminated this mode of trial to a great part of the world through colonization. Yet, trial by jury does not enjoy constitutional protection under English law. The system has been under severe criticism, curtailment and considerable pressure in recent times, perhaps far more than in other countries. Critics have demanded reform or outright abolition and supporters have opposed the demands just as vehemently and any reform achieved has been piecemeal and reluctant. The furore has helped to galvanise robust and extensive intellectual debate on the subject. It has also spurned extensive academic research. Trial by jury remains central to a tiny but significant part of the Criminal Justice System. Yet, the jury, unlike other decision-making bodies, retains the power to deliver a verdict that is unique by its lack of an explanation. The issue does not sit comfortably with those who would have the system abolished or pray fair trials. The matter is traced to antiquity and the modern democracy struggles to articulate jury accountability.

This paper, the first to investigate the place of an explained verdict in the English Criminal Justice System, explores the competence of the jury to articulate an explanation for its verdict.

In that pursuit, the paper engages in an analysis of the current state of jury trials in relevant legal and academic literature. It also engages in a comparative analysis of other jurisdictions and finds it instructive and prudent to draw extensively from the legal and social scientific experiences and experiments in selected parts of the world including the new quasi-jury systems in Europe. It explores the literature of legal scholarship and the social sciences and investigates the human psychology of decision-making based on selected text. Finally, it articulates the argument embodied in the hypothesis and the challenges facing its findings. The thesis concludes by examining the implications for its conclusions and sets the stage for areas of further research.

The Hypothesis: The Place of the Explained Verdict in the ECJS

There are, essentially, three objectives this work seeks to achieve:

1. To identify whether or not an explained verdict is a legitimate expectation of a modern democracy in its criminal trials.
2. To determine whether or not the jury is competent to produce that explained verdict given the nuances of a trial, its composition and mode of deliberation.
3. To determine the extent of fairness of a trial in the absence of an explained verdict.

The determination of these questions has led to a discovery of two essential phenomena in our criminal trial process. The first is the jury continuum which argues that a jury trial, far from being an isolated event in legal history, is more of a continuum which links historical, legal and social events using lay participation to complete the loop. The reason curve is a point in the continuum where the extraordinary occurs allowing for a more logical rounding of the continuum. The argument is that whereas a trial's progression is predicted at present on the sense that a verdict is expected to be a choice between 'guilty and not guilty', the reason curve provides an outcome that cannot be predicted. The jury is expected to choose between two verdicts which are known. The contents of a post-verdict explanation are altogether unpredictable. This reason curve, at which point, a measured, intellectual and engaged insight into the criminal justice system is expounded, provides an island rich with both understanding and fairness for the participants of the trial.

The Legal and Historical Continuum.

There are three practical areas of study that fed the hypothesis. The first area concerns group dynamics in decision science (whether or not a collegiate body such as a jury, under the prevailing trial conditions, is capable of articulating an explanation for its verdict). This is linked to the question whether an explained verdict is or should be an essential component of the modern criminal trial. This would depend on whether or not the jury, under different conditions, can articulate an explanation for its verdict.³

The second concerns the socio-psychological effect of those group dynamics on the juror relative to decision making and post verdict explanation. What is its implication on lay participation in the criminal trial process? Both are designed to explore and articulate the place for the explained verdict in the English CJS.

The third concerns the dynamics of deliberation and the reason curve in decision-making. It argues, from an intellectual and social scientific perspective, that a jury trial is an ill-structured romanticised process in which the juror is forced to employ inductive reasoning techniques to arrive at a verdict. The adversarial setting of the trial and the passivity of the jury make the discovery of the truth of a matter largely an issue for pure and personal speculation thus stifling the objective pursuit of certainty as an end in itself. Jurors weigh the evidence as presented, juxtapose it against their own personal experiences, employ the story model or Bayesian⁴ (rule of thumb) model of decision making and deliver a general verdict.

³ Such conditions would include some of the findings of recent researches articulated by Auld LJ. in Criminal Courts Review (2001) at <http://www.criminal-courts-review.org.uk> and other social scientific developments.

⁴ Bayes's Theorem is a simple mathematical formula used for calculating conditional probabilities. It figures prominently in subjectivist or Bayesian approaches to epistemology, statistics, and inductive logic. Subjectivists, who maintain that rational belief is governed by the laws of probability, lean heavily on conditional probabilities in their theories of evidence and their models of empirical learning. Bayes's Theorem is central to these enterprises both because it simplifies the calculation of conditional probabilities and because it clarifies significant features of subjectivist position. Indeed, the Theorem's central insight — that a hypothesis is confirmed by any body data that its truth renders probable — is the cornerstone of all subjectivist methodology. <http://plato.stanford.edu/entries/bayes-theorem/>

This verdict, supposedly conceived outside the ambit of legal interference and objective scrutiny, is never definitive but rather more or less probable. There is always the possibility that new evidence or a different thought influence, process or information could have an impact on the probabilities. Certainty therefore, remains subjective in the absence of an articulated response. This might explain why some judges disagree with juries in cases where previous criminal convictions are only known to the judge quite apart from the principle of judicial notice⁵ which is extended to the jury but only as part of the cryptic verdict. As it stands, this cryptic verdict is the climax of the trial and thus, largely, an end to the historical event barring appeals. The argument of this paper is that an informed jury trial would be reflective of the concepts of jury continuum and the reason curve. A jury continuum refers to an appreciation of the fact that a trial is more of a cyclical process rich with experience with ripples beyond the end of the trial for those involved than an event in time. In other words, the philosophy of a jury trial is a child of history and legal precedents that beget precedents as touching its legal academics and resonates amongst the players as touching its utility. Therefore, what this paper calls jury continuum and the reason curve become very important parts of the trial process if the system is to remain relevant to future trials. Seen in the context of past, present and future, precedents and utility, a jury trial, it is submitted, takes on the real image of substance and the verdict, a real catalyst. The ripple effect gives credence to the continuum and reason defines the curve.

⁵ See generally Choo, Andrew L-T, (2006), Evidence, Oxford University Press at pp. 365-37: Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer' – Commonwealth Shipping Representatives v P&O Branch Service [1923] AC 191, 212.

Choo goes on to articulate occasions when the Court of Appeal has held that a judge and indeed magistrates were expected and would be called upon to invoke the doctrine as a guide to reaching a decision. The interesting point of this doctrine is that in spite of it, judges are not deterred from

Jurors, Glanville Williams argues,⁶ are not first-rate intellectual machines and the institution therefore, is incapable of withstanding scrutiny on account of its perceived incompetence. That incompetence, this paper argues, is attributable to the system being treated, perhaps by virtue of the anonymity of its composition, as an isolated event rather than part of a continuum and the singular absence of the reason curve.

To discover what benefits the English Criminal Justice System stands to gain from an explained verdict, we need to see a trial and the following verdict in terms argued here. If that is the case, should there be a manifest place for the reign of conscience in a modern criminal trial when individual liberty is at stake? An exposition of the jury continuum and the reason curve would assist our understanding of the argument. Both theories argue that the Criminal Justice System would benefit from a discovery of the pulse at the centre of every trial which ultimately drives the system because when learning takes place, attitude shifts to reflect that learning. In a continuum, it is impossible to ignore what has been before or neglect self-mental propulsion. At the same time, the survival of a continuum depends as much on its drive as on what it discovers while contemplating the past and the future. However, to plot the right path, even a continuum has guidelines that must be strictly followed. That is the gravamen of this argument – that guidelines are essential to our purpose and accountability is paramount.

There is a further point. It is interesting that the threshold for criminal liability is ‘proof beyond a reasonable doubt’ - indicating the artificiality or fictional nature of the verdict and the mechanism that gives birth to it. This is not to conclude that the setting is designed to mislead or perjure however.

delivering reasoned verdicts in bench trials. The difficulty with lay assessors in this regard only needs to be stated to be appreciated without the format guidelines articulated by this thesis.

Merely that it is a necessary construct and as the name implies, is a speculation on the plethora of possibilities available in a given case. Thus, doubt, as an ever-present concept, occupies a special place.

Doubt is defined as ‘a feeling of uncertainty or a lack of full proof’.⁷ The implication is that in the absence of full proof (presumably, verifiable and documentary) of innocence or guilt, our trial system employs conjecture as the basis for the determination of truth – drawing largely from the experience, common sense and prejudices of the ordinary man - but denying an explanation of that conclusion on the basis that the decision maker is intellectually incompetent or avowedly divine by virtue of random selection. The definition for reasonable doubt has never been successfully articulated⁸ and the courts remain wary of defining a word or phrase they consider in common use, preferring instead, to leave it to the understanding and determination of the jury.⁹

Objectivity thus gives way to compromise and recognises that truth or certainty, as an objective pursuit, is a function of time and circumstance.

The question raised by this pursuit becomes cogent.

⁶ Williams, Glanville, *supra*

⁷ The Oxford Encyclopedic Dictionary, edited by Hawkins and Allen (1991) at page 429.

⁸ See generally Commonwealth v Webster, 59 Mass (5 Cush.) 295, 320 (1850) (per Lemuel Shaw, J) where it was held that ‘Reasonable doubt is a term that often used, probably pretty well understood but not easily defined. It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and considerations of all evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge’.

⁹ See also Glanville Williams, Criminal Law 873 (2nd ed. 1961) who opined ‘The gravamen of Lord Goddard’s objection to the formula of ‘reasonable doubt’ seems to have been the muddle occasionally created by an impromptu effort to explain to a jury the meaning of this phrase. A simple solution would be to refrain from explaining it, relying on the common sense of the jury. As Barton J. said in an Australian case, ‘one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary use with reference to this subject matter and which is usually stated to a jury without embellishment as a well understood expression’. However, some modes of embellishment seem to be unobjectionable. There is probably no harm in telling a jury, as some judges do, that a reasonable doubt is one for which a sensible reason can be supplied’.

Can a modern criminal trial condone the withholding of an explanation for a jury verdict and remain fair in the face of civil rights conventions? The matter begs further exploration. We shall return to these points later on in the work.

The debate spurned by recent manoeuvres on the jury system deserves investigation. In the advent of Human Rights Conventions and the international recognition for a need for reason in every public decision, there is a rejection of arbitrary commentary and decisions that cannot be sustained. In criminal trials, however, there is much weight given to the verdict of a jury. As Stephen observed, ‘juries’ verdicts are accepted more readily than those of judges’.¹⁰ Yet, if one proceeds by the light of reason, there are formidable arguments against the jury system.¹¹ These formidable arguments will be explored as this paper develops. The arguments become even more focused as society’s appetite and quest for transparency is heightened.

The gathering of evidence¹² has become a sophisticated and complex business even as the society becomes less homogenised. The advancement in the area of forensics has greatly affected the gathering and availability of evidence. This in turn, has a huge impact on what is presented to the trier of fact and how it is evaluated. This particular development suggests that the verdict of a jury is only as good as the evidence presented to it and the weight¹³ given to that evidence upon which it is based. All indications are that acceptance of that verdict ought to be predicated upon the jury’s articulation of its considerations.

¹⁰ Stephen, James Fitzajames, 1829-1894, *A History of the Criminal Law of England*, vol. 1, London: MacMillan.

¹¹ Williams, G. (1963) *The proof Of Guilt*, The Hamlyn Lectures 7th Series 3rd Ed. Pp. 207-214

¹² ‘Evidence is the information with which the matters requiring proof in a trial are proved’, per Choo, Andrew, L-T (2006), *Evidence*. Oxford University Press at p.1

¹³ ‘Weight of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law...’ DPP v Kilbourne (1973) AC 729, 756 in Andrew Choo’s ‘Evidence’, opp. Cited. At page 18, Choo draws

Jurors are chosen in a way that seeks to address the communal spirit in order to localise the matter, thus giving locus standi to those whom we believe have an interest in the outcome of the event.

There is much explanation as to why this is the case and why a jury's verdict is preferred, by the general public, above that of the judge. Yet that communal spirit is more imagined than real given the social divisions of the society.

Auld LJ described the jury as 'the jewel in the Crown of the Criminal Justice System'¹⁴ although he could scarcely conceal his lack of enthusiasm for it.

The deliberation process and the articulation of decisions remain objects of deep curiosity to jury observers. Verdicts are often seen to be irrational, illogical and sometimes perverse in some quarters.¹⁵ Others have denounced the system in equally strong terms arguing that 'there can be no room in the due process of criminal justice for the jury to import factors outside the ambit of evidence'.¹⁶ Yet, in his seminal Hamlyn lecture, Sir Patrick Devlin, in describing the jury as the lamp that shows that freedom lives, went on to observe that the juries' ability to return a perverse verdict gives protection against laws which the ordinary man regards as harsh and oppressive.¹⁷ That power granted it both by circumstance and judicial pronouncement belies the post-verdict explanations and excuses the cryptic nature of that verdict.

Sir Patrick's comments have since been held as a definitive statement on the latent powers the jury has to do as it sees fit with any given case since its acquittal is final and its conviction not always giving rise to a challenge. Inadvertently, it allows the jury to play a political role without a corresponding requirement for accountability.

attention to Wigmore's description of the rules of weight or credibility as 'moral treason', citing 'Book Review' by J.H. Wigmore, (1909) 3 Illinois Law Review 477, 478.

¹⁴ The Auld Review of the Criminal Courts of England & Wales, 2001

¹⁵ Auld LJ. recommended that 'the jury be barred, by statute, if need be, from returning verdicts against the weight of evidence'.

¹⁶ Luis Blom-Cooper writing in the Sunday Observer, 21 October 2001

'Perverse', in this context, serves as a euphemism for bad judgement or 'against the weight of evidence'. The phrase may be forgiven because a jury does not provide a reason.

Serving as a juror has been viewed, by some, as affording the citizen the chance to be part of the judicial process, thus maintaining public trust and confidence in the law.¹⁸ This view was aptly articulated by E.P. Thompson when he described the jury box as '...where the people come into the court: the judge watches and the jury watches back. A jury is where the bargain is struck.'¹⁹

Picking up on these comments, supporters maintain that the jury underpins the notion of the English as a law abiding group of people who maintain a link with democratic polity and thus control of the executive. Public opinion certainly suggests a high level of public confidence in the jury. Whether or not this is informed public opinion is quite a different matter.

However, most of these comments eulogise the jury as a system and do not concern themselves with the complexities of a modern system grappling with the increased demand for transparency and accountability from public figures and institutions. To that extent, these commentaries are, therefore, products of their time which must be juxtaposed with the real politic of the 21st Century. A reasoned judgment is expected from nearly all modern public decision-makers. The idea that a decision can be made by a public body without explanation therefore appears to be inconsistent with modern socio-political life.

The champions of this contemporary view such as Luis Blom-Cooper ask:

¹⁷ Devlin, P., 'Trial by Jury', Hamlyn Lectures (1965).

¹⁸ Baroness Kennedy, QC. of the Shaws during a debate of the Criminal Justice (Mode of Trial) (No. 2) Bill, House of Lords, 28 September 2000, Hansard, HL, col. 995.

¹⁹ E. P. Thompson, New Society 1978.

'Do serious commentators...really believe that a civilised system of justice should allow an unreasonable decision of any court to remain unchallenged merely on the grounds that it was made by a jury?'²⁰

When explored, the answer might be startling not least because that is precisely the current situation, at any rate, in English criminal trials with few exceptions.

Even then, the course of appeal upon which a challenge might be based is onerous, vigorous and narrowly defined. However, the idea that a reasoned verdict and the jury system are incompatible is challenged in the chapters that follow.

Reason and accountability are central elements of the doctrine of *stare decisis* in our legal system. In that context, the presence of the jury and its workings appear anachronistic and the jury itself appears to be 'an apotheosis of amateurism'.²¹

The debate as to whether or not to retain jury trial appears sterile given the developments in some other common law jurisdictions.²² The question of accountability in the modern setting is argued to be equally fatal to the institution as can be seen from the use of the jury in some of these jurisdictions. We shall explore this further.

²⁰ Luis Blom-Cooper in 'Twelve Angry Men Can Be Wrong', *The Observer*, Sunday October 21 2001.

²¹ Luis Blom-Cooper, *ibid*.

²² The Russian Federation, in 2003, introduced and has since made plans to extend jury trials throughout the Federation. Spain has also reintroduced jury trials in its criminal proceedings as has Belgium. The judicial systems in these countries do not quite allow the same latitude to juries in decision-making as obtains in England & Wales but instead, demand special verdicts from the juries.

The Topic: The Jury System in The 21st Century.

The jury, by definition, is a judge of facts and has, traditionally, not been required to explain its verdict.²³ Indeed, it has been argued that a change in this status may not be desirable given what it might reveal about the system and the institution. Given the nature of the trial process and the resources available to the jury, it is not so surprising that the jury is unable to explain its verdicts.²⁴ Auld LJ laments this position submitting that ‘we still subject them to archaic and artificial procedures that impede them in their task. They are given very little objective or conveniently summarised guidance at the start of the trial as to the issues they are to decide and as to what evidence is and is not agreed.’

The argument goes that explanations might endanger the validity of the verdict and thus increase the chances of appeal.²⁵ This is an interesting argument. However, it is an age of accountability characterised by an open political and judicial process that is almost universal. Furthermore, trial by jury has its roots in antiquity²⁶ when its role was significantly different from what it is today (a point I shall return to in subsequent chapters). In this context, can the jury, with its blatant lack of accountability be accommodated?

The jury has the right to make decisions but lacks the power to enforce those decisions.

Spain goes the furthest in its requirement for a reasoned verdict. See Thaman, *infra*. This paper contends that this is a step in the right direction but does not go far enough.

²³ This applies in the UK, at any rate. Some jurisdictions, as mentioned, do require some sort of formal response to questions posed by the judge to assist in decoding a jury verdict. History indicates however, that in the past, reasons have been required of juries and at times, they have voluntarily produced one albeit, always orally. See generally, Green, T. A (1985), ‘Verdict According to Conscience’: Perspectives on the English Criminal Trial Jury, 1200-1800. University of Chicago Press.

²⁴ The Auld Review of the Criminal Courts of England & Wales, 2001

²⁵ See Generally Cornish, W.R ‘The Jury’

²⁶ Green, T. A *ibid*.

In fact, it has no power except to deliver a general verdict and as Lord Mansfield observed in the Bishop of Asaph's case,²⁷ 'the power but not the right to return a verdict contrary to the weight of evidence.'

The recognised check on this power is divine – something extra-legal and quite outside the control of the court system or anyone else. Lord Mansfield further observed, 'it is a matter between them and their conscience.' This clearly has implications for the rule of law because a verdict against the weight of evidence may have huge impacts on the law.

However, it is a mechanism of the judicial system deriving its strength from its anonymity,²⁸ its legitimacy from random selection and the collective view that the trace of divinity expected to be present when disparate individuals of the local community come together is sufficient to justify an unreasoned verdict. It appears to pit hope against reason...yet, it appears to work precisely because it has become entrenched, institutionalised and lamentably, no one can articulate a better system.

In the 1% of criminal trials that is set before the jury, its role is crucial and acquittals are final. The convictions may or may not give rise to challenges. However, as most modern legal expectations have changed, can there be any justification for not explaining why a trial has resulted in a conviction especially where the evidence is hotly contested?

But the ECJS has always maintained a delicate balance between sweeping revolution and piecemeal innovative advancement.

²⁷ King v Shipley (1783), 21 How. State Tr. 847.

²⁸ Devlin, P. op. cit.

The Diplock Court system in Northern Ireland has demonstrated that it is possible to try a case at first instance and deliver a reasoned judgment without jeopardising public confidence. Is this a credible alternative?²⁹

By virtue of S. (8.1) Contempt of Court Act 1981, we are ignorant of the deliberation process³⁰ and the weight given to the evidence by the jury in the trial. The institution is a derivative tribunal. It should not be treated as an executive one. Are there any practical advantages to maintaining the status quo in a modern setting or do we couch our inertia for change with precatory words that may not withstand the light of reason or close scrutiny?

The medieval juries were largely self informing as they were composed of noblemen with verifiable local knowledge and were able to determine the innocence or otherwise of the accused. The modern jury, by contrast, is distinguished by its presumed ignorance of the facts of a case and in fact, is adversely affected by the rules of evidence which dictate that certain evidence be withheld from it.³¹ The rules of evidence dictate that the jury must not be influenced by irrelevant or prejudicial evidence – the decision being made by the judge and counsels at their discretions. This matter questions the efficacy of the jury's oath to try the defendant according to the evidence. That evidence must be sifted in the absence of the jury before a decision is made as to whether or not to present it to the jury.

²⁹ Many countries use bench trials only or a combination of judge and lay people. It must be understood however, that there are important safeguards to the Diplock Court system and that it is only used in extra-ordinary circumstances. The nature of Northern Irish politics makes the province a special case and there is an automatic right of appeal to the Northern Ireland Court of Appeal. In the recent past, there have been many calls for a normalization of the criminal trial process – a return to trial by jury not only as a political statement but also as the inheritance of a civilized society. See Jackson et al in ‘The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past’ in Vidmar’s ‘World Jury Systems (Eds.) (2000), Oxford University Press at pp. 283-314.

³⁰ Williams has argued that the real reason for ‘keeping the jury deliberation a secret is to preserve confidence in a system which more intimate knowledge may destroy’. ‘Proof of Guilt’. Op.cit. pp 205.

³¹ See generally Damaska, M. (1997), Evidence Law Adrift, Yale University Press.

Trial by jury may actually infringe Article 6 ECHR given the lack of reason.³² This has not been tested in court.

However, the secrecy of jury deliberations which is antecedent to an unexplained verdict was cleared in Gregory.³³ But law evolves and a future challenge, drawing on some of the arguments presented in this paper and elsewhere, cannot be ruled out.

Research by Zander³⁴ et al found that a vast majority of the public supports the jury institution. The Times Newspaper, in its opinion poll in January 2002, claimed that a solid 84% of the public is behind the jury. In a survey carried out in 2002 of 903 people in Britain, these claims are substantiated.³⁵

³² Sir. Louis Blom-Cooper, QC in 'Twelve Angry Men Can Be Wrong' The Observer, 21 October 2001. He argues that trial by jury 'may even be in breach of the European Convention since a fair trial demands a reasoned verdict'. Earlier, in The Independent, 25 August 2000, Robert Verkaik had submitted that 'Human Rights lawyers argue that verdicts are not in themselves reasoned judgments and that defendants are being denied justice if they are not told the reasons for their convictions'.

³³ Gregory v United Kingdom 25 EHRR 577, the European Court of Human Rights, at p 594, para. 4 where it was held that 'that the Court acknowledges that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard'.

³⁴ Zander, M. and Henderson, P., Crown Court Study (London: HMSO, 1993, Royal Commission on Criminal Justice, Research Study No.19).

³⁵ See the Department for Constitutional Affairs website at <http://www.dca.gov.uk/research/2002/9-02es.htm>. The British public may not be widely aware of the government's proposal to change the jury system in England, but they solidly oppose the idea once they hear a short description of it. They prefer to face a jury of 12 individuals than a judge alone or a judge aided by two magistrates. Key to understanding the public's opposition to the proposal is the fact that most of those surveyed believe a jury of 12 individuals is most likely to reflect their own and society's views and values.

- Respondents are most likely to have confidence in the police (81%) and juries (80%) than in other players in the justice system.
- Most think a jury of 12 individuals rather than a judge and two magistrates would be more likely to reflect their own (73%) and society at large's (80%) views and values.
- In fact, two thirds (64%) say that, should they appear as a defendant in court, they would prefer to have a jury of their peers rather than a judge and two magistrates or a judge alone decide their case.
- Although awareness of the government's proposal to change the jury system is low (78% have heard "not very much" or "nothing at all"), two thirds (66%) say they oppose the proposal after hearing a short factual description of it.
- One goal of the proposed change - cost savings - has little resonance with the public. Just 27% say they would favour a reduction in the number of jury trials if it would save taxpayers

The Bar Council, The Criminal Bar Association³⁶ and the Law Society³⁷ were united in denouncing the government's plans to 'ditch' or seriously curtail the right to trial by jury. The government has since altered its plans in the face of severe criticism. There are fresh proposals addressing the issue.

This thesis aims to articulate an objective response to the issues raised by the debate through a review and analysis of selected literature in legal and psychological fields.

Methodology

The scope of the research

I consider it prudent to say a word or two about the consulted material. In any academic pursuit of the sort engaged in here, of necessity, one must acquaint oneself with the most authoritative writings on the subject. This is a condition not only for obtaining the most up to date opinion but also to ensuring that one does not wallow in ignorance of history or self deception in the face of modern development. It is also vital to extend the scope of the review in order to entertain, even if one discards some of the opinions expressed, a wide range of scrutinising thoughts of the subject.

To that extent, this paper has consulted a wide bank of academic and legal writings in the public domain across a vast foray of jurisdictions ranging from the UK to the US,

money. In fact, seven in ten (69%) would oppose the change in order to preserve their current right to a jury trial.

- Other reasons that highlight why the public opposes the proposed reform include the findings that most of those surveyed trust juries to come to the right decision (85%), believe they get a fairer trial from a jury than from a judge (82%), and that the quality of the justice system is better when it includes jury trials as often as possible (81%).

³⁶ Response to the Criminal Justice White Paper 'Justice for All'. October 2002 at www.barcouncil.org.uk/documents 'We support the retention of trial by jury in all cases. Juries are representative of society as a whole. The involvement of the citizen in the criminal justice system, serving on a jury underlines society's connection with its own laws. The collective wisdom and experience of a jury can never be matched by a judge sitting alone'.

³⁷ Jury Trial Survey Report (2002) prepared by SWRWORLDWIDE for The Law Society and the Bar Council at www.lawsociety.org.uk

Africa and Europe. It has also benefited from legal press writers in England and the US and consulted some internet websites where opinions are expressed and shared. A full index of the consulted material is included.

In addition, in order to adequately research the subject, I received permission from my supervisor and took the advantage to explore research into human psychology as presented by the Social Sciences. Legal academic or judicial writings are limited in their ability to produce empirical evidence as to human behaviour. These are restricted to descriptive legal philosophy that relies largely on second-guessing the subject's behaviour from legal pleadings.

Thus, as loaded with dry logic as these commentaries are, they are necessarily held hostage by the lack of empirical legitimacy since they are based on legal history, purely objective assessment and highly speculative in nature. Social Science, by contrast, is the more practical. Its observations develop into hypothesis that is then tested through experiments. This is not to submit that its conclusions are invariably correct but that it provides a platform for evaluating the efficacy of a speculation and judicial commentary. Nonetheless, for reasons of brevity and coherence, not all consulted material has been included in this paper. Anyone reading this work will not fail to notice the absence of some eminent authors and their works. I have, of necessity, made the choice to exclude some works. That task has been fraught with challenges.

In developing the hypothesis for this research, the external quest was to explore why the ECJS did not require an explained verdict, whether the reasons for it are sustainable and are valid in the 21st Century, the implications of a reversed position and whether or not the tribunal of fact can be made competent. There was no direct answer.

Instead, one had to read into the circumstances surrounding medieval trial by jury and extrapolate from this position, the essence of a verdict in a modern criminal trial. Legal writing, in abstract, could not answer the question conclusively without allusions to certain legal rules.

These included rules of evidence and more startlingly, rules of procedure which for too long, it is argued, have been befuddled by inertia. Social science, on the other hand, provides a scientific platform for exploring the human decision making process. By so doing, it provides some understanding into how we reason and how we respond to various stimuli. Like legal academic writing, its answers are no more definitive or certain and in fact, evolve with time and new thinking. However, they provide a more measurable approach and a system for a constant evaluation of what we do and why we do it. Social science is thus dynamic. Law, by contrast, is reactive and extremely reluctant at that. Furthermore, social sciences allow for the development of what I have called the jury continuum and the reason curve. These, as noted, are theories that allow the understanding of the role of the jury in a present continuous story while energising the progression of that story with reason.

Left to legal scholarship, the jury's verdict is a matter for its conscience and the complexity and sophistication of human decision-making relative to the reason curve would have very little but slow bearing on this. With the advent of social science, one may be forgiven for paraphrasing John Rawls that there is very little logic in maintaining a particular way of life when the reason for its existence can no longer be articulated. Thus, the demands of a modern democracy are taken into account by constantly challenging the status quo. The reason curve allows this to happen.