

TAKING LIBERTIES

By

Peter Lilley MP

Adam Smith Institute

2002

Peter Lilley was chairman of the Bow Group (1973–75) and a consultant Director of the Conservative Research Department (1979–83). He was Member of Parliament for St Albans from 1983–1997 and, following boundary changes in 1997, he became MP for Hitchin & Harpenden

His first ministerial appointment was as Economic Secretary to the Treasury (June 1987), then Financial Secretary to the Treasury (July 1989). He joined Mrs Thatcher's Cabinet as Secretary of State for Trade and Industry 1990–1992. Mr Lilley was appointed Secretary of State for Social Security 1992–1997.

He is the author of several publications including: *Do You Sincerely Want to Win? Defeating Terrorism in Ulster*, 1972; *Lessons for Power*, 1974; *Delusions of Income Policy* (co-written with Samuel Brittan), 1977; *End of the Keynesian Era* (contributor), 1980; *Thatcherism, the Next Generation*, 1989; *The Mais Lecture Benefits and Costs: Securing the Future of the Social Security*, 1993; *Patient Power* (published by Demos) 2000; *Common Sense on Cannabis* (Social Market Foundation) 2001.

Contents

Introduction	4
Trial by Jury	7
Double Jeopardy	28
The Presumption of Innocence	36
Habeas Corpus	40
Epilogue	46

Bibliographical information

Published in the UK in 2002 by ASI (Research) Ltd
© Adam Smith Research Trust 2002

All rights reserved. Apart from fair dealing for the purpose of private study, criticism or review, no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, without the consent of the publisher.

The views expressed in this publication are those of the author alone and do not necessarily reflect any views held by the publisher or copyright owner. They have been selected for their intellectual vigour and are presented as a contribution to public debate.

ISBN: 1-902737-38-5

Introduction

British liberties are under threat. For a long time, Britain has been the envy of the world in the protection which it offers residents against the arbitrary power of the State. Indeed, many of these liberties have existed for so long that there is a danger of their being taken for granted.

They should not be. The current Government and the European Union are in the process of introducing new laws which would undermine the liberties on which British people have depended for so long. The attack on these liberties, though partly a misguided attempt to achieve laudable aims, is being fuelled by an unprecedented alliance between tabloid populism (to sound tough on crime) and modernising zeal. But the net result is to make British people more vulnerable than ever to arbitrary action by the State.

This paper looks at four areas where liberties are under threat:

- trial by jury, where the government has a manifesto commitment to abolish the defendant's right to opt for jury trial and, though currently baulking at implementing that, seems determined at least to erode trial by jury;
- the Double Jeopardy Rule, where the government intends to allow people to be tried twice for the same offence;

- presumption of innocence, where new laws are putting the burden of proof on defendants to prove themselves innocent; and
- habeas corpus, where British legislation and EU proposals could lead to people being arrested without charge or trial.

Most educated people are dimly aware of the importance of these liberties. Unfortunately debate about them is monopolised by lawyers with their own professional jargon, prejudices and vested interests. But these freedoms exist for all of us, not for the legal profession. I write as one of the few non-lawyers ever to address all these issues in the hope of alerting a wider audience to the danger these threats pose to us all.

In each case, I examine the history of and rationale for the original liberty and the nature of the possible threats to it. And where the objectives underlying proposed changes appear sensible, I examine alternative means of achieving them.

My starting point is that traditions should not be blindly upheld simply because they are old. But when something has worked well for centuries, the case for change needs to be strong. Above all, changes should only be considered if they strengthen the individual against the state, limit the state's power, protect the innocent, and respect the integrity of what has evolved over centuries.

We live in dangerous and violent times. Ordinary citizens are more than ever at risk from criminals at home and from actions by foreign terrorists.

Governments should properly take steps to reduce these risks and to ensure that criminals are convicted. But combating crime need not and should not mean undermining justice. It is ordinary citizens, not criminals, who are at risk from an erosion of our traditional liberties. For the defenders of freedom, now is the time to make a stand.

Trial by Jury

“No free man shall be seized or imprisoned, or stripped of his rights or possessions...except by the lawful judgement of his equals...”¹

Introduction

Trial by jury is one of the most ancient rights enshrined in the British system of justice. The Government is committed to eroding it. This will weaken a key defence of the individual citizen against arbitrary actions by the executive.

Origins

The right to trial by jury dates back to Magna Carta, if not earlier.² Although the role and nature of juries has changed greatly since then, the one crucial feature throughout has been that they have been felt to be fairer and, above all, more independent of the executive than the King’s justices. That is why jury trial has always

¹ Clause 39 of Magna Carta (1215)

² The Wantage Code endorsed by Aethelred II “states that twelve leading thegns in each wapentake are to go out from the court and swear...that they will neither accuse any innocent person nor protect any guilty one”. (Sir Frank Stenton, Anglo-Saxon England).

been seen as a pillar of English liberty — and subsequently cherished by all Common Law countries.

The right to jury trial was reaffirmed in the Bill of Rights in 1689³ when parliament sought to entrench the traditional liberties that had been threatened by the autocratic ambitions of the Stuarts. The right to jury trial was incorporated in the American constitution⁴ that again sought to entrench the rights of the individual against the executive.

As Lord Devlin wrote,

“The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution, it is the lamp that shows that freedom lives.”

³ “That juries ought to be duly impanelled...” Section II, Bill of Rights 1689

⁴ “The Trial of All Crimes, except in cases of impeachment, shall be by Jury...” Article III Sec 2: Clause 3

The current position

At present, whether or not a defendant must, may, or cannot have, a jury trial depends on the seriousness of the offence. There are three different types of offence:

Summary only offences, which include most motoring offences, are automatically tried before a magistrate without a jury. The maximum penalty is six months imprisonment. Convicted defendants who appeal have a right to a re-trial before a judge and two magistrates, but without a jury.

Indictable only offences are the most serious offences such as murder, rape and wounding with intent. They are automatically tried before a judge and jury.

Either way offences are intermediate offences. These include grievous bodily harm, actual bodily harm, child cruelty, indecent assault, theft, burglary, false accounting, forgery, criminal damage, supplying controlled drugs, affray and violent disorder.

Such cases are called either-way offences because they can either be tried summarily (before a magistrate) or on indictment (before a judge and jury). Magistrates may themselves decide that an either-way case should be tried in the Crown court. In 2001, they did so in 39,000 cases. In addition, a defendant to an either-way charge has the right to choose to be tried by a jury in the Crown court. In 2001, 16,000 defendants, around 3% of those charged with either-way offences, exercised their right to be tried before a jury.

The Government's proposals

Proposals to end the right to choose trial by jury in either-way cases did not begin with this government. In 1997 the idea was advocated in the Narey Review⁵ carried out by a Home Office official.

Within the Cabinet I strongly opposed endorsing this plan. The outcome was simply to consult on the proposal without commitment.⁶

Having sharply criticised the idea in opposition,⁷ Jack Straw changed his mind in government and introduced two Bills to give magistrates the sole right to decide whether a case should be tried summarily or before a jury (subject to an appeal to a judge). The Bills would also have let magistrates retain the right, having heard a case, to send the convicted offender to the Crown court for sentencing. (Both Bills were defeated.)

The Government made removal of the defendant's right to choose trial by jury an election commitment in the 2001 Labour Manifesto which pledges that "we will

⁵ "Review of Delay in the Criminal Justice System" February 1997. It was also considered and rejected by the James Committee on "The Distribution of Criminal Business between the Crown Court and the Magistrates' Courts"; cmnd 6323 (1975) and recommended by the Royal Commission on Criminal Justice in 1993 but rejected by the government.

⁶ Hansard 27th February 1997 col 431

⁷ Jack Straw stated that: "cutting down the right to jury trial, making the system less fair, is not only wrong but short-sighted and likely to prove ineffective. I therefore urge the Secretary of State not to accept the proposal"

remove the widely abused right of defendants alone to dictate whether or not they should be tried in a Crown Court”.

In November the Auld review of the court system, set up by the Government, strongly endorsed the government’s desire to abolish the defendant’s right to elect for jury trial. Auld went even further — advocating removal of several classes of case from the hands of juries, submitting jury verdicts to judicial review and setting up a new tier of District courts sitting without juries with powers to impose sentences of up to two years. This represents probably the most comprehensive assault on the jury system, short of its total abolition, ever proposed.

Lord Auld’s report is not the first from the judicial establishment to criticise the defendant’s right to jury trial. It is natural that some members of any profession should resent the involvement of lay people in their sphere and feel that the bureaucracy can more safely be entrusted with discretion than lay people like defendants, jurors and even lay magistrates. On the other hand, resolute support for the right to elect for jury trial has come from the Bar Council and Law Society, but they may be seen as having a vested interest in its retention. That is why it is crucial that those in the body politic who are free of these professional prejudices should involve themselves in this debate.

Recently the Lord Chancellor has given interviews⁸ suggesting that he will reject Auld's plan to set up District courts. Instead he is considering increasing the sentencing powers of magistrates' courts from six months to twelve months and eventually twenty-four months. Magistrates might then lose their power to refer convicted offenders up to a higher court for sentencing. He rejects Auld's proposal to make jury trials subject to review but he favours removing complex fraud cases from juries. The government's aim still appears to be to reduce reliance on jury trial. Lord Irvine believes that these measures will reduce the number of jury trials by some 6000 a year. But he has indicated that the government may not at this stage implement the manifesto commitment to remove the defendant's right to choose jury trial.

Two steps forward, one step back is a common enough tactic. The only reason the government has indicated a willingness to make a tactical retreat is that its two bills met with significant opposition. But it remains committed to abolishing the right to jury trial; it still plans to erode the role of juries; and there is still powerful hostility to that right in the judicial establishment. It would be foolish for believers in the jury system to suppose that the threat to juries has disappeared, unless and until the government formally repudiates its commitment to remove the right to jury trial and they and their allies abandon plans to erode the role of juries. Juries need strengthening not phasing out.

⁸ The Times law supplement 16th April 2002.

The Government's rationale

The Government's stated reasons for its proposals to abolish the right to choose jury trial are two-fold. First, Ministers argue that experienced offenders abuse the right to elect for jury trial and thereby get shorter sentences or escape scot-free. Second, Ministers allege that trial by jury involves unnecessary and avoidable costs. So by ending the defendant's right to choose jury trial the Government could simultaneously abolish abuse, be tough on criminals and save taxpayers' money.

However, the Government's case is in tatters since it emerged that the forecast savings would result largely from shorter sentences likely from magistrates, not from reduced court costs. So the notion that this change would be tough on criminals went up in smoke. It also casts grave doubts on the extent of abuse: clearly experienced criminals cannot be successfully manipulating the right to jury trial if they could get shorter sentences in the magistrate's court. If the extent of abuse is so uncertain, it is hard to believe that the hoped for savings will materialise.

Even if the system were being abused by the guilty, that would not justify removing from innocent people the right to jury trial. That would be like abolishing welfare benefits for the poor just because the system is abused by the greedy.

In any case the circumstantial evidence produced by the government in support of its case is weak. The Government argues:

- “nearly 90% of those who elect for jury trial, and are convicted, have previous convictions.”⁹ But this may simply show that people previously convicted think that a jury is more likely than a magistrate to be impartial.
- “two-thirds of those who elect for jury trial subsequently plead guilty and so never appear before a jury at all.” But in fact most of them do not plead guilty to the original charge, but to a charge reduced by the prosecution. Even Lord Justice Auld admits “There has undoubtedly been a good deal of overcharging leading to defendants electing to go to the Crown court when otherwise they would have consented to summary trial”. And a recent study commissioned by the Lord Chancellor’s Department found “no support for the arguments that defendants should be deprived of their right to elect trial by jury because the majority of them plead guilty after electing to go to the Crown Court.”¹⁰
- “the acquittal rate in contested either-way cases is higher in Crown courts than in magistrates’ courts.”¹¹ This implies that juries are more prone to

⁹ Ministers persist in using this 90% figure, often without mentioning that it relates only to those who *are convicted* and dates back to a sample of cases *in 1989*. The most recent study of a sample of cases in 1999 shows the proportion with one or more previous convictions was 68%. This too relates only to those convicted.

¹⁰ Dr Satnam Choongh, ‘Review of Delay in the Criminal Justice System’ Lord Chancellor’s Research Series No 2/97 December 1997

¹¹ The actual proportion of wholly contested cases (NB not just either-way offences) acquitted in magistrate courts in 2000 was 31%

acquit guilty defendants than are magistrates.” Those with stronger cases are more likely to insist on jury trial. It is not just the juries who throw out cases. Nearly 16% of all Crown court cases were dropped before trial in 2000. And a fifth of those who are tried and acquitted are acquitted because the judge directed the jury to do so. Jack Straw admitted that “If one takes account of the relative seriousness and complexity there is little difference in acquittal rates in magistrates courts compared with the Crown court”.¹²

The government’s argument on cost disintegrates on examination. Of course jury trials are typically more expensive because they are more thorough, involve more people, take longer and require a more time-consuming preparation of evidence. But although the government initially claimed that their proposals would save £128 million a year, most of this — £84 million¹³ — turns out to be from the lower sentences likely to be passed by magistrates’ courts. The Home Office admit that their costings are based on the assumption that 4,000 offenders will receive sentences on average 5 months shorter in the magistrates’ courts than if they had been allowed to elect for Crown court.¹⁴ Ministers have now conceded that the savings on court proceedings would amount to only £44 million a year. This cost — less than

against 45% in Crown courts – Hansard PQ reply to Peter Lilley 15th October 2001.

¹² Hansard col 953 7 March 2000

¹³ Hansard, col 377W, reply top PQ by Ann Widdecombe 2nd March 2000

¹⁴ Home Office Research Findings, “The Cost of Criminal Justice”, No. 103.

£1 a year for each British subject — is a small price to pay for keeping the right to jury trial.

Squeezing out jury trial

Traditionally, jury trials are mandatory for serious offences, and for either way offences the magistrate will direct that there should be a jury trial if the case is serious or complex. Only minor and simple cases are left to the magistrates' courts.

Lord Auld proposed a pincer movement to squeeze the use of jury trials at both ends. As well as raising the threshold below which cases are considered too minor for jury trial he proposes that, for the first time, cases that are too serious and complex should be excluded from jury trial — beginning with complex fraud trials. He would extend the definition of minor cases from those involving a maximum sentence of 6 months to 24 months. Exclusion of fraud cases would be a starting point but he recognises a “strong logical case for...extending the reform to other serious and complex cases.”

Once it is accepted that juries should be ruled out both because cases are too simple and minor and because they are too complex and serious, it will be hard to justify juries for intermediate cases. Indeed, no-one reading Auld can really believe he has much desire to retain them at all.

Lord Irvine has indicated that the government will only go part way along the route mapped out by Auld. But from raising the sentencing powers of magistrates to 24

months it is a small step to reclassifying all offences with sentences of less than that as 'summary-only' thereby precluding jury trial. And, as Auld indicates, once complex fraud cases are taken away from juries, it will lead inexorably to removing all 'complex cases'.

A number of high profile fraud cases have given rise to concern. Some involved surprise acquittals, others low sentences, most immense length. In several charges were dropped and in one the jury was told to ignore three-quarters of the evidence they had heard.¹⁵ As a result the impression has gained currency that juries cannot cope with lengthy and complex cases and invariably acquit. This is a myth. In fact the Serious Fraud Office had an average 92% conviction rate in the last four years against only 57% convictions in recent jury trials for all offences. It is, nonetheless, disturbing that some fraud cases are strung out for months and far from obvious that this is necessary or unavoidable. As one senior judge commented in a serious fraud case in 1976, "brevity and simplicity are the handmaidens of justice and length and complexity its enemies".¹⁶ It is surely the task of the judge to insist that the prosecution and defence focus on the key issues.

¹⁵ There are notable examples in which the prosecution brought forward multiple indictments leading to prolonged trials. The Levitt case in 1993, for example, brought against City financier, Roger Levitt, originally involved 62 charges – of which the prosecution withdrew all but one in order to get a conviction. During the 1994 case against George Walker, the jury heard from 82 witnesses during the four and a half month trial.

¹⁶ Lord Bridge of Harwich, quoted in an article in the *Daily Mail*, 29th July 1992.

Perhaps the best account of the working of a jury is *The Jurymen's Tale* by Stephen Glover, which describes a long and complex case (though not a City fraud). He concludes that juries can cope with complexity and even length.

Auld proposes that the jury be replaced by a judge sitting with two expert assessors. In practice those assessors will rarely be experts in the subject matter of the specific fraud. They will simply be familiar with financial matters in general. It would surely be more satisfactory to revive *Special Juries* drawn from a broad panel of people with professional/financial experience, for cases of this kind. That would not undermine the principle of jury trial and would leave the judge free to guide on the law and set the sentence.

The case for jury trial

Although the government's original case was ostensibly directed just at the defendants' right to choose jury trial, its response to the Auld report reveals an underlying hostility to jury trial *per se*. So it is worth restating the general case for jury trial before considering the case for retaining a defendant's right to opt for it in either-way cases.

- *Juries are independent of the State and its judicial and police systems.* Corrupt governments, from Hitler to Mugabe, have used the courts to harass their political opponents. Even some modern democracies are essentially elected dictatorships in which the state exercises enormous power.

Judges and magistrates are ultimately there to enforce its edicts. But juries are independent and harder to control.

- *Jury trial is the best protection for the innocent.* No method of trial is perfect. But there is a risk, acknowledged by many lawyers, that judges and magistrates become case-hardened and may develop an in-built bias towards the prosecution. A jury helps correct for this.
- *Jury trial enjoys public confidence.* Juries command respect because they have stood the test of time. They command confidence because they are 'people like us' who speak the same language as us where the professionals exchange legal jargon. Surveys have shown that ethnic minorities in particular have confidence in juries, partly because juries are more ethnically representative than magistrates.
- *Juries will not enforce laws that grossly offend their sense of justice.* In the last resort, juries will simply not convict if the law appears to them manifestly unjust. They may also acquit in hard cases where the judiciary and magistrates might feel compelled to apply the law with unfeeling rigour. It is worrying that some of the government's advisers do not value this. The Auld report, commissioned by the Government, recommends that "the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in

disregard of the evidence”. That would remove an essential safety valve.

- *Juries involve the ordinary citizen in the judicial system.* It is surely a good thing in itself that everyone can be called upon to play a part in applying justice. About 187,000 people served on juries in 2001.¹⁷ It is participatory democracy at work. It diffuses power to the general public which otherwise would be monopolised by the professionals. It helps create a widespread respect for the legal system itself. Jury service is almost the only way apart from the right to vote in which everyone can participate in the exercise of state power in this country. De Tocqueville, in his penetrating analysis of ‘Anglo-American’ democracy, said “the jury is above all a political institution...The jury plays an incredibly important part in forming popular judgement and improving people’s natural understanding.”¹⁸
- *Jury trial commands respect even among the guilty.* This is more important than one might suppose. Our system relies on the more or less willing compliance of the accused. Even the guilty normally co-operate with the system and let it try them. Most attend trial on the date set down without the need to keep them in custody. They sit quietly in the dock without forcible constraint. They do so because they tacitly believe the system

¹⁷ Hansard, col. 832W, reply to PQ by Peter Lilley, 27th November 2001.

¹⁸ Tocqueville “De la Democratie en Amerique” pp373/376.

is fair. The existence of jury trial contributes to that climate of trust even where it is not invoked

Why defendants should be allowed to choose jury trial

The Government's two Bills just sought to remove the right of defendants to opt for jury trial in either-way cases: they still allowed magistrates to decide that an either-way case should be tried before a jury. Now the Lord Chancellor has indicated that the government will be trying to reduce the extent to which magistrates send defendants for jury trial by increasing magistrates' sentencing powers.

It is far from certain that this change will achieve the government's aim of reducing the number of jury trials, and even less likely that it will save money. Magistrates can and do already accept cases which may merit sentences in excess of their six month maximum and then refer convicted defendants up to the Crown court for sentencing. They may lose that right when they can pass sentences of up to two years. Those magistrates who were reluctant to accept cases that they could try but not sentence may accept more cases if their sentencing powers are increased. But others may refuse to try cases they would previously have accepted if they can no longer refer them up for sentencing should they merit sentences exceeding their new maximum. The Government's estimate that the former will exceed the latter by 6,000 can be no more than a guess.

What is certain is that, once equipped with greater sentencing powers, magistrates' courts will use them.

Whereas the government's previous proposals produced savings from the shorter sentences magistrates could impose, this change would almost certainly result in extra sentencing costs which will dwarf any savings in court costs.

Moreover, this change will mean more serious cases will be accepted for trial by magistrates. So the defendant's right to elect for jury trial will become an even more crucial issue.

Why is it important that defendants themselves, rather than just magistrates, should be able to choose trial by jury?

There are three reasons for this:

Independence from the State. As we have seen, people's faith in the jury system stems from juries' perceived independence from 'the system'. That would be undermined if you could only have a trial independent of the system when the system itself decides to let you have one. Jury trial would no longer be your choice. It would be 'their' choice. That would undermine confidence in the judicial process at its very gateway. Jury trial always has been and should remain a right belonging to the citizen, not a favour granted by the system.

Misalignment with sentencing. The Government's original proposal would have let magistrates refuse a defendant's request for a jury trial on the grounds that the case was not sufficiently serious for the higher court. Yet, after the magistrates have heard the case, they could still decide it

was serious enough to send to the higher court for the longer sentence only it can award. Defendants' right to opt for jury trial means that they can opt to be tried by the court by which they expect to be sentenced if found guilty. It is welcome news that the government may now recognise the case for aligning trial and sentencing powers — albeit by removing magistrates' right to commit for sentencing only once their sentencing powers are greatly increased. But those greater sentencing powers will make the defendants' right to opt for jury trial even more necessary.

Reputation. Under the Government's second Bill, cases were to be allocated between courts largely on expected length of sentence should the verdict be guilty. But for some people the damage to their reputation, employability or self-esteem of a conviction could be far more of a threat than any sentence, and therefore make them wish to opt for a jury trial. This is a subjective matter that the defendant, not the court is best placed to assess. If magistrates are to be encouraged to try even more serious cases and empowered to pass sentences of up to two years, the right to defend one's reputation before a jury will be even more important.

A better approach to reforming jury trials

The current criminal justice system is far from perfect. The jury system itself is not working as well as it could or should. The Government, while professing a continued belief in jury trial in principle, is using those deficiencies as an excuse to erode their use in practice. If they sincerely intend juries to play a continuing role in

our system then they should be seeking to improve the way they work, rather than stealthily eroding access to them. There are better ways of achieving the government's professed objectives than those proposed by the Government themselves.

- *Case preparation.* Too many cases currently involve last-minute reduced charges, are abandoned, or are thrown out by judges. Both overcharging and plea-bargaining, though not officially countenanced, are rife. There should be a review of the way in which cases are prepared by the Crown Prosecution Service and the police.
- *Defence counsel.* Only 5% of defendants opting for jury trial were advised by their defending solicitor or barrister to elect for trial in a magistrate's court. Yet they risk a higher sentence, if found guilty, in a Crown court. Defence lawyers should be required to confirm that they have spelled out that risk to defendants.
- *Incentives.* Changes in the incentives facing defendants have helped to nearly halve the number of defendants electing for jury trial since 1992. A recent study¹⁹ identifies four procedural changes which have encouraged more defendants to opt for Magistrates' court: reduced discounts on sentences for late guilty pleas, pleas before venue, growing CPS willingness to accept guilty pleas to lesser charges at an early stage, and the extension of bail to defendants committed for sentence in

¹⁹ David Wolchover and Anthony Heaton-Armstrong, 'The right to jury trial', *New Law Journal*, 11 February 2000 vol. 150 no. 6992 p.158

the higher court. Removing the right of Magistrates' courts to try a case and then refer it to a Crown court for sentencing would be fairer in itself and add a further helpful incentive for defendants to prefer trial in Magistrates' courts.

- *Magistrates' referrals.* Magistrates have the right to refer cases for trial to the Crown courts. They should be required to base this decision primarily on whether the case would involve a sentence of over 6 months. This would help to cut the large number of cases referred up that ultimately involve short or non-custodial sentences.
- *Jury selection.* Many of the people best qualified to serve on juries avoid jury service. Of the 547,000 people who received summonses for jury service in 2001, only 187,000 actually served on a jury.²⁰ Nearly one third (175,600) of those summoned were excused, of whom 6% (32,300) were excused as of right and just 1% (fewer than 7,500) on the grounds of their profession.²¹ The statutory exemption of most categories should be ended. It should be made harder to obtain exemption from jury service but people should be given the chance to nominate a period convenient to them in the next twelve months.
- *Court procedure.* Trials are often complex in both substance and procedure. Juries could be helped to follow a trial better by being advised to take notes, being given an outline of the key issues by

²⁰ In London, five sixths of those summoned are avoiding or evading jury service. See Auld Report study, "What can the English Legal System learn from jury research published up to 2001?", p. 58.

²¹ Hansard 15th May reply to PQ from Peter Lilley.

the judge at the start, and a succinct explanation of the law before their deliberation.²² This would be particularly helpful in complex fraud cases. Jurors also should be encouraged to ask questions and to discuss the evidence at an interim stage, irrespective of the length of a trial.

Conclusion

It is a laudable objective to bring criminals to justice and to do so at moderate cost to the taxpayer. Any system of justice which was unnecessarily expensive, or which made it unreasonably hard to convict obvious criminals, would be a legitimate object of reform.

The Government alleges that allowing defendants in ‘each-way’ cases to elect for jury trial is manipulated by experienced offenders to get shorter sentences or escape scot-free. The Government also says this involves unnecessary costs. But both claims collapsed when it emerged that the government is assuming that removal of this right will result in shorter sentences which would account for the bulk of the expected savings. There are indeed shortcomings in the current system. But these are not the result of the right to choose trial by jury, and this paper has proposed ways of addressing them.

Removing the right to choose trial by jury undermines a fundamental protection in the relationship between the

²² For example, in the Harold Shipman murder trial in October 1999, the jury was given a pre-trial summary of the issues and other relevant instructions.

individual and the state. Unlike most other European countries, modern Britain has never yet experienced rule by an oppressive dictatorship. But a benign past should not make us complacent about the future, especially at a time of increasing disenchantment with mainstream politics at home and abroad. Disagreeable developments in European politics earlier this year are a pertinent reminder of the need not to be complacent about defending our liberties. Trial by jury, and the right to choose it, remains the most effective safeguard against the risk of arbitrary persecution of the individual by the State.

Double Jeopardy

Origins

The rule that a person may not be tried more than once for the same offence is one of the oldest rules in English Common Law. It dates back at least to the 12th century. It was incorporated in both the UN Covenant and the European Convention on Human Rights drafted after the Second World War. The rule was developed to protect the individual from repeatedly having to defend himself against a remorseless prosecutor. So once all normal appeal processes have been exhausted an acquitted person can rest secure.

Reasons for double jeopardy rule

If new evidence emerges which suggests that a person was wrongly convicted, he can be granted a free pardon. But if new evidence suggests that a person was wrongly acquitted he cannot be retried. There are four reasons for this lack of symmetry.

First: it protects the individual from 'harassment' by the state or other prosecutors. The prosecution, having failed to obtain a conviction, cannot return with new arguments, new evidence or new witnesses in the hope of convincing a new jury.

Second: it gives the police and the prosecution an incentive to prepare their case thoroughly and completely before bringing it to court.

Third: it gives innocent people, once acquitted, the peace of mind that they will not have to go through the distress of a further trial.

Fourth: a fair retrial would be virtually impossible since the new jury would be prejudiced by knowledge that a retrial implies that judges believe that the new facts are compelling evidence of guilt.

Pressure for abrogating the double jeopardy rule

The Double Jeopardy Rule means that acquitted people remain free even if they subsequently turn out to be guilty. To some, this will doubtless appear unjust. They will argue that criminals should not escape punishment through deficiencies of the judicial process. But for 800 years, these arguments have been outweighed by the four reasons (set out above) in favour of the Double Jeopardy Rule.

The pressure for changing the rule stems from the Stephen Lawrence case. The police investigation into the murder of Stephen Lawrence identified a number of suspects. But the police and the Crown Prosecution Service thought they lacked sufficient evidence to justify a prosecution. So Stephen Lawrence's parents took out a private prosecution, which failed. Under the Double Jeopardy rule no further prosecution of those acquitted was possible. But Sir William Macpherson was asked to report into the affair. In his report, Macpherson said

“if...fresh and viable evidence should emerge against any of the suspects who were acquitted, they could not be tried again however strong the evidence might be. We simply indicate that perhaps in modern conditions such absolute protection may sometimes lead to injustice ... the issue deserves debate and reconsideration perhaps by the Law Commission, or by Parliament.”²³

Following this the Home Secretary referred the issue to the Law Commission, who produced a consultation paper²⁴ that proposed allowing re-trials where new evidence emerged and where the offence was likely to attract a sentence of three years or more. The response to the public consultation persuaded the Law Commission to give greater weight to the need for ‘finality’ to protect innocent people, once acquitted, of the fear of retrial. As the Commission put it, “the potential lack of finality and the associated distress and anxiety would affect a much larger group of acquitted offenders than would ever be proceeded against under the exception”.

In its final report, the Commission proposed a narrower exception to the Double Jeopardy rule, subject to three restrictions. It must be limited to murder. The new evidence must be compelling. Unless the court is satisfied that it would be in the interests of justice, evidence will only be allowed if it is new and would not have been available at the first trial had the investigation

²³ The Stephen Lawrence Inquiry — Report of an Inquiry by Sir William Macpherson of Cluny (1999) Cm 4262 para 7.46

²⁴ Consultation Paper N156 — ‘Double Jeopardy 1999’

been conducted with due diligence. Let us examine each of these conditions in turn.

Murder

The Law Commission's reassessment of the value of the Double Jeopardy Rule convinced them that any exception should be very limited. But the Commission fail to make the case for singling out murder cases for exception from the Double Jeopardy Rule.

There are weaknesses in their approach. First, their affirmation of the need for 'finality' to give peace of mind to innocent people, once acquitted, torpedoed the case for breaching the Double Jeopardy Rule for serious cases just as much as for less serious cases. The graver the charge, the greater the distress caused by the possibility of retrial.

However, the Commission clearly felt unable to come back empty-handed. Revealingly they say, "The approach we have decided to adopt... is to see whether we can identify any specific offences ... which we believe are serious enough to justify [setting aside the Double Jeopardy Rule]". They abandoned their own initial proposal to cover crimes attracting a sentence of three years or more. They also rejected the Home Affairs Select Committee's proposal to exempt offences attracting a life sentence as "too blunt an instrument" covering too wide a range of crimes. They were left with murder as the narrowest and most serious crime which also conveniently covered the Lawrence case. But they gave

no reason why finality was not important for those innocently acquitted of such a terrible offence.

Second, once an exception is allowed for murder cases, it will be hard to prevent the exception being extended to other serious crimes — attempted murder, terrorist offences, cases where brutal injuries have been inflicted, rape, etc. Indeed the Commission itself proposed the category of murder be defined to include “genocide involving killing and reckless killing (if such an offence is created)”. And the Commission themselves admit that it might be hard to hold the line. As they say, “the history of extensions to the power of the Attorney General to refer unduly lenient sentences to the Court of Appeal suggests that the government might wish to extend the range of offences to which the exception [to the Double Jeopardy Rule] applied”. Lord Justice Auld has already proposed that exceptions to the Double Jeopardy Rule be widened to all “other grave offences punishable with life or long terms of imprisonment”.

No other country allowing exceptions to the Double Jeopardy Rule has limited them to murder. All countries with common law legal systems and most European countries retain the Double Jeopardy rule intact. A number of other states allow re-trials only where compelling evidence of *innocence* casts doubt on a *conviction* (where the UK can grant a Free Pardon). The few countries that allow re-trials on new evidence of illegitimate *acquittal* seem to extend it to broad categories of offence. Paradoxically in Denmark the exception only applies where a defendant has been acquitted (or convicted) of a *lesser* offence — presumably the equivalent of our summary offences. In Finland the

exception is applicable to all offences punishable with at least two years imprisonment.

Compelling evidence

The proposal is that a re-trial of an acquitted person will be allowed only if new evidence is so compelling that it drives the appeal court to the conclusion that it is highly probable that the defendant is guilty. There is clearly a severe danger of prejudicing the jury if they know that the appeal court judges have already reached that conclusion. To minimise this risk, it is proposed that the appeal hearing to decide whether a re-trial is warranted will be subject to restrictions on reporting. Nonetheless, there must be every likelihood of the jury being prejudiced. The discovery of new evidence, may well be publicly reported before the appeal court hearing. In any case, the jurors may well know that the reason for permitting a re-trial of an old case is new evidence and that such evidence must be compelling. Trials are stopped because jurors may have read newspaper articles expressing commentators' views. Yet it is proposed that trials should go ahead when jurors cannot but know the appeal court judges' views.

New evidence

It is proposed that to quash an acquittal the court must be satisfied that the new evidence could not have been available at the first trial. A major reason for the Double Jeopardy Rule is to give the prosecution an incentive to get all its ducks in a row before firing. Without it

prosecutors might launch prosecutions prematurely or without comprehensive investigation.

The Commission propose limits on a retrial based on new evidence. The court must be satisfied that it is in the interests of justice to allow a re-trial having regard to ‘whether it is likely that the new evidence would have been available at the first trial if the investigation had been conducted with due diligence’. But this is a weak protection. Even Finland, which allows the most extensive retrials, excludes all evidence at a retrial that could have been available at the first trial but for negligence. Under the Commission’s proposals, the court would be under pressure in high profile cases to say that the interests of justice would be served by a retrial. The Commission say that concerns about lack of diligence and premature prosecution are “somewhat remote and to a degree speculative”. This is odd given the circumstances of the Lawrence case.

Proponents of the Double Jeopardy exception suggest two types of new evidence that might justify retrials: DNA tests and confessions. But DNA tests would only constitute new evidence in cases tried before DNA testing had been established. And since DNA data will not then have been systematically collected there is a significant risk that any DNA data in such cases could have been accidentally contaminated.

Confessions raise different issues. Many people may feel that anyone who has committed a crime, subsequently secured an acquittal and then flaunted their guilt, could legitimately be retried. But such confessions would be unlikely once the Double Jeopardy Rule was abolished.

To use confessions made before any change in the Double Jeopardy Rule would be to punish someone retrospectively for an act which could not have had adverse consequences for them at the time they committed it. Moreover, not all post acquittal confessions will be genuine. In recent years we have learnt a lot about the propensity of some people under stress to become convinced they are guilty of offences they did not commit. It will be important to protect such people from themselves.

Overall, therefore, the proposed relaxation would apply primarily to a finite pool of past cases. Is it worth undermining an 800 year old principle to rectify a few past cases even though this will have no deterrent effect on crime in future and will deprive all innocent people acquitted of a crime of the certainty that they will never be tried again for that crime?

The presumption of innocence

Origins

If there is one English legal principle that is universally known and deeply cherished it is that we are all innocent unless and until proven guilty. Its central importance was vividly expressed by Lord Sankey:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject...to the defence of insanity and...any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

Limited exceptions

The presumption of innocence has never been absolute. Even in common law it has long been accepted that if defendants plead insanity it is for them to prove it rather than for the prosecution to prove every accused person is sane.

In addition, in cases where some specified ‘excuse, exemption, proviso or qualification’ applies, the defendant who claims such an exception has to prove that it is valid in their case. For example, in the Prevention of Corruption Act 1916, an accused person who claimed, say, that his financial dealings with a public official awarding arms contracts were innocent, had to prove that this was the case. However, the standard of proof required to establish such an exception is generally only the civil ‘balance of probabilities’ rather than ‘beyond reasonable doubt’. The Magistrates Court Act 1980 makes this requirement a general one. Nonetheless, where the statute is not explicit about the burden of proof in relation to any specified ‘excuse, exemption, proviso or qualification’, the Courts are reluctant to shift the burden of proof to the accused. Lord Griffiths in *R v Hunt* [1987] ruled that “Parliament...can never lightly be taken to have imposed the duty on an accused to prove his innocence...”

The threat

The danger is that what was once a rare exception is becoming a norm. This is showing itself in three areas: UK government legislation, proposals for an identity card, and EU directives.

Recent government legislation. Recent government legislation shows a disturbing disregard for the presumption of innocence. Take the Immigration & Asylum Act 1999. This Act assumed truckers whose vehicles contained illegal stowaways to be guilty of collusion or negligence. To get off, truckers had to prove

to the satisfaction of the Home secretary that they were acting under duress or had operated a thorough system to prevent stowaways. This was struck down by the courts as being contrary to human rights.²⁵

Or take the Football (Offences and Disorder) Act 2000. This Act empowers police to arrest anyone and detain them for up to 24 hours on suspicion that they may be travelling to commit a disorder abroad. They must be taken before a magistrate who may take away their passports unless the accused can prove they are not potential hooligans. So the accused are in effect presumed guilty and required to prove not merely that their behaviour but also their intent is innocent.

European Directives. The presumption of innocence is under attack not just from legislation initiated by the British government, but also from legislation initiated by the EU. For example, the European Directive on the Burden of Proof in Cases of Discrimination Based on Sex (97/80/EC), as its title implies, alters the burden of proof in such cases. Because the Labour Government signed up to the Social Charter in 1997, the UK became subject to the terms of this Directive.

The new rules mean that if someone can provide '*prima facie*' evidence that they have suffered discrimination, the burden of proof shifts to the employer to prove that 'in all probability' he did not discriminate directly or indirectly. It also broadens the definition of indirect discrimination.

²⁵ International Transport Roth GmbH v Home Secretary [2002 EWCA civ 158]

Before the Directive, Britain already had the Sex Discrimination Act 1975. The law said that only if a tribunal considers the employer's explanation to be unsatisfactory would it be 'legitimate' to infer discrimination. The Euro directive goes well beyond that. As the Equal Opportunities Review points out "it is a far cry from it being *legitimate* to draw an inference of discrimination to a tribunal being *compelled* by statute to draw that inference"²⁶.

Previously there were two questions after a *prima facie* case was established: first, had the employer provided a satisfactory explanation for the primary facts and second, if not, was sex discrimination to be inferred or was there another possible explanation of the facts. Following the new regulations there is only one question: has the employer proven that he did not discriminate? The Equal Opportunities Review concludes that this will have 'considerable practical importance'.

Nor is the Sex Discrimination Directive an isolated case of EU legislation. The UK is now bound to implement by 2003 the EC Race Directive (2000/43/ED) that similarly shifts the burden of proof in cases of alleged racial discrimination.

²⁶ Equal Opportunities Review No 99, Sept/Oct 2001

Habeas Corpus

Origins

Habeas Corpus is our most fundamental protection against arbitrary detention without charge or trial. The opening words of the writ of Habeas Corpus mean ‘have the body’: i.e. bring the person who is being detained before the courts forthwith. Since every detention is *prima facie* unlawful the burden of proof is on the detainer to justify it. Normally that will mean showing that there is *prima facie* evidence that the prisoner has committed an offence, has been charged and is to be tried — or some specific exceptional legal authority for the detention.

Magna Carta proclaimed, “No free man shall be seized or imprisoned... except by the law of the land”. Writs of Habeas Corpus emerged as a weapon to uphold that right several centuries later. They became the focal point of battles against Stuart attempts to detain people by royal prerogative. Lawyers seeking to release prisoners invoked Magna Carta as the ultimate authority for writs of Habeas Corpus to secure their release. Habeas Corpus was affirmed by Parliament in the Petition of Rights and later enshrined in statute in 1640 and again in the Habeas Corpus Act 1679 that is still on the statute book.

Limited exceptions

Habeas Corpus has only been suspended in times of war or threatened insurrection. These exceptions are understandable. If there is a genuine threat to the security of the British state and people, and if a time-limited suspension of Habeas Corpus is necessary to meet that threat, then most people would agree that such action is reasonable.

Anti-Terrorism Act

However, Habeas Corpus is now under threat from two directions: from the Government's Anti-Terrorism Act 2001; and from the newly proposed EU Arrest Warrant. Let us consider each in turn.

The current government incorporated the European Convention of Human Rights into English law. One result is that Britain is bound by decisions of the European Court of Human Rights. One such decision, in the Soering case, means that it is no longer possible to extradite people to countries where they may face capital punishment or unacceptable treatment. Nor is it possible to detain people indefinitely pending extradition. The ruling is such that if the extradition process is likely to be protracted, the suspect must be released immediately, *not* after a long period has elapsed.

This decision creates a problem for the Government. There is a small number of suspects in this country who are believed to be involved in international terrorism but who can neither be tried nor extradited. They cannot be

tried without risking the sources that provided the information to our security services. And they cannot be extradited because of the ruling of the ECHR.

Other countries, such as France, negotiated an effective exemption from the ECHR rules on exemption by entering reservations at the time of ratifying the Convention. The UK could do similarly by temporarily leaving the Convention and adopting the reserve power before rejoining. Instead, the government has given itself the power to intern indefinitely people suspected of international terrorism who cannot be extradited. The suspect need not be charged nor told of the evidence against him. The Home Secretary's decision to intern is subject to review by the Special Immigration Appeals Commission. But those detained have no right to see the evidence. Since this legislation has been enacted, the Home Secretary has used his powers to detain nine foreign citizens.²⁷ Detainees can obtain their release by agreeing to leave the UK for any other destination. Two have done so. This provision means that suspects are free to resume their activities abroad which suggests that the Government's aim is more to remove a potential embarrassment than to prevent a serious threat.

These powers are clearly repugnant to the normal principles of British justice. Not only do they undermine the presumption of innocence, but they also threaten to erode the due process of the law.

²⁷ Hansard, col. 1262W, reply to PQ by Peter Lilley, 15th March 2002.

Nor can the Government's actions be justified by external threats. International terrorism threatens all Western countries. But no other country except the USA has taken measures similar to the Anti-Terrorism Act.

Worst of all, the government sought to take these new powers indefinitely. Under pressure, the government conceded a review of the powers after 14 months and a maximum life of the powers of five years. But even this is far too long.

EU Arrest Warrant

Proposals for an EU Arrest Warrant were not originally connected with the threat of international terrorism though that was invoked to steamroller them through. The EU simply to make arrest warrants issued by any EU government for offences carrying a maximum sentence of at least 12 months applicable in all Member States. For a list of 32 offences people may be extradited even if the offence is not a crime in the country from which extradition is sought.

Most people accept that it should be possible to send people from the UK to face trial for crimes allegedly committed in other Member States and vice versa. But this should be possible only subject to certain safeguards: dual criminality; equivalent protection; and expectation of fair trial.

Dual criminality. Offences for which extradition is sought should also be recognised as a crime in the UK. As Lord Justice Scott put it:

“We do not extradite people to face trial on charges that we do not recognise as offences. We would not extradite someone to face charges of homosexuality that would not be criminal in this country or to face blasphemy charges.”

But the Arrest Warrant exempts from this safeguard the list of 32 vaguely worded offences including xenophobia and racism which are not crimes in the UK.

Equivalent protection. People facing requests for extradition should get the same protection as people arrested for domestic offences. The authorities must lay a charge against the person and within a matter of days convince the court that there is a *prima facie* case to answer. That will no longer be required if someone is subject to an Arrest Warrant issued by another EU state. The court will be obliged to hand the person over within 60 days. The court will no longer be able to confirm that there is a specific charge, nor *prima facie* evidence of involvement in an offence. Our courts will only be entitled to check that the person held is the person specified in the Warrant, that the Warrant and documentation are in order, and that the offence to which it relates is covered by the scheme. Yet in many continental countries the investigating judges can arrest suspects and hold them without charge almost indefinitely while pursuing their enquiries.

Fair trial. In Scott’s words, “We should not send people to be tried abroad unless we can be satisfied that they

will receive a fair trial”. At present extradition is: by our standards a fair trial”.

That safeguard, too, will disappear since the Home Secretary will not be able to exercise discretion under the Arrest Warrant, even if he has reservations about the defendant receiving a fair trial.

An added complication arises from the recent vogue for countries to empower their courts to try offences committed abroad. Belgium, for example, has given its courts powers to try Human Rights offences committed anywhere in the world. So Belgium could issue an Arrest Warrant covering someone living in Britain relating to an offence committed in Germany. More bizarre, unless the British authorities chose to intervene they could in theory arrest and extract for trial in Belgium a British citizen accused of committing a crime *in Britain*.

Conclusion

There is a good case for streamlining extradition procedures both within the EU and with other judicially advanced countries. If technical differences in the definition of offences sometimes mean that the Dual Criminality rule can be exploited for litigious delays they need to be resolved. Lists of offences recognised as being substantively the same could be agreed bilaterally, if not multilaterally. What cannot be tolerated is a weakening of safeguards such that in future British citizens and residents would have *less* protection against foreign states than we give them against our own.

Epilogue

This fourfold attack on our established freedoms reflects a political alliance of populism and modernising zeal — reinforced in part by the professional disdain of many in the legal profession for lay involvement, and in part by political correctness.

We should be concerned, above all, for freedom. That means not just economic freedom but also the judicial freedoms which enable us to live our lives without fear of an overbearing state. We believe in ‘freedom under the law’. The emphasis should be on freedom and liberty, not on making laws more punitive. The fundamental purpose of the law is to protect the innocent. Punishing the guilty is a necessary means to that end. But it is not an end in itself.

I believe that freedom, as we in these islands have come to understand and value it, requires limits to be set on the role of the state. That is true not only in economic policy and in social and moral matters, but also in judicial matters. If the state were to enforce the law through a salaried magistrature and judiciary, its power would be significantly increased. Lay juries (and lay magistrates) put an independent check on that power. They are a concrete example of civic society as an alternative to state power. Juries give the accused the assurance that they will be judged by their peers. And in the last resort juries simply will not uphold laws seen

to be oppressive, unreasonable, or contrary to entrenched public values. If the state with all the resources at its disposal could bring an acquitted person back to trial, its power would be intolerable. If the state could require us to prove our innocence then its power would be dangerously oppressive. If we can be handed over to other states without the protections we demand to protect us from our own, there will be outrage.

Defence of our liberties is a cause which is right in itself and which has a far wider appeal than many that some politicians have adopted in recent years. Certainly, when I have raised these issues in schools and colleges, they have aroused passionate interest among the young. They resonate, too, with adults who have not lost their sense of idealism and justice but feared that the political classes had done so. Those of us engaged in politics must seek to renew our appeal to these groups, not by adopting weak or flashy causes to court quick popularity, but by espousing a cause at whose heart lie the basic principles of freedom itself.