Public Confidence in the Administration of Criminal Justice

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Some observations on the administration of criminal justice suggest that the commentators would never be happy unless legal decision-making occurs either by means of polls on talkback radio or by means of voting on reality television.

Ancient Greece did not have the technology that would enable citizens to sit at home, watch a trial and record a verdict by electronic communication. The reality audience of that era had to be gathered in one place. Major trials in Ancient Greece were conducted in the public agora by a jury of 500 citizens voting on guilt or acquittal and then on penalty.[1]

It was one of the great Pericles' innovations that jurors were entitled to significant pay for their deliberations, hence allowing the poorest of Athenians to participate, indeed for them to do so at a profit.

Lawyers were banned. Any litigant had to speak for himself or herself. However, a class of speech writers or logographers emerged and their drafts have come down to us as one of the major sources of our knowledge of Athenian society. Our other major source is such of the Greek plays as have survived.

It is noteworthy that a common theme, particularly in the plays of Aristophanes, is a sustained attack on the excessive litigiousness of Athenian society. Aristophanes satirised citizens who became as obsessed with litigation as any dedicated watcher of reality television, thrilled by the power of rendering a verdict, in the same way as a reality television audience is thrilled by the power of voting for an eviction from the program.

A principal target of the dramatists, particularly Aristophanes, was the class of litigants who flooded the courts with tendentious prosecutions. This class was denounced as 'sycophants'. The word did not then mean a servile flatterer, as in contemporary usage, but something like a public informer, with an overtone of being a pest.

The plays of Aristophanes characterise sycophants as freelance operators out to make money, if necessary by blackmailing individuals, inventing false charges and indulging in slander.

On the two occasions when the Greek democratic system was suspended during the course of the 5th century BC, law reform, particularly the control of sycophancy, was high

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1 The following analysis is based in large measure on Matthew Christ *The Litigious Athenian* (1998).

on the list of changes. One of the leaders of the revolt known as 'The Thirty Tyrants' was a student of the philosopher Socrates. Even Aristophanes had, before this revolt, characterised Socrates as a subversive, when he described a gang of pro-Sparta aristocratic youths as 'Socratified'.

Socrates was convicted by a jury of 500 citizens, voting 280 to 220 for guilt on charges of corrupting the youth of Athens and impiety. When Socrates treated the verdict with scorn, during the hearing on sentence, the 500 jurors overwhelmingly voted for death.

Any reality television audience would have done the same. This model of reality law has serious defects. One obvious defect is the failure to develop a body of professional prosecutors.

As this audience is, occasionally painfully, aware, there are those in our community who approach the administration of justice on the basis that it requires an outcome that is responsive to the immediate wishes of the community. This approach assumes that one could devise a mechanism for identifying such wishes. It also assumes that those wishes are well informed and neither transitory, nor likely to alter after tranquil deliberation. It is an approach which frequently expresses a great deal of impatience with the mechanisms that the administration of criminal justice has developed over many centuries for the protection of civil liberties and to ensure that persons accused of criminal conduct receive a fair trial.

The maintenance of public confidence in the administration of criminal justice is a matter of the utmost significance to the peace, stability and harmony of our society. Public confidence has been described as 'in present times, ... the meaning of the ancient phrase "the majesty of the law"' (*Mann v O'Neill* at 245 per Gummow J). All participants in the administration of criminal justice, including, I need not tell you, prosecutors, make a contribution to this objective.

We must not confuse public opinion, which is fragmentary and transient, with public confidence, which is broadly based and enduring. All of us involved in the administration of criminal justice have to tolerate, from time to time, a certain level of public outrage when we act to respect the rights of unpopular people or otherwise apply the legal requirements for a fair trial.

It is, however, necessary to maintain a sense of perspective as well as of proportion about these matters. It is almost exactly a century since Roscoe Pound delivered a lecture entitled 'The Causes of Public Dissatisfaction with the Administration of Justice' (1906). Much of what Pound said a century ago is still applicable. We have to accept a level of popular dissatisfaction as inevitable. We simply have to do whatever we can to ensure that public debate on these matters is properly informed.

At the heart of the contribution to public confidence in the administration of justice that is made by prosecutors is the special range of duties and responsibilities of prosecuting counsel that have been developed over many years of practical experience, throughout the common law world, in the course of ensuring that the criminal justice system attains fair outcomes arrived at by fair procedures. Inevitably, as no institution is perfect, there are from time to time lapses in the conduct of prosecutors. This is understandable because the boundaries of permissible conduct cannot be stated in terms of a fixed body of rules. Issues of fact and degree are involved, about which judgments may reasonably differ.

The overriding duty of a prosecutor to act as a minister of justice and not to obtain a conviction at all costs lies at the heart of our understanding of what is required. The High Court reminded us of these principles only a fortnight ago in *Libke v The Queen* (see esp at

[2], [34]-[40], [71]-[85], [118]-[135]). Although the court divided on whether the trial miscarried, the criticism of the conduct of the prosecutor by all of the members of the court will, I am sure, provide useful guidance to prosecutors throughout Australia as to the boundaries of proper behaviour in the conduct of a cross-examination.

However, as Heydon J emphasised, the conduct of the cross-examination was not simply in breach of a prosecutor's duties. It was also in breach of the rules established by the law of evidence (*Libke* at [118]-[120]). This insight highlights the fact that both prosecutorial duties and the law of evidence have a common origin in the principle of a fair trial which is, as I have sought to show in another address, a principle that permeates the common law (see Spigelman 2004).

As Lord Devlin once put it:

> [N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused (*Connelly v DPP* at 1347).

Over the last decade the High Court has emphasised on a number of occasions that the criminal justice system in this nation is not only adversarial, it is accusatorial. The first such reference I have found was in 1996 (see *Walsh v Tattersall* at 94). That characterisation has since been deployed in High Court judgments when explaining the right to silence and the inapplicability of the rule in *Jones v Dunkel* to a criminal trial (see *RPS v The Queen* at [22]; *Azzopardi v The Queen* at [34], [38], [64]; *Dyers v The Queen* at [9], [60]); the inapplicability of the rule in *Browne v Dunn* to a criminal trial (*MWJ v The Queen* at 340); to explain the approach a court of criminal appeal should adopt to applying the proviso (*Vice v The Queen* at [43]; see also *Nudd v The Queen* at 618 which refers to the adversarial nature of the process; *TKWJ v The Queen* at [109]); and to determine whether or not the conduct of counsel caused a miscarriage of justice at trial (*Ali v The Queen* at [25]).

One essential aspect of the accusatorial system is that it is adversarial. However, the idea of an accusatory system is not equivalent to the idea of an adversary system. It has a broader scope. It carries with it procedural and, especially, evidentiary requirements which go beyond adversarial processes. It carries with it a requirement about the onus of proof and, probably, that the onus of proof must be discharged beyond reasonable doubt. Most significantly it carries with it the idea of a formal, separate law of evidence by which numerous matters which pass the test of relevance are not admissible into evidence. Although many of these rules find their origins in the jury system, the rules are not, or are no longer, so confined.

The existence of a separate law of evidence, constituting a distinct body of exclusionary rules, is one of the most fundamental differences between the common law tradition and the civil law tradition. About two decades ago, Italy formally abandoned the inquisitorial system for a system based on the common law. The new system has been characterised as accusatorial and not merely as adversarial (see e.g., Amodio 2004; Panzavolta 2004-05).

There are important differences in the ethical requirements placed upon members of the profession, including prosecutors, in the two different systems (see Nagorcka et al. 2005). In the process of what comparative lawyers call the convergence between civil law and common law legal traditions, of which the Italian adoption of an accusatorial model for criminal justice is an excellent example, an understanding of the differences in the respective traditions can enrich the understanding of all.

Traditionally the inquisitorial system, which did not clearly separate the processes of investigation and trial, also did not have a clearly separate law of evidence containing the

kinds of exclusionary rules with which we have become familiar. The distinction between an accusatorial system and an inquisitorial system was once described, as accurately as shorthand labels can do so, as the distinction between 'procedural truth' and 'fact' (see Certoma 1982).

No doubt from time to time prosecutors experience frustration at the manner in which some of the traditional rules of procedure and of evidence make it difficult to secure a conviction and, accordingly, fail to ensure that the administration of justice attains the actual truth rather than some kind of 'procedural truth'.

In 1846, in a judgment which Lord Chancellor Selborne would later describe as 'one of the ablest judgments of one of the ablest judges whoever sat in this Court' (*Minet v Morgan* at 368), Vice-Chancellor Knight Bruce said:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be opened to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much (*Pearse v Pearse* at 28-29, ER 957).

When Chief Justice Gleeson and Justice Hayne in a joint judgment described the accusatorial process as one of the 'fundamental underpinnings of the criminal law', their Honours went on to affirm some fundamental principles that I know are deeply ingrained in the administration of criminal justice and amongst prosecutors, and are so ingrained notwithstanding the frustration that sometimes must arise. Their Honours said:

> A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer' may find its roots in these considerations (*R v Carroll* at 643 [21]).

In all of recorded history there has never been a time when crime and punishment has not been the subject of debate and difference of opinion. This is not likely to change in the future. The problem seems to have started in the Garden of Eden itself, when God called Adam to account for his transgression. He, of course, blamed his wife. She – more imaginatively – blamed the snake. All three were the subject of condign punishment. For millennia, theologians and others have been debating whether that punishment has had the desired effect of general deterrence and how to enhance mankind's prospects of rehabilitation. I regret to inform you that this debate is unlikely to end.

Cases

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