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In Defence of the Right to Trial by Jury

Jury – a Solution to the Ailing Czech Justice System?

Susan Rutberg

According to the pollsters¹, public confidence in the Czech justice system is very low. 65% of Czechs do not trust their judges. Certainly, there is a connection between this mistrust and the fact that approximately 40 % of the CR's 2 500 current judges have been on the bench since before 1989. To an outsider, it seems surprising that the post-communist governments did not make changes to a system that had been controlled by the Communist party. The institution of trial by jury may be one way to promote public confidence in the Czech justice system.

The purpose of this article is not to claim the superiority of the American criminal justice system, but merely to suggest that there is at least one aspect of the American criminal justice system worthy of emulation: a guarantee that every person facing loss of liberty or loss of property enjoy the right to trial by a jury of ordinary citizens. The right to a jury of one's peers serves several important functions in a free society. These functions are crucial to a legitimate public sense of confidence in the system of justice.

There were, and are, good reasons for a democracy to provide its people with the right to trial by jury. In the Czech Republic, if for no other reason than to bolster public confidence in the judiciary, trial by jury makes sense. I suggest that now is the time to consider re-institution of this fundamental right.

Historical Origins

Historians dispute just how ancient is the right to trial by jury. Some say the notion of trial by jury dates to the **Magna Charta**, others disagree. What historians do agree on, however, is that the first use of citizens in judicial proceedings goes back as far as the Frankish conquerers. Juries then were groups of citizens convened to discover the King's rights. They served at the pleasure of the King and functioned as presentment bodies whose role was not to judge, but rather to collect evidence - a sort of inquest.

King Henry II regularized this custom in order to establish royal control over the judicial system. Trial by a group of citizens, a petit jury, was not employed until at least the reign of Henry III; still in those days, "jurors" functioned as a body of witnesses called to testify to their knowledge of the case, rather than serving as judges of the facts. It was during the reign of Henry VI that juries became triers of evidence or fact finders, rather than mere witnesses. It was then that the right to trial by jury became a part of the English common law.

Lessons from History

Bulwark against the Power of the State

The Common Law is a group of rules developed to serve many masters, but one at least - as described by an early commentator on the U.S. **Constitution** - was "fencing around and interposing barriers on every side against the approaches of arbitrary power". The role that juries played in scrutinizing the state's evidence provided a bulwark or safeguard for the individual accused against the power of the state. Thus it was, that during the 17th century, the presence of a jury began to be viewed as a protection for those accused of crime.

In the 18th century Blackstone described the jury as "part of a strong and twofold barrier between the liberties of the people and the prerogative of the Crown..." because the truth of every accusation must be confirmed by the unanimous suffrage of 12 of his equals and neighbors, indifferently chosen and superior to all suspicion".

Subversive Power

The subversive powers of the jury became clear to the English King when, in 1734, John Peter Zenger, publisher of the New York Weekly Journal, was tried for seditious libel. The charge was based on the fact that Zenger's newspaper published very strong criticism of the King's appointed henchman, the then governor of the colony of New York. When Zenger was acquitted by a jury, the decision created a community benchmark for freedom of the press in the colonies and, later, throughout the world.

Conscience of the Community

More colonial juries began to rebel against the laws of England and refused to enforce the **Stamp Act**². Angry juries used their power to find colonists accused of violating the **Stamp Act** not guilty. Afraid that more juries would behave like the one that acquitted Peter Zenger, the King's response was to deny colonists the right to jury trials. The mere prospect of "the conscience of the community" was too much for the King. According to Thomas Jefferson, the loss of the right to trial by jury was one of the major grievances leading to the colonists' rebellion against Great Britain.

Why? The early Americans, who ultimately fought for independence from Great Britain, brought the right to jury trial with them when they emigrated to the colonies. When the King tried to take that fundamental right away from

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them, that was further proof that as long as they lived under the King's rule, they could not live as free men. So, they fought a war of liberation, and made the guarantee of trial by jury a cornerstone of the freedoms the new government guaranteed to its citizens. The basic principles defining the independence sought by the founders of the new democracy included the right to trial by jury, along with freedom of speech and freedom of religion.

Development of the Right in the USA Guaranteed by the Constitution

In 1787, when the members of the first U.S. Congress met, they insisted that the right to jury trial be embodied in the **Constitution**. In 1791, the **Bill of Rights** - containing the **Sixth Amendment's** guarantee of trial by jury - was ratified by all the states and the right was secured.

Specifically, the **Sixth Amendment** guarantees: "The accused in a criminal case shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense".

Similarly, the **Seventh Amendment** provides that in all civil cases where the amount in controversy (is) was more than \$20, the right to trial by jury shall be preserved.

Thus, although jury trials originated as part of British legal history, one could say that the particular attachment Americans feel to the right to jury trial was "Born in the USA". The presence of random groupings of ordinary citizens as decision-makers in our courtrooms is the embodiment of our democracy's distrust of the arbitrary exercise of power.

Amelioration of Unjust Laws

The jury's historic subversive role—beginning with the trial of John Peter Zenger - in nullifying laws perceived as either unjust, or unjustly applied, continued during the days before the United States Civil War, before slavery was outlawed. The "Underground Railroad", conducted by many unsung American heroes, was successful in helping many former slaves escape to freedom. Yet, during the 1850's, though slavery itself was illegal in the north, Union states continued to arrest and prosecute people who helped fugitives escape from slavery. The "Fugitive Slave Laws" laws required people who discovered escaped slaves to capture them and return them to their "owners". There was widespread flouting of this law, a law that today, in our evolved society, we would all view as unjust.

The way the juries of the northern states made the "conscience of the community" known, was to repeatedly refuse to convict any individual charged with violating the Fugitive Slave Law, no matter what the evidence.

A Modern Example

„Enough humiliation already“.

In the affluent Bay Area suburb of Marin County, in the small town of San Rafael, a young African American woman was charged with petty theft. The crime: Stealing a \$6 steak from a grocery store. The evidence: The store manager was in his office, looking down at his store through a one-way mirror, and as soon as this young woman came into the store he kept an eye on her. Why? This was a white neighborhood, and she just didn't belong: She was a young dark-skinned woman with a baby in a stroller. He told police he saw her pick up some things from the shelves and he watched her carefully. Why? Because he just knew she was a shoplifter from the minute she came in. He said he watched her pick up a small steak and put it in her shopping bag. Then he saw her at the counter, paying for her purchases and there was no steak. He leapt up from his chair, ran down the stairs and grabbed her by the arm as she was leaving the store. There was no steak in her bag, but he didn't stop accusing her. He called police and said she must have thrown it back onto the meat counter. She told the police yes, she had picked up the steak and put it in the bag initially, but then, after she saw how much the milk and diapers cost, she realized she couldn't afford the meat, so she tossed it back into the meat counter, *before* going to the cashier.

The cashier said she didn't see anything. The young woman was arrested and taken to jail: her baby was taken to foster care. She got out of jail two days later and came to a law school legal clinic for representation.

Students investigated the case and tried to persuade the prosecutor to dismiss. No luck. But, during jury selection when one prospective juror heard the facts of the case, she said out loud what many people were thinking: "This whole thing is about 6 dollars worth of meat? She was arrested? She went to jail? Now a trial? Enough humiliation already!!"

Of course the prosecutor used a peremptory challenge and excused her from service. But as she left the courtroom she walked right up to the client and patted her on the shoulder, saying, "This is ridiculous. I certainly hope you win, dear".

So, even though that woman never got to serve on the jury, her words remained, a ghostly reminder of the conscience of the community. The jury acquitted in less than thirty minutes.

Value of the Right to Jury Trial in a Democracy Gives the Imprint of Public Approval to Verdicts

Due to fundamental distrust of the state - born of those unfortunate experiences we've talked about with the policies of the King of England - the men who wrote the **Constitution** and the subsequent first **Ten Amendments**, decided that decisions over life and liberty were too important, too basic, too precious, to entrust to a group of lawyers and judges.

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In guaranteeing an accused the right to trial by jury we guarantee that he has the right to be judged by his neighbors, rather than by faceless members of the government. This involvement of ordinary people in the business of deciding important issues reflects a profound judgment about the way in which the law should be enforced and justice administered. A profound belief in the power of the people. A profound belief in the collective wisdom of a group of ordinary people. The lawyers can urge jurors to be reasonable. They can urge them to be compassionate and to decide cases on the basis of the facts and not their own passions and prejudices. Yet, ultimately, we trust them, because they speak for us.

A truly representative jury gives an authentic democratic imprimatur to the results of a trial. By gathering twelve citizens who (at least theoretically) embody the customs of all of the community, the jury actually represents the community's mores. In this way, the sometimes rigid application of the laws can be tempered with an injection of the common sense of the community at large. As former California Chief Justice Rose Bird wrote in *Lyons v Wickbourn* (1986)³:

"The jury is a remarkable institution that helps insure that any general rule of law (or procedure), that may be overly harsh in its application to every situation, may be tailored or shaped to ensure justice in each individual case".

Safeguards the Rule of Law

Chief Justice Bird also believed that "The presence of the right to trial by jury helps to safeguard the rule of law in face of constant challenges to its authority". (*Lyons*, supra.) Particularly, because our society is multicultural with many identity groups competing for public attention, rather than leave decisions about life and liberty and property to judges or to vigilante mobs, we permit ordinary citizens - guided by principles of laws, and in open forums attended by members of public and the press - to make decisions. Jury trials can thus function as an outlet for the passions of the people, an alternative to taking to the streets.

Performance of Civic Duty Increases Commitment to Society

Citizenship has few obligations and many privileges. One must pay taxes; one must respond to a summons from the court. One *may* vote or not. But when a jury summons appears in the mailbox, one must respond, even if grudgingly. The Court has the power to insist on a citizen's response to a jury summons. Once a citizen responds to a jury summons, instead of grumbling, he or she can view it as a rare opportunity to have a voice in the administration of justice. Instead of just complaining about the courts at home or on the street, a citizen has a chance to have some input in the decisions made there.

Jury Builds Empathy, which Translates Into Community

One can't know what another person's life is like, until,

as the saying goes, "we've walked a mile in his shoes". Jury duty permits the ordinary citizen a glimpse into other realities. Generally the people prosecuted for criminal offenses come from our poorest communities; jury service provides an opportunity to learn about the constraints under which poor people live, and also to learn from and about other members of our community. The jurors form a random group of people, connected merely by accident and happenstance, and yet they are urged to work together, to listen to each other's point of view, to strive to reach unanimity. In the end, their decision means something - their collective wisdom has a direct effect on another person's freedom or property rights.

The Consent of the Governed

In addition to giving citizens the feeling of having been a part of a group that does something important, namely participate in self-government, the fact that a jury is made up of members of the community imbues the entire judicial process with a sense of legitimacy. The community has been consulted and the community's representatives have spoken. The jury's verdict (generally) assures that the outcome of the trial is acceptable to a substantial portion of the community. The presence of a jury gives meaning to the concept of governing with "the consent of the governed".

The Search for Truly Representative Juries No Longer All Male

The original juries could be described as "twelve men, good and true" - or at any rate, twelve men. Only since 1941, after a U.S. Supreme Court ruling, has it been unconstitutional to exclude women from federal jury lists.

The Persistence of Racial Bias

Although racial discrimination in jury selection was made illegal by the **Federal Civil Rights Act of 1875**, the practice of using peremptory challenges to exclude minorities from jury service continues to this day. Courts have outlawed discrimination on the basis of race, ethnicity, gender, or economic status; yet even the active presence of a vigilant defense attorney cannot always prevent a determined prosecutor from exercising peremptory challenges on grounds he or she claims are "race-neutral" but in fact are pretexts for excluding people who look like the defendant.⁴

Only when defendants are judged by a true cross-section of their communities are they legitimately judged. Only by facing a fairly constituted jury will a defendant feel as if he or she has really had the respect of a day in court, and can thus accept the judgment of the community. In the U.S. today people of color, particularly young black or brown men, are enormously over-represented in our jails and prisons. Part of the reason for this is a lack of adequate representation of people of color in the legal profession. Even though the diversity of our courts has improved over the

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last 40 years, still, to a defendant of color, the courtroom, and especially the jury box, often looks overwhelmingly foreign. Since in the law, the appearance of impartiality is often as important as impartiality itself, when a defendant feels that he's been judged by people completely different from himself, he has no reason to feel that he's been judged fairly.

Legal Evolution of "Impartiality" as Defined by Case Law

The catchy phrase "jury of one's peers" does not actually appear in the **Constitution**. Perhaps this contribution to the legal lexicon originated in case law or, more probably, in Hollywood, but either way it is certainly a legitimate interpretation of the phrase which does appear in the words of the **Constitution**: "...an impartial jury of the state and district where the crime shall have been committed".

Impartiality within the meaning of the law has come to be defined in two ways:

First, the jury must be "a representative cross section of the community".

To establish a *prima facie* violation of the "fair cross section" requirement, a defendant who is appealing his conviction on these grounds, must show that the group alleged to be excluded is in fact:

- a) "a distinctive group within the community," and also
- b) that the representation of this group in the venire (pool of prospective jurors) is not fair and reasonable in relation to the number of persons from this group in the community, and
- c) that the underrepresentation is due to the systematic exclusion of the group in the jury selection process.⁵

The second meaning of "impartiality" is that an accused is entitled to jurors who are unbiased: willing to decide the case on the evidence presented, rather than on the basis of preconceived notions or bias.

This remains the great American contradiction: although our government proclaims equality under the law, the United States is still a country divided by race in the administration of criminal justice. It will take the concerted efforts of people of good will to overcome the many persistent legacies of slavery. Just as, it will take similar energy to overcome the many legacies of the illegitimate Communist government under which the people of Czechoslovakia suffered for so long.

Value of Trial by Jury in the Czech Republic Protection against Official Corruption

The function of the jury is to safeguard the citizen against the arbitrary exercise of official power. Those who wrote the **U.S. Constitution** knew, both from ancient history, as well as from their own personal experience, that it is necessary to protect against unfounded criminal charges

brought by corrupt officials in order to silence enemies. And also that it is necessary to protect citizens against judges who may be beholden to, or too responsive to, the voice of some higher authority.

Leads to Greater Scrutiny of Evidence before Trial

The existence of the possibility of a jury helps keep both sides honest. Most cases in the U.S. settle without trial, yet knowing that the defendant may demand a jury, and thus the witnesses must withstand community scrutiny, helps a defense lawyer decide to settle an "iffy" case, or a prosecutor to dismiss one where conviction on the strength of evidence he must present to a jury is unlikely.

The concept of the arbitrary exercise of official power, the bringing of unfounded criminal charges, and the political pressure on judges to reach corrupt verdicts: these are realities with which people who lived under communism are painfully familiar. In fact, who knows better than the Czech and Slovak people, the effects of the arbitrary exercise of official power?

Lessons from History

A book called "Under a Cruel Star" written by Heda Margolius Kovaly teaches an important lesson about Czech History. Mrs. Kovaly, whose family lived in Bohemia for more than 300 years, was, along with some other 72,000 Czech Jews, transported to Auschwitz in 1941. She miraculously, somehow, survived the horrors, though the rest of her family perished. After the war, she returned to Prague where she was, again miraculously, reunited with her husband, Rudolf Margolius.

Rudolf Margolius, a lawyer and economist (and also a concentration camp survivor) joined the Communist Party because, like so many others, he believed in Communism as the antithesis of Nazism. By late 1949, Margolius was a Cabinet Chief in the Ministry of Foreign Trade and helped negotiate a trade agreement with England; for this he was publicly congratulated by then President Gottwald.

But in 1952, Margolius was arrested, accused of being an enemy of the state. He spent four years in prison. His so-called confession was widely reported, and was tried in secret, without of course, a jury. Eventually, along with 10 others, all Jewish, and many of them Holocaust survivors, Rudolf Margolius was executed. More than ten years after his arrest, Rudolf Margolius and the other so-called enemies of the state were completely exonerated, and their "show trials" exposed as shams.

Certainly it is no wonder that the right to trial by jury was unheard of under Communism. Jurors, like all the little people in a totalitarian regime, can only be puppets. But now that the Czech people have thrown off the yoke of tyranny, now that in the great Masaryk tradition democratic institutions exist once again, why hold on to the outdated notion

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that questions of justice are too complicated for ordinary people to have some say? Every community needs a conscience. And, perhaps, it is only when we permit the community's conscience a voice in decisions made in our courts, that we can find justice there. ■

¹ And justice for all, Prague Post, May 9, 2001.
² This was a tax levied on paper, that, because it increased the price of paper prohibitively, was viewed as an attempt to censor newspapers.
³ *Lyons v Wickhourst* 42 Cal 3d 291(1986).
⁴ See „Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal

Justice“ Stevenson and Friedman, Washington and Lee Law Review, Spring 1994.
⁵ *Batson v. Kentucky* 476 U.S. 79 (1986).

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The Legal Aspects of Multiculturalism in Canada

Harald Christian Scheu

Introduction

In modern political discourse there has been increasingly wide use made of the term *multiculturalism*. In the absence of an exact definition of the term *culture* the paradigm of multiculturalism describes a rather vague political strategy standing between the poles of assimilation and confrontation. Politicians who express a commitment to multiculturalism claim to take a positive attitude to cultural and ethnic diversity. They describe multicultural society as a place where people of different ethnic or national origins, speaking different languages and practising different religions and traditions, can live together in harmony and mutual respect. Their opponents in the political arena would rather stress problematic issues such as, e.g. the loss of traditional identity.

For the purpose of the current article we will apply the term multiculturalism only to such strategies which are based both on political and legal mechanisms. From a legal perspective we will examine how the political concept of multiculturalism is supported by concrete legal means. To date only Canada and Australia have officially declared a policy of multiculturalism which aims at the preservation and encouragement of ethnic, cultural, religious and linguistic diversity. Both countries have reached a level of discourse in which multiculturalism as a political strategy may have an impact on the legal argumentation in the field of

fundamental rights. The legal status of the individual in a multicultural society is likely to be developed in court decisions.

In this article we will focus on the political and legal concept of multiculturalism as it has been applied in Canada, the first country in the world to adopt a multiculturalism policy. This policy was launched by the federal government in 1971 under the title “Multiculturalism within a Bilingual Framework”. The concept was seen as a contrast to the traditional policy of biculturalism and bilingualism which was aimed at an equal partnership of the British and French element. The shift from biculturalism to multiculturalism was the political answer to the demands of Aboriginal and immigrant groups.

Changes in Canadian Society

Whereas in the first decades of the 20th century most immigrants to Canada came from Europe and North America, the liberalisation of Canadian immigration policy in the 1960s led to an increase in the number of immigrants from Asian, African and Latin-American countries. Another factor contributing to ethnic diversity has been the presence of the Aboriginal population. Historically, Aboriginal people have been the target of considerable prejudice.

Official statistics document the development of ethnic and cultural diversity in Canada. According to the 1996 cen-