Law & Society REVIEW

Commentary on Valerie P. Hans's Presidential Address

The Jury as a Translation of Democratic Participation and Political Conflict

Lee Demetrius Walker

In this response to Valerie Hans's Presidential address, I use her "legal translating" term to argue that the implementation of liberal democratic structures in new democracies opens new opportunities to translate the jury system into and onto new democratic societies. While policy makers have concerns about the strength and vibrancy of lay participation in the legal system, policy makers' decisions to adopt trial by jury are not always democratic. Nonetheless, the consequence of the translation of trial by jury furthers democratic development. Using Nicaragua, Mexico, and Russia as case studies, I suggest that one goal of policy makers who attempt to adopt trial by jury is to reduce the discretionary power of judges who remain from the prior government. Comparative trial-by-jury research can contribute more to our understanding of democratic development than prior research has indicated.

A long tradition in scholarship champions the juror as an important manifestation of democratic participation. Some scholarship advances the jury as an expression of and method to instill democratic duty and produce lay participation at the individual level (Dalton 2008; Hans 2007; Fukurai, Knudtson, and Lopez 2009). Other scholarship views the jury as an institutional manifestation of deliberative democracy and as a method to facilitate consensual democracy (Gastil et al. 2002; Smith and Wales 2000; Hans, Gastil, and Feller 2014; Warren and Gastil 2015). Both approaches view the jury as a mechanism to establish further democracy through participation in democratizing societies. In her presidential address, Valerie Hans offers the useful concept of "legal translating" to understand further the adoption, expansion and decline of trial by jury in established and developing democracies. I use her deployment of this term to argue that the implementation of liberal democratic structures in new democracies opens new opportunities to translate the jury system into and onto new democratic societies.

Please direct all correspondence to Lee Demetrius Walker, Department of Political Science, University of North Texas, 1155 Union Circle #305340, Denton, TX 76203; email: Lee.Walker@unt.edu.

Law & Society Review, Volume 51, Number 3 (2017)
© 2017 Law and Society Association. All rights reserved.

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

Hans's address is grounded in the idea of lay participation, but she also alludes to the concerns that policy makers have about the strength and vibrancy of this participation (31). This concern opens questions as to policy makers' decision-making processes to translate trial by juror into the fabric of their polities. I would argue here that the aims of policy makers are not always democratic. Nonetheless, the consequence of the translation of trial by jury furthers democratic development. To express this idea I examine specifically the adoption (or attempt to adopt) trial by jury in three countries: Nicaragua, Mexico and Russia. These three countries implemented the process to adopt trial by jury between 1992 and 2008. In all three cases, governments adopted or attempted to adopt the jury trial in the aftermath of control of the state apparatus by a hegemonic political party. The strategic decision to adopt trial by jury was partly an attempt to remove legal decision making from the sole control of a state that was occupied by officials who the new government believed retained allegiance to the prior government.

In Nicaragua, the Popular-Socialist Sandinista (FSLN) government partly abolished the jury trial in 1988 because of juries' tendencies to acquit, particularly to acquit poor defendants (Wilson 1990). Juries during the Revolutionary period use the *íntima convicción* (innermost belief) standard to guide their deliberations (Wilson 1992: 359). The government prior to the Sandinista state (the Somoza dictatorship 1933–1979) had constitutionally established trial by jury, but rarely were people tried-by-jury in civilian criminal courts during the period of the Somoza regime.

The Sandinista Government did embrace the concept of lay participation in legal decision-making process. As Hans's address highlights, the jury is only one of several forms of lay participation in legal decision-making. The Sandinista government attempted to institute the concept of lay participation by allowing non-attorneys to populate the lower levels of the judicial hierarchy (Walker 2003). Jackson and Kovalev (2016) point out that the lay-judge mechanism has been adopted in some European countries to replace juries as a mechanism of lay participation.

The Sandinista Government built its justice system on the idea of popular justice. It, nonetheless, abolished trial by jury. Indeed, the Government's overall lay participation program failed. Beyond juries' tendencies to acquit, the Sandinista Government constructed their criminal justice system on a socialist model of justice that requires a "machine-like system of judgment and punishment" (Ventura 1971: 101). Because the Sandinistas opted for the socialist model of justice, they viewed the jury system as flawed in its ability to efficiently allocate judgment and punishment. In addition, the system requires judges, even

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

lay-judges, to interpret cases and to base "their decisions on the norms of formal law, rather than popular sentiment" (McDonald and Zatz 1992: 289).

In returning to trial by jury, the center-right government (1990–1995) that replaced the Sandinistas inherited a state apparatus that was occupied by governmental officials who were committed—at various levels—to the popular justice program of the Sandinista Government. The *Unión Nacional Opositora* (UNO) was highly interested in reestablishing the primacy of property rights and minimizing Sandinista influence in the state. The center-right government's first attempt to accomplish both goals failed, as the Nicaraguan Supreme Court struck down the UNO led National Assembly creation of a centralized executive branch agency to adjudicate land disputes (Walker and Williams 2010).[1]

The reinstatement of the jury was the UNO's government second attempt to minimize Sandinista influence in state decision making. The UNO government's decision to reestablish the jury was a strategic one. The government viewed the jury as a way to take the total enforcement of criminal law out of the hands of Sandinista judges. One reason for this decision was that the center-right UNO government was more interested in the implementation of laws that would protect property than they were in the strict enforcement of these laws. In short, the UNO government took power from judges (Sandinista judges) that liberal and conservative elites did not trust. More generally, the move by the UNO government constitutes the first successful effort to devolve power from the Sandinista state.

The Mexican case is similar to the Nicaraguan case in that the attempt to reestablish the jury trial came in the environment of transition to electoral democracy. In 2000, the incoming center right National Action Party (PAN) inherited a state apparatus occupied by government officials aligned with the outgoing hegemonic Institutionalized Revolutionary Party (PRI). While similar in attempt, Mexican political officials were unsuccessful in their attempt to implement the reestablishment of trial by jury (Fukurai, Knudtson, and Lopez 2009: 6; Zwier and Barney 2012). Like the UNO government in Nicaragua, the PAN and the Party of the Democratic Revolution (PRD) desired to reduce the influence of PRI officials in the state apparatus.[2] Unlike the UNO government, the PAN and PRD were not an ideologically unified

[1] The Supreme Court ruled the decree unconstitutional on the grounds that the law granted an administrative agency powers that rested exclusively in the judicial power (Walker and Williams 2010).

[2] The PRD was the second political party that challenged PRI political control of Mexico.

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

coalition. The two parties were similar in their desire to overturn 70+ years of PRI rule, but were (and are) different in their policy agendas. Given this limitation, the two parties were unsuccessful in implementing a trial by jury system. Nonetheless, the process by which they attempted to reestablish the Mexican jury is instructive.

Prior to the Mexican Revolution (1910–1929), the jury trial was an important mechanism of the Mexican legal system (Fukurai, Knudtson, and Lopez 2009: 10). Even before the transition to the Revolutionary government however, Fukurai, Knudtson and Lopez (2009: 15) show that the government of Porfirio Díaz (1876–1910) eventually phased out the jury trial in criminal economic cases (such as fraud, embezzlement and extortion) because the government insinuated that these cases required more technical expertise than the average juror possessed.

In 2001, PRD legislators proposed reform legislation that included broader application of jury trials in criminal cases (Fukurai and Krooth 2010). Again, one of the first initiatives by the non-PRI dominated legislature was to propose the devolution of state power from the judiciary. Legislators argued that public concern about police corruption and judicial transparency necessitated the reestablishment of the Mexican jury system.[3] These arguments are non-political, and lay participation in Mexico has had broad public support (Fukurai, Knudtson, and Lopez 2009: 5).

Despite broad public support, the Mexican government could not reestablish the jury trial into the Mexican legal system. In 2008, the Mexican legislature approved a broad overhaul of the judicial system that included an oral trial, an adversarial process, a presumption of innocence, but no trial by jury (Fukurai and Krooth 2010: 6; Zwier and Barney 2012). The hesitancy of the PAN led legislature is likely due to the government's historical distrust of the jury. In turn, the idea of translation plays an important role in the slowness with which the country may be adopting trial by jury.

The Russia case has certainly generated the most attention among the three cases that I examine (Thaman 1999, 2007; Hans 2017; Jackson and Kovalev 2016). As Hans (2017) points out, Russia retuned to the jury system in 1993. The right to a jury trial was extended nationwide in 2001 with the adoption of a new code of criminal procedure (Thaman 2007: 358). Again, Hans's use of the term translation appropriately describes the process of implementing the jury system in Russia.

---

[3] *Iniciativa de Reforma al Código de Procedimientos Penales y a la Ley Orgánica del Poder Judicial de la Federacion, Gaceta Parlamentaria*, Nov. 22, 2001

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

Prior to the 1917 revolution, Russia only briefly used trial by jury as a mechanism of the legal system (1864–1917) (Hans 2017). As I stated earlier, socialist governments prefer a disciplined state apparatus that allocates legal judgments and punishments (Ventura 1971: 101). The Bolsheviks abolished trial by jury in 1917, and their legal system became the model of the socialist system of justice. As Hans (2017) highlights, the Soviets addressed lay participation by including "people's assessors" in the resolution of criminal cases.

Hans reminds us that the government had great influence over Soviet judges and over the people's assessors. In turn, it is not surprising that the new liberal government that emerged after the collapse of the Soviet Union desired to gain public assistance against judicial officials who may have internalized the Soviet model of justice.[4] The adoption of the jury was a method to devolve decision-making power from these state officials to private citizens.

Translation, as opposed to transplantation, is apparent in how the Russian legal system implemented the jury. Juries do not give general definitive verdicts of guilt or innocents. Instead, juries answer specific questions about the evidence of the case (Thaman 2007). The Russian jury system allows judges to have a great deal of discretion (Hans 2017). This judicial discretion reflects the continued distrust that the Russian state has in lay participation. It also reflects the desire of the new liberal government to confound the state apparatus in the aftermath of the regime change.

Discussion

These three cases are united in the fact that new governments desired to restrict or minimize the influence of state officials who may have had residual connection to the outgoing regime. In varying degree, trial by jury becomes a mechanism to remove a portion of legal discretion from judges. Scholars like Jodi Finkel (2005) argue that some outgoing governments increase the structural independence of the judiciary to insulate themselves against the incoming government's possible use the state apparatus as a political tool. In the response and under certain conditions, I suggest that reestablishing the jury system and using lay participation may be mechanisms incoming governments use to reduce the power of the state apparatus–judicial power.

[4] Foglesong and Soloman (2001) point out that it is typical for the police to lag behind the change in governmental emphasis in systems that have undergone radical chance to the political structure.

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

Nonetheless, I argue too that including lay participation furthers democratic development. The extension of justice system discretion to ordinary citizens is very democratic. Legal system discretion within the jury system allows ordinary citizens to have a greater feeling of participation. In two successful cases that I discuss, political officials in new liberal governments were quite aware that juries would be inefficient. Nonetheless, these political officials viewed the reestablishment of the jury to be in their strategic interest. This means these new liberal governments were willing to surrender legal discretion to an institution that they cannot fully control and that has historically nullified the law.

Why surrender control to this institution instead of creating other mechanisms to control directly the legal system? Douglas Hay (1975) offers the convincing answer that public perceptions about justice shape these new liberal governments' decision making. The new liberal governments in both countries turned to trial by jury to benefit from the public's positive beliefs about lay participation.

Hay (1975) argues that legal system inefficiency and selective enforcement are valuable tools of elite class power. In referring to eighteenth Century England (a chaotic period of weak and shifting elite rule), he argues the "law did not enforce uniform obedience, did not seek total control; indeed, it sacrificed punishment when necessary to preserve the belief in justice" (Hay 1975: 55). The inefficiency of the justice system strengthens the law as an instrument of democratic ideology. In this environment, it is not just elites who decide to bend the law, but it is also ordinary citizens who have discretionary power to use the law's elasticity to further their beliefs about justice. Consequently, the use of the jury creates inefficiencies in the system of justice, but inefficiencies that are structured in a more democratic manner.

Translation is again the optimal word in expressing how these two political systems have responded to the inefficiencies that the jury system brings to the respective legal systems. Nicaraguan judges have voiced the same complaint that Nicaraguan judges voiced in 1988, when the Sandinista Government abolished the jury. Nicaraguan juries acquit in the face of overwhelming evidence of the guilt of the accused.[5] Nonetheless, the state's prior history and desire to incorporate lay participation binds judges (even former Sandinista judges) to accept the inefficiency of the jury. Nicaraguan judges are very reluctant to nullify jury verdicts.[6]

[5] Interview with Josefina Ramos, former Nicaraguan Supreme Court Justice, February 26, 2002, Managua Nicaragua. Interview with Zela Diaz de Porras. Magistrada of Tribunal de Apelacón de León, León, Nicaragua, March 28, 2002.

[6] Diaz de Porras Interview

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

Alternatively, the Russian government clearly chose to hedge its bets about trial by jury. Because the Russian jury's decisions are not definitive findings of guilt or innocent, the judge's verdict supersedes the decisions of juries. That said, judges have the discretion to submit cases to juries for definitive decisions. In these cases, Thaman (2007: 359) provides evidence and argues that "the Supreme Court of the Russian Federation (SCRF) has effectively co-opted jurors' competence to decide guilt, reducing them to mere fact-finders while reposing the ultimate power to determine guilt in the judge." We see that the Russian state has not fully embraced the jury system in its idealized form.

Conclusion

Hans (2017) recommends collaborating to help us "to plot and understand" the translating of the jury trial into various societies around the world. The idea of translating suggests interesting and important research programs for sociolegal scholars. A few of these important areas are (1) comparative approaches to the decision process for (re)establishment of trial by jury, (2) comparative approaches taken by the state to reconcile public decision making after the jury system is established, (3) comparative public opinion research about the performance of the juror, (4) comparative institutional study of the jury as a part of the partisan political process, and (5) comparative study of the jury as part of the devolution of power from the state (or the jury as a mechanism of decentralization).

Following Professor Hans's address and as an illustration, my brief response indicates that the strategic decision making of policymakers to institute the jury is an area of research that is ripe for comparative politics and legal scholars. This research area is particularly important for scholars interested in democratic transition and consolidation. This brief illustration suggests that countries transitioning to liberal democracy from hegemonic-party systems may use the trial by jury as a mechanism to remove some discretionary power from the state. This suggestion and Hans's address demonstrate that comparative trial-by-jury research can contribute more to our understanding of democratic development than prior research has indicated.

References

Dalton, Russell J. (2008) "Citizenship Norms and the Expansion of Political Participation," 56 *Political Studies* 76–98.

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press

Finkel, Jodi (2005) "Judicial Reform as Insurance Policy: Mexico in the 1990s," 47 *Latin American Politics and Society* 87–113.

Foglesong, Todd S., & H. Soloman Jr. (2001) *Crime, Criminal Justice, and Criminology in Post-Soviet Ukraine*, Washington, DC: National Institute of Justice.

Fukurai, Hiroshi, & Krooth, Richard (2010) "The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform," 16 *Texas Hispanic J. of Law and Policy* 51–100.

Fukurai, Hiroshi, Clark Robert Knudtson, & Susan Irene Lopez (2009) "Is Mexico Ready for a Jury Trial?: Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea, and Ireland," 2 *Mexican Law Rev.* 3–44.

Fukurai, Hiroshi (2007) "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S," 40 *Cornell International Law J.* 303–14.

Gastil, John E., Pierre Deess, & Phil Weiser (2002) "Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation," 64 *The J. of Politics* 585–595.

Hans, Valerie P. (2007) "Introduction: Citizens as Legal Decision Makers: An International Perspective," 40 *Cornell International Law J.* 303–14.

Hans, Valerie P, John Gastil, & Traci Feller (2014) "Deliberative Democracy and the American Civil Jury," 11 *J. of Empirical Legal Studies* 697–717.

Hans, Valerie P. (2017) "Trial by Jury: Story of a Legal Transplant," 51 *Law & Society Review* (this issue).

Hay, Douglas. (1975) "Property, Authority and Criminal Law," In Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, & Cal Winslow eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. London: Pantheon. 17–63

Jackson, John D., & Nikolay P. Kovalev (2016) "Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury," 6 *Onati Socio-Legal Series* 368–395.

McDonald, James H., & Marjorie S. Zatz. (1992) "Popular Justice in Revolutionary Nicaragua," 1 *Social and Legal Studies* 282–305.

Smith, Graham, & Corinne Wales (2000) Citizens' Juries and Deliberative Democracy 48 *Political Studies* 51–65.

Thaman, Stephan C. (1999) "Europe's New Jury Systems: The Cases of Spain and Russia," 62 *Law and Contemporary Problems* 233–259.

——— (2007) "The Nullification of the Russian Jury: Inspired Reform in Eurasia and Beyond," 40 *Cornell International Law J.* 357–428.

Ventura, Franco. (1971) *Utopia and Reform in the Enlightenment*. Cambridge: Cambridge Univ. Press.

Walker, Lee Demetrius. (2003) *The Democratic Arbiter: The Role of the Judicial Institution in the Process of Democratic Consolidation in Nicaragua and Costa Rica* Doctoral dissertation, Dissertation. Gainesville, FL.: Univ. of Florida.

Walker, Lee Demetrius, & Philip J. Williams (2010) "The Nicaraguan Constitutional Experience: Process, Conflict, Contradictions and Change," In Laurel E. Miller, ed. *Framing the State in Times of Transition: Case Studies in Constitution Making*. Washington, DC: United States Institute of Peace Press. 483–504

Warren, Mark E., & John Gastil (2015) "Can Deliberative Minipublics Address the Cognitive CHallenges of Democratic Citizenship," 77 *The J. of Politics* 562–574

Wilson, Richard J. (1992) "Criminal Justice in Revolutionary Nicaragua: Intimations of the Adversarial in Socialist and Civil Law Traditions," 23 *Univ. of Miami Inter- American Law Rev.* 269–387.

Zwier, Paul J., & Alexander Barney (2012) "Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications," 26 *Emory International Law Rev.* 189–225.

https://doi.org/10.1111/lasr.12287 Published online by Cambridge University Press