**The Jury Trial Post Covid-19**

The jury trial has been entrenched in the English criminal justice system for over 1,000 years (Cairns and McLeod, 2002:1) and has been described as its most “striking…even most endearing” feature (Dorian, 2002:379). However, it should be noted that approximately 95% of criminal cases are tried at the magistrates’ court, without the presence of a jury (Judiciary.co.uk, 2020). Additionally, around 67% of defendants had entered guilty pleas in the crown court in 2018 (Ministry of Justice, 2018). The limited use of the jury trial suggests that whilst it is admired in theory, in reality the jury system is considered impractical with legal professionals favouring the time and cost-effective alternative of the magistrates’ court and plea bargains instead.

The coronavirus pandemic has forced governments worldwide to adapt in order to function whilst nations are on lockdown. This has also created additional stress for the judicial system, where jury trials would make it almost impossible to adhere to social distancing. Hrdinova et al (2020) claim that the courts face “unique challenges” during the pandemic, as trials are structured around physical encounters and committing to due process measures (Hrdinova et al, 2020). This article details the impact coronavirus has had on the judiciary since March 2020 and considers the future of the jury trial post Covid-19.

Prior to Covid-19, the U.K. courts were already facing a backlog of approximately 37,000 cases with many defendants required to wait two years before going on trial (The Economist, 2020). The pandemic brought new challenges to the judiciary and how they would function in a post-covid society.

*“The fact is, the Courts cannot close. As the third branch of government, an independent judiciary is vital for our [Canadian] democracy to function. It is never more important than in times of crisis” (*Wood inPuddister and Small, 2020).

Similarly, the Lord Chief Justice stressed the importance of maintaining the court service in the U.K. and pledged to ensure “as many hearings in all jurisdictions can proceed and continue to deal with all urgent matters*”* ([Rt Hon Lord Burnett of Maldon, 2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-_Overview_of_HMCTS_response_A4L_v3.pdf)). The judiciary in all affected countries have proven flexible during these unprecedented times. At the peak of the pandemic, many countries adjourned their jury trials and tried only the most serious cases, often opting for remote hearings, using video communication services such as Zoom (Puddister and Small, 2020). This proved a successful alternative and some courts in the United States expanded their use of video conferencing beyond urgent and serious cases (Puddister and Small, 2020).

In their emergency response to Covid-19, the U.K. prioritised “the most urgent and important” criminal matters, such as terrorism and domestic violence cases ([HM Courts and Tribunal Service, 2020)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-_Overview_of_HMCTS_response_A4L_v3.pdf). Additionally, 157 ‘priority’ courts[[1]](#footnote-1) remained open for face-to-face hearings. The U.K has also seen an increase in the use of video and telephone links in court trials, rising from 1,000 to 3,000 a month by April 2020 (Nicolson and Russel, 2020)[[2]](#footnote-2). Commentators believe this is motivated by Article 6 European Convention on Human Rights (ECHR), which provides the defendants the right to be tried within a reasonable period of time, relying on the maxim ‘*justice delayed is justice denied’* (Nicolson and Russel, 2020). Trial delays do not only affect the defendant, but also the victim, witnesses and the public’s interest in seeking justice (Nicolson and Russel, 2020).

Academics often consider the extent in which technology should be used in the courtroom (Puddister and Small, 2020). On the one hand, it is argued that the courts should remain open to the public even during a pandemic (Nicolson and Russel, 2020), so that the criminal justice system remains transparent. Academics have suggested that live-tweeting or blogging the trial (Hall-Coates, 2015) would engage more public interest and keep citizens informed, as well as enforcing the transparent relationship between the courts and the public (Olsen and O’Clock, 2010). This can however have a negative impact and diminish the right to a fair trial. Some cases in the United States are live streamed on ‘*Court TV’,* which has been accused of sensationalising cases and polluting jury pools through their extensive media coverage ([CourtTv, 2020).](https://www.courttv.com/)[[3]](#footnote-3) Additionally, former Chief Justice (*Canada*) Beverly McLachlin argued the use of social media to report court cases could “fall short of journalistic standards of accuracy and fairness” (McLachlin, 2012). The U.K. were forced to close the courts to the general public in March 2020. They did however extend their live-stream court service to include family proceedings at the Court of Appeal, but criminal cases are still excluded ([MoJ and HM Courts & Tribunals Service, 2020](https://www.gov.uk/government/news/court-of-appeal-to-live-stream-family-cases)).

The challenges presented by Covid-19 has encouraged courts to “embrace the capabilities of digital technology” (Puddister and Small, 2020**)** and modernise the legal system (Powell, 2020)[[4]](#footnote-4).Some jury trials in the U.K were allowed to continue during the nation-wide lockdown, as one anonymous juror wrote:

*“Trials that usually take up a single courtroom might now require three: one for the hearing, one for jury deliberation and one for observers to watch via video link. As the judge in the Old Bailey case adds, "we're all going to have to be patient."* (The Economist, 2020).

The practically of holding a jury trial whilst maintaining social distancing measures imposed by the government “has had a significant impact on backlog and delays” (Nicolson and Russel, 2020). The accumulation of untried cases rose to over 50,000. Consequently, the government considered temporarily removing the jury for certain either-way offences, such as theft[[5]](#footnote-5) ([Hyde, 2020](https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article)). Lord Chancellor Buckland suggested that these cases should be tried by a judge and two magistrates only, but he described it as a ‘last resort’ and expressed it would “not be the basis for permanent change” ([Hyde, 2020](https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article)).

The proposal was (unsurprisingly) controversial, and the government received major backlash after the announcement. Online campaigning organisation *38 Degrees* described the proposal as a “disaster for our justice system” and petitioned for the government to reverse the decision, the petition received over 45,000 signatures [(38 Degrees, 2020](https://you.38degrees.org.uk/petitions/protect-our-justice-keep-trials-by-jury?bucket=email-blast-2_7_2020_jury-petition-test&utm_campaign=2_7_2020_jury-petition-test&utm_medium=blast&utm_source=email)).[[6]](#footnote-6) The news was also a trending topic on social media website Twitter, with many users angry and concerned that the government were considering abandoning the right to jury trial, which they equated with ‘true’ justice as opposed to a judge only trial.[[7]](#footnote-7)

Strong supporters of the jury trial have resented past government policies[[8]](#footnote-8) for expanding the powers of the magistrates and reducing the need for juries. Hostettler argues that the government feared the acquittal rate was too high, and consequently limited the scope of cases that should be tried by jury (Hostettler, 2004:154). Additionally, he believes that the U.K governments have weakened the jury system “by not accepting the cultural significance… they undermine the jury as a safeguard of liberty” (Hostettler, 2004:154).

Similarly, Moss (2020) argues that the judiciary are “more concerned about the inconvenience of the case backlog than defendants’ rights” ([Moss and Heath, 2020](https://www.theguardian.com/law/2020/jun/19/reviewing-the-case-for-trials-without-a-jury%3e)). This view is shared Bennet, who stated that the proposal to remove the jury trial “lacks in principle” and is based on convenience over protecting citizens’ rights ([Bennet, 2020](ps://www.theguardian.com/commentisfree/2020/jun/21/abandon-trial-by-jury-that-would-hardly-restore-trust-in-the-justice-system)). The Chair of the Criminal Bar Association also rejected the idea, claiming that the backlog of case was a pre-existing issue that requires financial investment to build new courts ([Bennet, 2020](ps://www.theguardian.com/commentisfree/2020/jun/21/abandon-trial-by-jury-that-would-hardly-restore-trust-in-the-justice-system)). Further questioning: “Are we really serious when we say that the solution to what is financial obduracy is to get rid of juries?” ([Bennet, 2020](ps://www.theguardian.com/commentisfree/2020/jun/21/abandon-trial-by-jury-that-would-hardly-restore-trust-in-the-justice-system)).

Furthermore, the issue of coerced plea bargains may have been heightened during Covid-19 (Cannon, 2020). Cannon argues that the pandemic has magnified the prior concern of innocent defendants pleading guilty to avoid imprisonment (Cannon, 2020). The increased risk of contracting coronavirus in prison which can be fatal, is seen as a “highly motivating factor to plea, and one that has the power to overshadow the value of maintaining one’s innocence” (Cannon, 2020). Existing research in the cognitive science of decision-making has demonstrated that defendants will disregard their own innocence to secure their release from prison (Cannon, 2020).

On the contrary, few support the notion of jury-less trials (Bowcott, 2020)[[9]](#footnote-9). Retired circuit judge Michael Heath advocates for temporarily suspending jury trials, suggesting that crown court cases should be tried by judge only ([Moss and Heath, 2020](https://www.theguardian.com/law/2020/jun/19/reviewing-the-case-for-trials-without-a-jury%3e)). Heath goes a step further in recommending that “judges should have to give written reasons for their verdicts” which would be “scrutinised” if the case was to be appealed ([Moss and Heath, 2020](https://www.theguardian.com/law/2020/jun/19/reviewing-the-case-for-trials-without-a-jury%3e)). Heath argues that if action is not taken to combat the rising number of backlogged cases the “criminal justice system will implode” ([Moss and Heath, 2020](https://www.theguardian.com/law/2020/jun/19/reviewing-the-case-for-trials-without-a-jury%3e)). Furthermore, he affirms that the current climate is ‘exceptional’ and therefore requires ‘exceptional’ action ([Moss and Heath, 2020](https://www.theguardian.com/law/2020/jun/19/reviewing-the-case-for-trials-without-a-jury%3e)).

Candler (2020) acknowledges the benefit of ‘virtual courts’ as cost and time effective. The use of virtual courts has been essential during the pandemic to maintain the rule of law: “virtual courts are essential to stability during a pandemic and present a viable option to continue to increase disposal rates even during normal times” (Candler, 2020). Further suggesting that virtual courts can also reduce trial waiting times through the use of “electronically enforceable time limits on hearings” which could “instil more disciplined time management” (Candler, 2020).

Nicolson and Russel also consider the potential for long-term reform (2020). They argue that the criminal justice system has been focused on the crime control policy of “speedy justice” through plea deals and increasing the number of cases tried at the magistrates’ court, claiming that this is “due to the rise of penal populism”(Nicolson and Russel, 2020). The issue is that ‘speedy justice’ does not necessarily mean a fair trial. Nicolson and Russel suggest that some Covid-19 measures may become permanent, such as the use of video conferencing, this will be even more important due to the lack of public funding that will be available post Covid. However, they argue that any decisions made, “are not based on convenience or cost-savings but on evidence, including on how the criminal justice systems in England and Wales, and in Scotland work in practice” (Nicolson and Russel, 2020).

Aggressive backlash from the public and legal professionals subsequently led the government to abandon their proposal to try certain either-way offences by judge’s alone ([Hymas, 2020](file:///Users/loren/Desktop/PHD%20LAW%20/%3chttps:/www.telegraph.co.uk/news/2020/07/01/plan-scrap-crown-court-trial-juries-set-abandoned-legal-backlash)). There is an extensive debate in legal literature concerning the effectiveness of the jury trial with documented issues of juror prejudice, bias and juror misconduct impacting the decision-making process.[[10]](#footnote-10) But despite all the detailed flaws, the U.K. has a sentimental attachment to the jury trial, which Darbyshire has described as ‘dangerous’ (1991).[[11]](#footnote-11) This has been demonstrated by the power of public opinion to maintain the legal and cultural norms and ultimately has highlighted the inflexibility of the U.K criminal justice system to commit to change.

As a sceptic of the jury trial it is hard to relate to the 45,000 citizens who believe justice is doomed without the jury, especially as this would not have affected serious or indictable only offences. In reality, its limited use should imply the significance of the jury is not what it once was. Furthermore, the U.K. are one of few countries that still adopt the traditional jury trial in their criminal justice system (Jackson and Kovalev, 2016) and there is no concrete evidence to suggest that the jury trial is the ‘best’ way of securing just convictions. The strong support for the jury implies that somehow other countries have it wrong, or that our judges are not capable of delivering justice on their own accord.

Empirical research has demonstrated that British citizens view the jury as the fundamental aspect of their criminal justice system and often described it as “the best in the world” (see: Almond and Verba, 1963; Hertogh and Kurkchiyan, 2016 for an in-depth analysis of the British legal and civic culture). These strong beliefs in the jury trial are hindering the prospects of improving the current system, which is far from perfect. Whilst it is true that government funding is required to deal with the backlog of criminal cases, Covid-19 has also unlocked the opportunity for a drastic change in our system to modernise the judiciary and move on from the archaic, time consuming and expensive jury trial.

It is unsurprising that the U.K. are not ready to depart from the jury (just yet) but this has not stopped the Ministry of Justice (MoJ) from limiting their use during the pandemic. In the recent Courts and Tribunal recovery report ([2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-_Overview_of_HMCTS_response_A4L_v3.pdf)), the MoJ will aim to resolve some cases ‘rapidly’ without the need for a full trial. Additionally, there is focus on increasing the number of listings in the magistrates’ courts to cope with the reduced number of jury trials. The unpredictability of the pandemic means there is no set end date, so the judiciary will have to remain resilient and willing to change. In the long term, using three court rooms for a single criminal case is neither practical nor feasible. Judge-only trials will relieve some of the backlog stress whilst shortening the length of trials, this in return would also discourage legal professionals from coercing defendants into taking a plea deal to avoid the lengthy jury proceedings.

*Wordcount: 2468*

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1. 124 court and tribunal buildings were closed to the public. [↑](#footnote-ref-1)
2. Figures from March 2020 – Mid April 2020. [↑](#footnote-ref-2)
3. See: Kurtis (2019) The Accuser: The Story of the Big Dan’s Gang Rape Victim. [↑](#footnote-ref-3)
4. Justice Pringle (Ontario Court of Justice) stated, “One of the silver linings … we feel that we have been booted into the 21st century of technology by this crisis” (in Powell, 2020). [↑](#footnote-ref-4)
5. The new legislation (if passed) would only apply to cases where the maximum sentence is two years’ imprisonment. [↑](#footnote-ref-5)
6. As of 13th July 2020. [↑](#footnote-ref-6)
7. Trending topic on 23/06/2020. [↑](#footnote-ref-7)
8. Applicable to both Labour and Conservative governments throughout the years. [↑](#footnote-ref-8)
9. The article noted that some judge’s support the idea that less serious crimes should be tried without the jury before a judge sitting alone. [↑](#footnote-ref-9)
10. This is beyond the scope of this article but see the following for some interesting perspectives: Daly, G. and Pattenden, R. (2005). Racial Bias and The English Criminal Trial Jury. *The Cambridge Law Journal*, 64(3), pp.678-710; Darbyshire, P. (1991) The lamp that shows that freedom lives - is it worth the candle? Criminal Law Review pp. 740-752.; Ellison, L & Munro, V (2009) 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' *British Journal of Criminology,* 49:3 pp.363-383; Froeb, L. and Kobayashi, B. (1996). Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?. *Journal of Law, Economics, and Organization*, 12(1), pp.257-276; Jackson, J & Kovalev, N. (2016) ‘Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury’*SSRN* 6:2 pp. 368-389 [↑](#footnote-ref-10)
11. Darbyshire is still a supporter of the jury trial but believes the significance of the jury should not be overstated – this is due to its limited use in practice. [↑](#footnote-ref-11)