



Position on jury trials

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. In an attempt to get the criminal justice system functioning again in the wake of the COVID-19 lockdown, it has been suggested that a defendant pleading not guilty to an either-way offence could be tried by a judge and two magistrates rather than a jury. JUSTICE does not consider this proposal to be a suitable alternative to a jury trial.
3. A person's right to trial by jury or to the 'lawful judgment of his peers' has been enshrined in English law since Magna Carta in 1215.¹ Over the last 50 years, the question of removing the jury from certain types of trial has been asked and answered many times.² Attempts to restrict the right have, on the whole, been resisted, with only very limited exceptions permitted in law.³ In fact, the most recent proposal was made by Scottish Government in April, in response to the Covid-19 crisis, but it accepted that removal of jury trial was not the answer to the problem, in the face of considerable objection.
4. JUSTICE has consistently, throughout its over 60-year existence, valued and supported jury trial. We consider that there are three reasons to retain jury trial: legitimacy; capacity; and finality.

¹ Clause 39.

² See, for example, Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (Ministry of Justice, 2001) and Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings*, January 2015, Para 10.3.1.

³ Under section 44 of the Criminal Justice Act 2003 a trial can proceed without a jury where there is a danger of jury tampering.

Legitimacy

5. Jury trials play a legitimising role in three ways.⁴
6. **Judgment by the community:** The stakes are high in cases involving juries: a guilty verdict could result in someone losing their liberty, job and community ties. The jury system is predicated on the idea that it is more legitimate for such a life-changing verdict to be delivered by a collection of ordinary people, rather than a single, unrepresentative judge. This is particularly so in relation to offences which are defined according to 'community standards' such as indecency, dangerousness and dishonesty.
7. **Comprehensibility:** The requirement for both parties, and the judge, to present the case in a way in which a random selection of the public understands, makes it likely that the trial will be understood by the public at large whether by reading media reports or attending the trial. In judge-only cases, the risk is that cases could become more complex and legalistic and, therefore, harder to understand.
8. **Civic participation:** Jury service is a visible way of ensuring that the public takes part, and therefore has confidence, in the criminal justice system. Virtually every verdict in a criminal trial is returned by lay members of the public –whether magistrates or jurors. It is also one of the only duties which (almost) every electorate must perform. Jury service therefore provides a balance between the rights we enjoy and the duties we owe in return to the State.

Capacity

9. The role of the judge would be significantly altered in judge-only proceedings. This would present two particular problems.

⁴ As recognised by the European Court of Human Rights in *Twomey and Others v United Kingdom* App Nos 67318/09 and 22226/12 at [30], Member States with jury systems are 'guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences.'

10. **Burden of decision-making:** Judges will need to make reasoned verdicts rather than solely ruling on matters of law during the trial. English judges interviewed by New York Supreme Court Judge Robert Julian in 2007 not only clearly favoured jury trial, they were strong and passionate advocates for the jury. By contrast, there was no support for judge-only trials replacing juries, with many judges expressing concern about perceived or actual unfairness and partiality. Some interviewed judges sat in both criminal and civil trials. They expressed a view that there was a significant difference between the purpose and arrangement of each, some highlighting the constitutional, democratic relevance of juries in criminal trials.⁵
11. **Risk of case-hardening or bias:** The burden of deciding issues of fact as well as law risks judges becoming case-hardened over time – having heard a line of defence repeatedly.⁶ Judges will be required to make determinations of fact and law. Subsuming the role of the jury, judges may also struggle – or be perceived to struggle – to put prejudicial material they have ruled inadmissible out of their minds. Moreover, when asking relevant questions to determine the facts, there is a risk they could be seen by the parties to be prematurely deciding the outcome.⁷ For all these reasons, a defendant may seek to argue that the tribunal trying them has become biased, which would incur significant cost and delay to resolve.
12. A jury may also be preferable to a judge and two magistrates for more practical reasons. Larger groups are able to combat the prejudices – spoken or unspoken – of any one individual.⁸ A collective memory may also recall more of the evidence during deliberations.
13. A group of 12 volunteers is also easier to assemble than the proposed judge and two lay magistrates. Courts are operating at capacity, with massive backlog in Crown (40,000 cases) and magistrates' courts (almost 500,000 cases). There are simply not enough magistrates to spare to cover the proposed work, without recruitment, which will require time and training.

⁵ Robert Julian, *Judicial Perspectives on the Conduct of Serious Fraud Trials*, Crim LR [2007] pp.751-769.

⁶ By contrast, lay magistrates are required to sit 26 half days per year, which substantially reduces the risk of becoming case hardened.

⁷ Robert Julian, *ibid*.

⁸ Sapan Maini-Thompson, 'Juries and Covid-19: protecting the right to fair trial', 4 May 2020, *The Justice Gap*. Note that the research cited in this post concerned reduced jury sizes, rather than jury v. judge and two magistrates.

14. Fundamentally, as JUSTICE has reported over the past couple of years, the judiciary⁹ does not generally reflect the population which it tries for criminal conduct – on race, age or socio-economic background. The magistracy suffers from a similar problem.¹⁰ A tribunal that pronounces verdicts on serious matters of criminal conduct but appears far removed from the defendant being tried risks being seen as out of touch or, worse, biased.

Finality

15. Jury verdicts are returned without reasons. A benefit of this system is that the defendant and victim receive finality.¹¹ A bench of judges and magistrates would be required to give reasons for their decisions, with appeal as of right on fact and law. If decisions are appealed in greater numbers than at present, this will not only add to the extensive caseload in the criminal justice system but will prolong the outcome for victims of crime and defendants.

Conclusion

16. The jury system is a fundamental component of the British criminal justice system. The jury serves to legitimise the imposition of criminal sanctions which flow from a ‘guilty’ verdict, or the freedom flowing from a ‘not guilty’ one. Juries also bolster public confidence in the legal system, add a valuable deliberative element to decision-making and ensure an important degree of finality for defendants and victims. JUSTICE considers that their advantages cannot be replicated by a judge and two magistrates.

17. This is all the more so, given the risks to fair trial posed by changing the system without careful thought and consideration. In the current context there is an alternative, viable solution to address the increasing backlog of cases, extended remand in prison and uncertainty caused by lengthy delay. This is a fully virtual trial where all participants take part online and experience the same process. JUSTICE has tested a platform for fully virtual jury trial four times, with the fourth iteration having jurors join from a local,

⁹ Justice working party report [Increasing Judicial Diversity \(2017\)](#) and [Update \(2019\)](#)

¹⁰ However, there are not comprehensive statistics on these data sets, House of Commons Justice Committee report [The Role of the Magistracy: follow up June 2019](#), HC 1654

¹¹ The issue of juries giving reasons was discussed in Sir Robin Auld’s report in 2001. Reasons were thought to be required by the ECHR, but this has not turned out to be the case. See Auld, LJ, Review of the Criminal Courts of England and Wales (Ministry of Justice, 2001).

community hall. Independent, expert evaluation concluded: "*It is in the view of the authors that HMCTS should seriously consider the benefits of this format for restarting criminal jury trials, in order to deal with the significant backlog facing the criminal justice system.*"¹²

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¹² Professor L. Mulcahy and Dr E. Rowden, *Exploring the case for Virtual Jury Trials during the COVID-19 crisis – an evaluation of a pilot study conducted by JUSTICE* (June, 2020) The evaluation report, technical report by the platform creators AVMI, and videos of the trial and jury hub set up are all available on our dedicated webpage <https://justice.org.uk/our-work/justice-covid-19-response/>